TREASURY, POSTAL SERVICE, AND GENERAL GOVERNMENT APPROPRIATIONS FOR FISCAL YEAR 1994

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Treasury, Postal Service, and Gener...

NGS

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON APPROPRIATIONS

HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

SUBCOMMITTEE ON THE TREASURY, POSTAL SERVICE, AND GENERAL GOVERNMENT APPROPRIATIONS

STENY H. HOYER, Maryland, *Chairman*

PETER J. VISCLOSKY, Indiana
GEORGE (BUDDY) DARDEN, Georgia
JOHN W. OLVER, Massachusetts
TOM BEVILL, Alabama
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C. WILLIAM SMITH, ELIZABETH A. PHILLIPS, ROBYN C. BASON, and JENNIFER MUMMERT, *Staff Assistants*

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JUN 23 1993

BOSTON

TREASURY, POSTAL SERVICE, AND GENERAL GOVERNMENT APPROPRIATIONS FOR FISCAL YEAR 1994

HEARINGS

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TREASURY, POSTAL SERVICE, AND GENERAL GOVERNMENT APPROPRIATIONS FOR 1994

TUESDAY, FEBRUARY 23, 1993.

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS

WITNESSES

JOHN KINCAID, EXECUTIVE DIRECTOR
FRANKLIN A. STEINKO, JR., BUDGET AND MANAGEMENT OFFICER

INTRODUCTION

Mr. HOYER. We will begin today's hearings with the presentation of the Advisory Commission on Intergovernmental Relations, Mr. John Kincaid, the Executive Director of ACIR, is here with us. Mr. Kincaid, we will include the prepared statement from Mr. Hawkins. Mr. Hawkins is not here.

Mr. KINCAID. He extends his apologies. He is a private citizen member of the Commission living in San Francisco. He was unable at the last minute to get here, so I am here instead.

Mr. HOYER. That is certainly understandable. You may proceed in whatever way you wish. We will include the entire statement in the record.

SUMMARY ACIR STATEMENT

Mr. KINCAID. Thank you, Mr. Chairman. Let me summarize briefly the main points that we tried to outline in the testimony. The first is that given the events of the late 1980s with respect to intergovernmental relations, ACIR is really the only institutional forum available now for resolving intergovernmental issues and bringing the appropriate people together. As we outlined in the statement, there are some critical intergovernmental issues that really need to be addressed by the Federal Government and State and local governments. The Commission has endeavored to play a role in addressing those issues.

At the same time, the Commission has a very good record of responding to the 52 percent reduction in appropriations we experienced between 1985 and 1989. We have complied with congressional requests to secure additional revenue from other sources, I think, without compromising the mission of the Commission. We have improved our productivity considerably in the last number of years. There is a great demand for the information that we produce, and we try to respond to that demand the best we can with the resources that we have available.

The last point I would raise is that the newest development with the Commission is the increasing requests we receive for assistance from abroad. With the collapse of the Soviet Union, there is a tremendous interest in decentralization and Federalism, and we have tried to respond to those needs as well without expending any appropriated funds, using other sources. We have pulled together the major State and local associations which have agreed to undertake an initiative for State and local government in the former Soviet Union if funding can be forthcoming under the Freedom Support Act to help do that. So we have a very vital organization, and given the change in climate in Washington we would hope that this would be a very opportune time for the Commission to really make some solid contributions to intergovernmental issues. So I will just stop on that point.

[The statement follows:]

Prepared Statement of

The Advisory Commission on Intergovernmental Relations

for the

House Appropriations Committee
Subcommittee on
Treasury, Postal Service, and General Government

February 23, 1993

Witnesses:
Robert B. Hawkins, Jr., *Chairman*
John Kincaid, *Executive Director*
Franklin A. Steinko, Jr., *Budget and Management Officer*

Prepared Statement of

Robert B. Hawkins, Jr., Chairman
U.S. Advisory Commission on Intergovernmental Relations

for the

House Appropriations Subcommittee
on Treasury, Postal Service, and General Government

February 23, 1993

Thank you, Mr. Chairman.

My name is Robert Hawkins. I am a private-citizen member and chairman of the Advisory Commission on Intergovernmental Relations. It has been my pleasure to serve as chairman of ACIR since 1982, during which time the federal system and ACIR have experienced wrenching changes, both positive and negative.

Because I will be stepping aside when President Clinton designates a new chairperson, I wish to take this opportunity to thank the Committee for meeting ACIR's requests for subsistence support in recent years. I also wish to thank the many members of ACIR who have given tirelessly of their time and expertise during the past eleven years, and to thank John Kincaid, ACIR's executive director for the past four years, for doing a superb and thoroughly professional job in helping to rebuild the productive capacity of ACIR after our severe budget crisis of the late 1980s. ACIR has already reinvented itself and pioneered the kinds of entrepreneurial, customer-focused practices now being urged on all agencies.

Need for ACIR

Although ACIR will undoubtedly take a somewhat different philosophic tack during the next four years, I wish to reiterate the importance of ACIR and the need for Congress to give it enthusiastic support. It should be noted that ACIR was hit with a 52 percent reduction in appropriations in FY 1986-89. Although appropriations have increased modestly since then, they have fallen short of congressionally mandated and economically induced cost increases. To the best of our knowledge, no other federal agency has been put through such a devastating fiscal wringer. Yet, ACIR has emerged stronger in many ways, though more limited in capacity and still operating on a fiscal tightrope. At the same time, the need for ACIR has become more important than ever.

For one, ACIR is the only federal institution dedicated to identifying and analyzing intergovernmental problems and recommending policies to improve cooperation among our federal, state, and local governments. The past decade has been hard on such institutions. OMB's intergovernmental unit was abolished in 1983. GAO's intergovernmental division was downgraded, downsized, and transferred to Human Resources in 1985-89. The Department of the Treasury's Office of State and Local Finance dwindled to nothing after 1986. Even in Congress, intergovernmental affairs, which once merited independent subcommittee status, barely registers on the radar screen today.

Second, dramatic changes have occurred in our federal system, changes that require serious attention.

- More than 50 percent of all federal statutes preempting state and local authority enacted in our 204-year history have been enacted only in the past 24 years.
- Federal mandates on state and local governments have reached unprecedented levels as well, often requiring state and local governments to raise taxes and cut services at the same time.
- Contrary to conventional wisdom, federal regulation of state and local governments did not decrease during the 1980s. Both regulation and conditions of aid increased during the decade.
- Federal aid to state and local governments dropped from 26.5% of state-local outlays in 1978 to 20.5% in 1990 and from 17.0% of federal outlays in 1978 to 11.5% in 1991.
- Federal aid has shifted dramatically from human and capital investment to current service consumption. Federal aid to state and local governments that is dedicated to payments to individuals has increased from 31.8 percent of all grant funding in 1978 to an estimated 64.7% this year.
- Yet, the number of grant programs leaped from 404 in 1984 to 557 in 1991. However, categorical grants accounted for 89.4% of all federal aid outlays in 1991. Moreover, the median grant obligation was only $4.2 million.
- And what do state and local governments find when they come to Washington to try to cope with these problems? They confront some 80,000 lobbyists and fragmented decision-making.

These dramatic changes are as damaging to our economy and civic morale as the federal deficit and the health-care crisis. These developments get little media attention because, like rust on the underside of a bridge, they reflect the largely imperceptible structural damage to our federal system that underlies the more visible problems that capture the headlines. The transformation of our federal system that has occurred in the past 20-some years corresponds exactly with the long-term decline of the U.S. economy since 1972. We have lost sight of the fact, therefore, that America became the world's dominant economy and most affluent society before, not after, the federal government extended its authority over every facet of federalism and state and local governance.

We very much need our federal, state, and local governments to work together in partnership, and we need the Congress and the President to work with ACIR to repair the structural damage to our federal system and promote better intergovernmental cooperation. We believe, moreover, that the alignment of issues resulting from the last election presents the first opportunity in more than a decade to restructure our federal system for greater efficiency, productivity, equity, and innovation.

Six Facets of ACIR

To give you a well-rounded picture of ACIR, let me outline the six basic facets of ACIR's work.

1. Intergovernmental Problem-Solving Forum

ACIR, established in 1959, is an independent, bipartisan intergovernmental forum consisting of leading federal, state, and local officials and private citizens who identify current and future policy issues of intergovernmental importance to develop consensus positions that help the President, the Congress, and state and local governments resolve issues. The Congress appoints six members and the President appoints 20 members to ACIR, The Commission also works closely with the independent ACIR equivalents that operate in 25 states. The U.S. ACIR serves informally as a secretariat and clearinghouse for the state ACIRs.

In addition, ACIR regularly convenes federal, state, and local officials to resolve specific issues and improve cooperation. For instance, ACIR is working with the U.S. Army Corps of Engineers to meet the Corps' congressional mandate to cooperate with federal, state, local, and private interests to develop a national infrastructure strategy. We are assisting the Corps on drought planning as well. We are also working with the U.S. Geological Survey to help the Federal Geographic Data committee forge a better partnership with state and local governments to share data and information and to reduce costs. Many federal agencies have difficulty talking with state and local governments without the help of a facilitator, such as ACIR. In addition, being exempt from the Federal Advisory Committees Act, ACIR is able to facilitate such dialogue effectively, expeditiously, and inexpensively.

2. Policy Recommendations for Intergovernmental Cooperation

ACIR regularly produces ***policy recommendations*** for federal, state, and/or local action. ACIR's recent work on preemption, for example, led to bipartisan introduction in the Senate of a "Preemption Clarification and Information Act." ACIR's just-released report on state regulation of insurance has drawn tremendous attention. We hope our recommendations will nudge the states toward better regulation and, perhaps, an interstate compact. Last November, ACIR issued a report and recommendations to improve intergovernmental decisionmaking in environmental protection and initiated discussions on these matters with EPA and CEQ. The recommendations will also be useful to the President and the Congress in considering legislation and executive action to enhance environmental protection while expediting public works investment. On Medicaid, ACIR has been one of the few agencies to highlight the role of local governments, especially counties, in health care and to urge that health-care reform not produce negative fallouts for local governments. ACIR recently approved recommendations on the National Guard, an important intergovernmental issue in light of current defense reductions. ACIR has also issued a series of recommendations on water governance and the coordination of groundwater and surface water management. At its next meeting, the Commission will likely approve recommendations on intergovernmental reform in child care. The accompanying report has already drawn very positive reviews in draft form.

3. Identification of Emerging Issues

ACIR is also well known for ***pioneering issues***. The Commission, for example, was the first to identify mandates as an emerging issue in the federal system two decades ago. This work led, among other things, to the enactment of fiscal note processes in state legislatures and the Congress. Obviously, much more needs to be done on mandates. In another area, ACIR issued in 1988 the first 50-state casebook on state constitutional law in American history. The Commission sought to enhance awareness of the importance of state constitutions in the federal system and to encourage the teaching of state constitutional law in law schools. This effort, which received a strong endorsement from former U.S. Supreme Court Justice William J. Brennan, Jr., has been very successful. Most recently, the Commission has sought to call attention to the silent explosion of preemption in our federal system. ACIR has produced, among other things, the first 202-year inventory of federal statutory preemption of state and local authority.

4. Information Dissemination

ACIR is highly regarded for its ***dissemination of useful, objective information*** on many aspects of federalism and intergovernmental relations.

Among the best known are ACIR's annual two-volume *Significant Features of Fiscal Federalism*, biennial *Characteristics of Federal Grant-in-Aid Programs to State and Local Governments*, and biennial *State Fiscal Capacity and Effort* reports. ACIR's staff, which consists of 19 persons, also makes many public presentations and responds to more than 1,800 specific requests per month for information from members of Congress, federal agencies, state and local officials, academics, business people, and news reports. ACIR's output appears frequently in the nation's leading newspapers.

ACIR also issues a quarterly magazine, *Intergovernmental Perspective*, that is mailed to more than 17,000 people, mostly public officials. In addition, ACIR produces specific guidance materials, such as a series of handbooks on local revenue diversification and a forthcoming *Guide to the Criminal Justice System for General Government Elected Officials*. This guide will be accompanied by a major policy report with recommendations on criminal justice. This project was largely funded by the National Institute of Justice of the U.S. Department of Justice. Finally, for example, ACIR is the only entity that has been tracking annually the effects on state and local governments of the unified volume cap on state and local issuance of private-activity debt.

5. Technical Assistance and Comment

ACIR regularly provides ***technical assistance*** to federal agencies and state and local governments, such as recent tax studies for Hawaii, Maryland and South Carolina and a study of jurisdictional fiscal disparities in the Chicago metropolitan area. Just recently, we helped the Federal Highway Administration develop an official list of the metropolitan planning organizations (MPOs) required by federal law to maintain state and local eligibility for highway, transit, and surface transportation grants. ACIR also ***comments***, upon request, on bills before the Congress, recommendations proposed by the Administrative Conference of the United States, and federal agency plans and proposals having intergovernmental relevance. ACIR occasionally provides testimony before the Congress and state legislatures as well. We have also commented on draft topics for national education standards on civics and government, and have worked to ensure that federalism, intergovernmental relations, and state and local government will be adequately covered by the standards.

6. International Assistance

In recent years, the Commission has become more active in helping to ***promote federal democracy internationally***. ACIR conducts a regular Thursday briefing on American federalism for foreign visitors. We hosted about 150 such visitors last years. ACIR has also provided some assistance abroad, for example, on federalism in Australia, aboriginal self-government in Canada, creation of a ACIR in Nigeria, local government reform in Poland, intergovernmental relations in Russia and Ukraine, and federalization in Spain. Last month, ACIR co-hosted with the American Bar Association the Chairman and other leading members of the Russian Constitutional Commission for a series of workshops on federalism and intergovernmental relations. All of these activities have been funded by external sources.

ACIR has also helped to forge a unique and unusual alliance of the "Big 7" and other state-local associations to carry out a major initiative on intergovernmental relations and regional and local self-government in the NIS. The Congress endorsed this idea in its conference report on the Freedom Support Act of 1991. The World Bank has just issued a report arguing that intergovernmental reform will be critical for the success of general economic and political

reform in Russia. The Russian Constitutional Commission also emphasized that federalism is their highest priority. Indeed, the draft constitution is dominated by federalism issues. We have been making this case for more than a year, but to no avail. Funds have been appropriated for a major state-local initiative; however, the last Administration could not mount a coherent aid program, and USAID had thus far proven to be impenetrable.

In summary, although ACIR is one of the smallest agencies in the federal government, it is a highly productive and visible force in the intergovernmental community. The Commission is well equipped to serve as an arbiter and help resolve major intergovernmental problems that have been neglected in recent years and is prepared to work with the Congress and the President to respond to the voters' mandate for change. Indeed, ACIR has already provided assistance to the new Administration on grant-in-aid reform and a possible executive order on intergovernmental cooperation.

ACIR's Compliance with Congressional Cost-Sharing Directives

Turning to the financing of ACIR, I can confidently report that ACIR has complied with Congressional directives to raise revenue from state contributions and sales of publications and services to compensate partially for appropriations reductions from $2,148,000 in FY 1985 to $1,320,000 in FY 1993. This decline stands in stark contrast to the growth in many other federal agency appropriations, the rate of inflation, and annual GNP growth.

In FY 1992, ACIR realized $163,000 from state contributions, $68,000 from sales of publications and diskettes, $62,500 from private nonprofits, $30,000 from state and local government contracts, and $450,000 from interagency research and administrative contracts, honoraria, and other income. As of January 31, 1993, the Commission had realized $14,400 from state contributions, $24,500 from sales of publications and diskettes, and $507,300 from contracts, administrative services, honoraria, and other income.

We will continue these cost-sharing activities. Also, to cut costs, we have purchased all leased equipment, cut the number of full-time employees from 30 to 19 over the last eight years, reduced leased office space from 14,600 square feet in FY 1982 to 7,800 square feet, purchased labor-saving and cost-reducing equipment, and drastically reduced the number of publications distributed free of charge. In FY 1992, ACIR eliminated the last 1,200 square feet of its leased warehouse space.

The Commission has clearly established an excellent record of complying with the Congress' cost-sharing directives and tightened appropriations. At the same time, it should be noted that ACIR's appropriations since FY 1985 have fallen below what would have been provided under Gramm-Rudman-Hollings cuts. ACIR's FY 1993 appropriation is $10,000 below ACIR's FY 1992 appropriation when the funds earmarked for the local government study are removed. The FY 1993 request is still $625,000 less than our FY 1984 appropriation and $757,000 (or 39 percent) under our FY 1985 appropriation. During this time, ACIR also has absorbed all government-wide pay and rent increases as well as other required service-cost increases. Clearly, the Commission has been on subsistence or below funding since FY1988.

Consequences of Cuts

Although the Commission has managed eight years of real-dollar reductions of budgetary resources rather well, it becomes more difficult each year to maintain current services. FY 1993 marks the third straight year (fourth out of the last five) that the portion of ACIR's Congressional appropriation totally under agency control, referred to as nonmandatory, will be $0.

Although the Commission increased state contributions from $84,750 in FY 1986 to $203,000 in FY 1991, they dropped off to $163,000 in FY 1992 and our FY 1993 projection is $145,000 because most states are facing adverse fiscal conditions. This will result in a reduction of current services and, possibly, of staff as well.

There also are limits on ACIR's external revenue potential. For example, supplying reports to U.S. government depository libraries reduces the library market considerably. In addition, the Commission cannot accept commercial advertising in *Intergovernmental Perspective*. We do not object to these limits in principle. We simply note that the limits exist.

On the expenditure side, ACIR has experienced increased difficulty in retaining and hiring high-quality research staff because of rising salary pressure. Furthermore, the 1990 civilian and executive pay acts increased ACIR's personnel expenses by $98,000 between FY 1990 and FY 1991. It is significant to note that ACIR has had to abandon given step increases to employees out of fiscal necessity, and ACIR also has inquired about the possibility of not granting the governmentwide increases approved by the Congress.

Further, an anomaly arose when the SLEP regulations implementing the *Federal Employee Pay Comparability Act of 1990* went into effect. Because the executive director's salary is fixed by law at Level V of the Executive Salary Schedule, certain subordinate professionals are eligible for a higher salary than that of the executive director.

Similarly, there has been an increase in the cost of conducting research under contract with outside experts. We go outside the Beltway as much as possible; nevertheless, costs have increased nationwide.

The Commission, therefore, has come under noticeably stronger budget pressure in the past two years. Through increased productivity and other efficiency measures, plus increased external resources, the Commission compensated to a great degree for the steep reduction in appropriations that occurred from FY 1985 to FY 1989. However, the combination of virtually flat appropriations since FY 1988 and significantly increased costs means that the Commission faces further reductions in current services.

Appendix A

RESEARCH PROGRAM AND PROJECT STATUS REPORT

I. Continual Monitoring and Information Dissemination

Project Name: Significant Features of Fiscal Federalism (Annual)

Initiation: Approved by the Commission as an annual report under the general mandate of ACIR to collect and disseminate information relevant to intergovernmental relations.

Assigned Staff: Brenda S. Avoletta and Jennifer Bing (Intern)

Description: ACIR published *Significant Features of Fiscal Federalism* periodically (under different titles) from the Commission's inception through 1977. The report has been updated and issued annually since 1977. Among the most widely used of ACIR's publications, *Significant Features* presents data and information on federal, state, and local revenues, expenditures, grant-in-aid policies, tax rates, indebtedness, public-sector employment and earnings, and additional topics that vary from year to year. The report provides timely information that is often used as a basis of analysis by members of Congress, state legislatures, federal agencies, special federal and state tax and expenditure study commissions, citizen groups, academics, and the media. To ensure timeliness, *Significant Features* is issued in two volumes. Volume I, which contains information on budget processes and tax systems for federal, state, and local governments, is issued in time for state and local policymakers to use in new fiscal year policy decisions. Volume II presents data on federal, state, and local government revenues and expenditures, including tables on revenues by source, expenditures by function, and state-by-state rankings. The 1993 edition of Volume I includes information on major tax changes 1992 and updated tables presenting results of a survey of state revenue departments relating to income taxation and property tax relief. The volume also contains graphics and expanded narratives to facilitate understanding of the data.

Current Status: The 1993 Volume I edition will be published in February. Work on 1993 Volume II is nearly complete.

Expected Completion: The 1993 Volume II is expected to be published in September 1993.

Project Name: State-Local Government Finance Diskettes

Initiation: A continuing activity to accompany the publication of *Significant Features of Fiscal Federalism.*

Assigned Staff: Brenda S. Avoletta and Jennifer Bing (Intern)

Description: ACIR produces government finance data diskettes for use by intergovernmental finance analysts on state-local government finance (expenditures and revenues),which accompany the annual *Significant Features of Fiscal Federalism.* These diskettes greatly enhance the analytical power of the published volumes, and are widely used by analysts and practitioners throughout the country. In order to market these diskettes to a wider audience, the staff has developed a demonstration disk. Diskettes from previous years are also available for persons who wish to work with historical data. The diskettes are accompanied by a guidebook in order to facilitate their use by persons who do not have a technical computer background.

Current Status: The 1992 diskettes and guidebook were published in September 1992. Work has begun on the 1993 edition of the diskettes.

Expected Completion: The 1993 edition is expected to be distributed in September 1993.

Project Name: Changing Public Attitudes on Governments and Taxes (Annual Public Opinion Poll)

Initiation: Approved by the Commission, 1972

Assigned Staff: Bruce D. McDowell, Jeffery S. Fitzpatrick, and The Gallup Organization (contractor)

Description: Since 1972, ACIR has commissioned a public opinion poll on governments and taxes. Two questions have been asked every year, and the responses to those questions provide a unique measure of long-term trends in public opinion on federalism and taxes. Other questions are asked at intervals, or are designed to meet the needs of current ACIR re-

search projects. Polling is done by personal interviews by the Gallup Organization; results are summarized by ACIR staff. Results of the poll appear in newspapers, magazines, and other outlets around the country.

Current Status: Polling for the 1993 survey will take place in June 1993.

Expected Completion: *Changing Public Attitudes on Governments and Taxes—1993* is expected to be published in September 1993.

Project Name: Measuring State Fiscal Capacity and Effort (Biennial)

Initiation: This is a continuing activity, once done annually but now done biennially.

Assigned Staff: Marcia A. Howard and Peat Marwick (contractor)

Description: ACIR research on improving the measurement of state-local fiscal capacity began in 1962 with the staff report *Measures of State and Local Fiscal Capacity and Tax Effort*. That report was the first to present estimates of the Representative Tax System (RTS), an alternative to per capita income as a measure of state and local fiscal capacity. In 1982, the Commission recommended that the federal government use a fiscal capacity index, such as RTS, in several grant-in-aid programs and that estimates of capacity be prepared periodically. Since that time, ACIR has also developed and published a more comprehensive measure, the Representative Revenue System (RRS). The most recent RTS and RRS estimates published by the Commission are for 1988.

Current Status: Report containing estimates based on 1990 and 1991 data is under way. A shortage of resources required postponement of the 1992 report to 1993.

Expected Completion: Report is expected to be published in July 1993.

Project Name: Fiscal Capacity and Effort Diskettes

Initiation: A continuing activity to accompany the publication of the biennial report, *Measuring State Fiscal Capacity and Effort*.

Assigned Staff: Marcia A. Howard

Description: Data on individual tax bases, tax rates, and the resulting indexes contained in *Measuring State Fiscal Capacity and Effort*.

Current Status: Work will start in April 1993 and coincides with preparation of the report.

Expected Completion: Diskettes are expected to be issued in August 1993.

Project Name: Characteristics of Federal Grant-in-Aid Programs to State and Local Governments

Initiation: Approved by the Commission as a report issued every two years under the general mandate of ACIR to collect and disseminate information relevant to intergovernmental relations.

Assigned Staff: Bruce D. McDowell and Albert J. Richter (contractor)

Description: The first edition was issued in October 1977 as one volume of a multivolume study entitled *The Intergovernmental Grant System: An Assessment and Proposed Policies*. This report lists and describes each program of federal grants to state and local governments that is actually funded for the fiscal year covered by the catalog. The characteristics described include the type of grant (general purpose, block grants, or categorical grants), the method of allocating funds (eligible recipients, formula elements, discretionary authority), budget function and subfunction classifications, and other items.

Current Status: The FY 1991 edition was published in March 1992. Research for the FY 1993 edition will begin in June 1993.

Expected Completion: The FY 1993 edition is expected to be published in December 1993.

Project Name: Directory of State-Local and Intergovernmental Relations Organizations

Initiation: First prepared in conjunction with a policy report on state-local relations organizations, this report was authorized by the executive director in 1987 and published in February 1991.

Assigned Staff: Jeffrey S. Fitzpatrick

Description: This periodically updated directory is the only source of information about the "state ACIRs." It also includes contacts in the federal department and agency offices of intergovernmental relations, and in the U.S. ACIR.

Current Status: The next edition is nearly complete.
Expected Completion: An updated directory is expected to be published in March 1993.

Project Name: *Intergovernmental Perspective* (Quarterly Magazine)
Initiation: Approved by the Commission, 1974
Assigned Staff: Pamela L. Reynolds, Joan A. Casey, and John Kincaid
Description: This is a glossy magazine of 32-48 pages published four times a year. The magazine contains articles, points of view, and research reports about current issues in federalism and intergovernmental relations. Also included are news notes about ACIR and about publications and microcomputer data diskettes available from ACIR. The magazine serves a constituency of more than 20,000 private citizens, public officials, business people, and academics.
Current Status: Two issues for FY 1993 have been published; two more have been planned and articles are being prepared for these issues.
Expected Completion: The magazine will appear four times in FY 1993 and four times in FY 1994.

Project Name: *ACIR Annual Report*
Initiation: Required by P.L. 86-380
Assigned Staff: Jeffrey S. Fitzpatrick
Description: By law, the Commission must submit to the President and the Congress, by January 31st of each year, a summary of its activities for the past calendar year.
Current Status: Thirty-four consecutive annual reports have been submitted on time.
Expected Completion: The 1992 annual report was delivered January 31, 1993.

II. Topical Research Projects

A. Projects Completed in FY 1993

Project Name: Intergovernmental Decision-Making for Environmental Protection and Public Works
Initiation: Approved by the Commission, June 1987
Assigned Staff: Bruce D. McDowell, Daniel R. Mandelker (contractor), and Kenneth Rubin (contractor)
Description: During the last two decades, especially, a wide array of federal and state mandates for environmental protection have grown up. In addition, a process calling for environmental impact statements has become a widely accepted means of determining how individual projects and aggregations of projects will affect the environment and how development objectives can be met without harming the environment unnecessarily or irretrievably. This project examined the adequacy of federal, state, and local environmental evaluations and mitigation practices used to inform the intergovernmental negotiations required before development can take place. The project produced a Commission policy report.
Current Status: Completed.
Expected Completion: Publication occurred in November 1992.

Project Name: State Regulation of Insurance
Initiation: Commission authorized, September 1989.
Assigned Staff: John Kincaid and Sandra B. McCray (contractor)
Description: For many years, federal legislation has reserved regulatory authority over the insurance industry to the states. Now there are proposals to reverse this practice. This study assesses the need for and potential consequences of this proposed shift. In addition, the report examines recent insolvencies in the insurance industry and analyzes policy options to address this problem.
Current Status: Completed.
Expected Completion: Publication occurred in December 1992.

B. Projects Expected to be Completed in FY 1993

Project Name: State Laws Affecting Local Government

Initiation: Approved by the Commission, September 1989

Assigned Staff: Bruce D. McDowell and Melvin Hill (contractor)

Description: This information report is a thorough inventory of laws in the 50 states for 1978 and 1990 affecting the functional, fiscal, and governance powers of local governments.

Current Status: The Commission has adopted this report.

Expected Completion: Publication is expected in February 1993.

Project Name: The Role of General-Purpose Governments in the Administration of Justice

Initiation: Approved by the Commission, June 1989

Assigned Staff: Bruce D. McDowell and Vivian E. Watts (contractor)

Description: The federal, state, and local governments all are involved in the administration of justice through a complex array of relationships involving the legislative, judicial, and executive branches of each government. The criminal justice system is under stress now, at a time when federal, state, and local government budgets also are under stress. Key characteristics of the criminal justice system are established without relation to their costs, and the elected officials of general-purpose governments are left to find the necessary funds. Too often, the officials responsible for finance are left out of the decisions that create the demand for funds.

This project focuses on key relationships between (1) local governments, state governments, and the federal government, (2) the legislative, executive, and judicial branches of these governments, (3) local governments within states, counties, and metropolitan areas, and (4) the relationships between local officials and practitioners throughout the criminal justice system. The project has produced recommendations for improving the intergovernmental relations of criminal justice administration, coupled with institutional mechanisms prepared to follow through on the recommendations.

Current Status: Funding was received from the U.S. Department of Justice. Two reports and policy recommendations have been approved by the Commission.

Expected Completion: Publication is expected in March 1993.

Project Name: Regulatory Federalism Update: The Record of the 1980s

Initiation: Approved by the Commission, September 1989

Assigned Staff: Bruce D. McDowell, Timothy J. Conlan (contractor), David R. Beam (contractor), and Cynthia Collela (contractor)

Description: The term "unfunded federal mandates" is being used increasingly by state and local governments to express their perception that federal assistance is declining while federal intrusiveness is increasing. Following up on previous Commission studies of several elements of this issue, the study comprehensively examines activities under Federalism Executive Order 12612, the Congressional "Fiscal Notes" process operated by CBO, the regulatory relief efforts of the Reagan administration, and other similar activities. The purpose of this study is to assess the net impact of these activities, and to suggest improvements. A Commission policy report has resulted, updating the Commission's 1984 report that coined the term "regulatory federalism."

Current Status: The Commission adopted the report, with recommendations, in June 1992.

Expected Completion: Publication is expected in March 1993.

Project Name: National Guard

Initiation: Approved by the Commission, September 1989

Assigned Staff: Bruce McDowell and Norman Beckman (contractor)

Description: This study examines intergovernmental arrangements involving the National Guard and has resulted in Commission recommendations for improving cooperation.

Current Status: The Commission adopted the report with recommendations in June 1992.

Expected Completion: Publication is expected in March 1993.

Project Name: National Drought Planning

Initiation: Approved by the Commission, March 1991, at request of the U.S. Army Corps of Engineers

Assigned Staff: Bruce D. McDowell and William Blomquist (contractor), Vivian E. Watts (contractor), Bill Lord (contractor), and David Harrison (contractor)

Description: This is the final phase of a three-phase project. In the first phase, the Commission supplied a brief issues paper to the Corps on the roles of various governments in drought planning. In Phase II, the Commission supplied a more fully developed outline of institutional and governance issues depicting the interplay between the American political system and the technical aspects of water resource planning and management pursued in anticipation of and during droughts. The outline includes diverse institutional influences on water planning and management, such as alternative decisionmaking processes, means of integrating advocacy groups into the process, and procedures for introducing formal risk assessments into the process in a credible and constructive fashion. ACIR is developing these issues through the use of workshops and will recommend how effective decisionmaking can be integrated most appropriately into drought planning and drought response activities consistent with the American political system. In Phase III, ACIR is providing direct assistance to the four drought planning teams assembled by the Corps, and is converting this outline into appropriate sections for a drought planning manual being developed by the U.S. Army Corps of Engineers.

Current Status: Phase I was completed in Fall 1990. Phase II was completed in Fall 1992. Phase III is underway.

Expected Completion: The final report to the Corps of Engineers is expected to be submitted by May 1993.

Project Name: Coordination of Geographic Information Systems

Initiation: Approved by the Commission, September 1992.

Assigned Staff: Bruce D. McDowell

Description: The federal, state, and local governments collect and use large amounts of geographic data. Increasing proportions of this information are automated, making it potentially available to be shared. The 14-agency Federal Geographic Data Committee (FGDC) was established by OMB Circular A-16 and is charged with coordinating federal geographic data and involving state and local governments (as well as the private sector) in its work. ACIR is helping to develop effective and efficient means of involving state and local governments in the work of FGDC.

Current Status: An informal working group of state and local officials has been convened to consider this issue. It has met twice, and will meet twice more before May 1993.

Expected Completion: The results of the four meetings will be compiled into a report to FGDC and presented before May 10, 1993.

Project Name: State Courts and Local Autonomy

Initiation: Approved by the Commission, June 1987

Assigned Staff: Seth B. Benjamin and Michael Libonati (contractor)

Description: A substantial body of state case law is developing around the issue of local government standing in state courts to challenge state limitations on local autonomy. Essentially, these cases test the limits of home rule within each state, but there is no systematic tracking of these cases across the country. Hence, the true meaning of home rule in the United States remains unknown. This project is tracking these cases and will make the information available to a wide audience.

Current Status: The draft report is under review. It is scheduled for consideration by the Commission in March 1993.

Expected Completion: Publication is expected in May 1993, pending form and timing of Commission action.

Project Name: How Local Public Economies Work: Equity, Viability, and Service Responsiveness in America's Civil Communities

Initiation: Approved by the Commission, June 1987

Assigned Staff: Bruce D. McDowell, Seth B. Benjamin, Ronald J. Oakerson (contractor), and Roger B. Parks (contractor)

Description: This study is an extension and expansion of Commission work on local self-government in the federal system. It includes two case studies focused on St. Louis County, Missouri, and Allegheny County, Pennsylvania, both of which are highly "fragmented" metropolitan areas. Included in the research are examinations of state-local and interlocal relations, the viability of small local governments, and the degrees and ways in which fragmentation and consolidation affect efficiency and equity in the production and provision of local public services. Based on these two case studies, a final report is being prepared comparing their findings and drawing conclusions about the organization of local governments in metropolitan areas.

Current Status: A report on the first case study, St. Louis County, Missouri, was published in September 1988. The second case study was published in February 1992. Work on the comparative study is underway.

Expected Completion: The report is expected to be published in June 1993, pending form and timing of Commission action.

Project Name: Public Works Perspectives

Initiation: Approved by the Commission, September 1989

Assigned Staff: Bruce D. McDowell and Michael E. Bell (contractor)

Description: ACIR continues to distribute more than 50 working papers prepared for the National Council on Public Works Improvement. Although many of them are quite good, their current photocopy format and imposing length make them less attractive and accessible than they should be. With continued attention to this topic, the usefulness of these papers will be enhanced greatly by publishing them in a more accessible format. This project has identified the best 15 of these papers and will issue them together as an ACIR information report.

Current Status: Work is underway.

Expected Completion: Publication is expected in June 1993.

Project Name: Federalism: Concept and History

Initiation: Approved by the Executive Director, April 1990

Assigned Staff John Kincaid

Description Chapter on concepts of federalism and history of American federalism for reference work on American government for school teachers and journalists assembled by the Center for Civic Education.

Current Status: Chapter was published in 1991. ACIR will issue a longer version as an instructional aid.

Expected Completion: Publication of ACIR version is expected in July 1993.

Project Name: The Property Tax in a Changing Federal Environment

Initiation: Approved by the Commission, September 1989

Assigned Staff: John O. Behrens and Contributors

Description: The federal system has been undergoing a significant realignment of spending and revenue-raising responsibilities. An important consequence of that realignment has been an increased fiscal role for local governments in service provision. The local property tax has been, and still is, the single largest generator of local revenues. Recently, however, circumstances surrounding the property tax have changed significantly. These include a period of historically high rates of inflation, a tax revolt (e.g., California's Proposition 13), a January 1989 U.S. Supreme Court decision (*Allegheny Pittsburgh Coal* v. *County Commission of Webster County*) invalidating systematic overvaluation of recently purchased property vis-a-vis long-term but otherwise similarly situated property owners, and new evidence relating to the distributional and local economic-development implications of the tax.

This project will produce an overview report on the local property tax and an issue of *Intergovernmental Perspective* examining specific aspects and new developments in the property tax in more detail. Topics that will be examined include (1) different structures

of the tax (e.g., classification systems based on types of property and/or improvements versus land); (2) the role of the states in strengthening the tax (e.g, financing tax relief); (3) the interplay between the property tax and alternative sources of revenue (e.g., impact fees); and (4) the effects of property tax changes on the growth of new local governmental institutions (e.g., special districts and authorities) and private communities (e.g., residential community associations). Throughout this project, the role of new technologies and recent court decisions will be analyzed.

Current Status: Project is under way.

Expected Completion: Publication of the *Intergovernmental Perspective* issue is expected in June 1993. The report is anticipated to be published in August 1993.

Project Name: Local Governments in International Affairs

Initiation: Approved by the Commission, June 1987

Assigned Staff: John Kincaid and Robert Maffin (contractor)

Description: This report analyzes the growing involvement of local governments, especially major cities and ports, in international affairs. Such activities as trade missions abroad, "sister city" programs, and local government resolutions concerning foreign policy issues are examined. Federal, state, and local relationships in these activities, as well as constitutional issues and evaluation of the economic payoffs from such activities are investigated.

Current Status: Report has been adopted by the Commission. Final publication revisions are being made.

Expected Completion: Publication is expected in August 1993.

Project Name: State Governments in International Affairs

Initiation: Approved by the Commission, June 1987

Assigned Staff: John Kincaid and John M. Kline (contractor)

Description: This project is a larger companion to the research on Local Governments in International Affairs. States have become increasingly active in international affairs, especially in sending foreign trade missions abroad and undertaking a variety of activities designed to promote exports from the states, attract foreign firms to establish operations within the states, and allow the states to compete more effectively in world markets. The new emphasis on international competitiveness has spurred this activity. This report examines legal and constitutional issues involved in state international activity, matters of intergovernmental and interagency coordination, and the economic effectiveness of state international programs.

Current Status: Report has been adopted by the Commission, and is being finalized for publication.

Expected Completion: Publication is expected in August 1993.

Project Name: Local Revenue Diversification: Tourist Taxation

Initiation: Approved by Executive Director, March 1991

Assigned Staff: Brenda S. Avoletta, Jennifer Bing (Intern), and James Mak (contractor)

Description: This will be another brief report in an ongoing series designed to provide information to local governments looking for effective and equitable ways to diversity and strengthen their revenue systems.

Current Status: Project is underway.

Expected Completion: Publication is expected in August 1993.

Project Name: Federal Mandate Reimbursement

Initiation: Commission adopted work plan, March 1985

Assigned Staff: Bruce D. McDowell and Joseph F. Zimmerman (contractor)

Description: This project builds, in part, on GAO's research on state and local experiences in complying with federal mandates and in being reimbursed for the costs related thereto. The report will develop and examine criteria for reimbursement and the appropriateness and adequacy of federal reimbursement practices—present and proposed.

Current Status: The research is nearly complete. Commission consideration is scheduled for June 1993.

Expected Completion: Publication is expected in August 1993, pending form and timing of Commission action.

Project Name: Areawide Organizations: An Update

Initiation: Approved by the Executive Director, February 1991 as part of the Decade of Change study authorized by the Commission, September 1989.

Assigned Staff: Bruce D. McDowell, Jeffrey S. Fitzpatrick, Patricia Atkins (contractor), and Albert J. Richter (contractor)

Description: Certain functions of local government spill beyond the borders of individual local governments. In response, most local governments have joined together for intergovernmental cooperation or to create areawide organizations. This practice occurs in both metropolitan and nonmetropolitan areas. It has been a decade since ACIR examined this phenomenon. This study will update previous work and produce an information report.

Current Status: Research is complete. Commission consideration is scheduled for June 1993.

Expected Completion: Publication is expected in August 1993, pending form and timing of Commission action.

Project Name: Child Care in the American Federal System

Initiation: Approved by the Commission, September 1989

Assigned Staff: Bruce D. McDowell and William T. Gormley, Jr.(Contractor)

Description: The need for safe, reliable, and productive child care is increasing rapidly in America as more parents find it necessary to work outside the home. Governments are becoming more involved in making sure that these services are available to all, not just those who can easily afford it. Along with this public involvement comes regulation as well as financial assistance. Federal, state, and local governments all are involved. Issues of intergovernmental coordination and equity are growing. The ACIR study is exploring these issues and will make recommendations.

Current Status: The draft report is complete and was considered initially by the Commission in December 1992. It is scheduled fo further consideration in March 1993.

Expected Completion. Publication is expected by September 1993, pending form and timing of Commission action.

C. Other Projects in Process

Project Name: Federal Interagency Infrastructure Strategy

Initiation: Approved by the Executive Director, July 1990, and Commission, February 1991

Assigned Staff: Bruce D. McDowell, Charles Griffiths, and Jeffery S. Fitzpatrick

Description: The U.S. Army Corps of Engineers initiated interagency discussions within the federal government for the purpose of developing an interagency infrastructure strategy for the nation. The Corps requested the assistance of ACIR. In the first phase of this project, ACIR prepared two of the four issue papers used to kick off discussions with other federal agencies. The two issue papers are entitled "The Value of Infrastructure" and "Alternative Funding Strategies and Methods of Implementation." In the second phase, ACIR convened a series of interagency and intergovernmental meetings to identify opportunities for federal interagency cooperation. The final phase will explore the potential for several federal "memorandums of understanding" (MOUs) that would advance public works projects.

Current Status: The issues papers were delivered to the Corps in March 1991. Eight subsequent meetings produced an initial Commission report, adopted in June 1992, and published in August 1992. Work has begun to explore the potential for six MOUs.

Expected Completion: A final report is scheduled for publication in October 1993.

Project Name: Estimating the Impact of Federal Mandates on State and Local Finances

Initiation: Approved by the Commission

Assigned Staff: Marcia A. Howard

Description: In recent years, state and local government budgets have had to accommodate a growing number of federal statutory and judicial mandates. However, there is no consistent and comprehensive methodology for calculating the impacts of these federal actions on state and local budgets. For example, do the impacts vary by size of jurisdiction, geographic region of the country, or the allocation of responsibilities between the state and

its localities (or among the types of localities within a state)? This project will develop a methodology to provide more consistent and comparable estimates of the impacts of federal mandates among states and localities.

Current Status: Project is under way.

Expected Completion: Publication is expected in November 1993, pending form and timing of Commission action.

Project Name: Immigration and Federalism: Intergovernmental Impacts

Initiation: Approved by the Commission, June 1989

Assigned Staff: Marcia A. Howard

Description: Under the U. S. Constitution, the federal government has principal responsibility for foreign affairs, including immigration. Yet, once immigrants have entered the country, they place undeniable demands on the services of state and local governments. The intergovernmental relations of immigration are not smooth. The federal government recognizes responsibility for only certain classes of immigrants, although state and local governments—under Supreme Court order—must serve most of the social service needs of all immigrants. Federal support for recognized immigrants is decreasing at a time when the case loads for state and local governments are increasing for that group, as well as for groups of immigrants not recognized by the federal government. In short, the system appears to be out of balance, and this imbalance appears to be growing. The project will investigate this phenomenon, evaluate the relevant existing intergovernmental programs and relationships, and propose improvements.

Current Status: Project is under way.

Expected Completion: Publication is expected in November 1993, pending form and timing of Commission action.

Project Name: State Taxation of Telecommunications

Initiation: Approved by the Commission, June 1990

Assigned Staff: John Kincaid, Marcia A. Howard, and Sandra B. McCray (contractor)

Description: This is the second of two studies conducted by the Commission that focuses on the telecommunications industry; the first study examined state regulation of telecommunications. This study examines recent changes in the structure and technology of the telecommunications industry and what these changes portend for state taxation of the industry. The study identifies the various types of taxes levied on telecommunications among the states (e.g., gross receipts, general sales, corporate income, and property taxes) and analyzes the key issues raised by the industry's changing structure and technology.

Current Status: Thinkers' session was held on February 19, 1993.

Expected Completion: Publication is expected in December 1993, pending form and timing of Commission action.

Project Name: Improving Education Outcomes

Initiation: Approved by the Commission, September 1989. Funded in part by the Carl and Lily Pforzheimer Foundation, and in part by the U.S. Department of Education.

Assigned Staff: John Kincaid

Description: This study will examine the effects of intergovernmental factors on public schools. During the past three decades, the reach of federal and state governments into the classroom has increased immensely. Civil rights and economic opportunity concerns, curriculum reforms, international competition, and the desire to equalize per pupil spending have played parts in the rising intergovernmentalization of education. Thus, off-site governments increasingly are using money and mandates to address issues that do not necessarily enhance classroom learning. At the same time, research indicates that the most effective schools are those that concentrate on the needs of their own students, teachers, parents, and communities. The study will focus on the extent to which state and federal influences have advanced and retarded the institutionalization of factors associated with effective schools.

Current Status: Project is under way.

Expected Completion: Publication of a report with case studies is expected by December 1993, pending form and timing of Commission action.

Project Name: State and Local Roles in the Federal System: An Update

Initiation: Approved by the Executive Director, February 1991

Assigned Staff: Bruce D. McDowell, John Kincaid

Description: The Commission's 1982 volume entitled *State and Local Roles in the Federal System* continues to be in demand. It is now nearly out of print. Rather than reprint the old volume, an updated volume will be prepared. Much of the information needed for this update is being supplied by other projects in the current and recently completed work program.

Current Status: The volume is being planned. A contractor will be identified in FY 1993.

Expected Completion: Publication in expected in December 1993, pending form and timing of Commission action.

D. Projects Planned for Initiation In FY 1994

Project Name: Siting Locally Unwanted Land Uses

Initiation: Approved by the Commission, September 1989

Assigned Staff: Bruce D. McDowell

Description: Many essential facilities needed for the pursuit of regional, state, and national—not to mention local—objectives must be sited in local jurisdictions despite the perception, possibility, or actuality they may harm the area. The basic authority for deciding land use is held by local governments, where it is often most difficult to deal with the pressures of neighborhood and the community-wide opposition. Several approaches will be explored for resolving such siting issues. This project will produce a Commission policy report recommending the most feasible and effective means of dealing with the siting of locally unwanted land uses on an intergovernmental basis.

Current Status: Awaiting initiation.

Expected Completion: Within one year of initiation.

Project Name: Local Fiscal Capacity and Fiscal Equalization

Initiation: Approved by the Commission, September 1989

Assigned Staff: To be determined

Description: The fiscal capacity of general-purpose local governments is an important consideration in the intergovernmental system. States seek this information in order to better understand the relative fiscal well being of their local governments and to determine whether and how to provide equalizing aid to their localities. Twice before, in a 1971 report and in a 1983 unpublished paper, ACIR has studied this topic. A number of states have also done work in this field, often building on ACIR's Representative Tax System. This project will develop improved methods for measuring local fiscal capacity that could be used by state and local fiscal analysts. Draft studies have already been completed for Hawaii, Maryland, and the Chicago Metropolitan Area.

Current Status: Pending Commission approval of research plan.

Expected Completion: Within two years of initiation.

III. Possible Future Research Projects

The Commission is now preparing a new four-year work program. It is likely that the continuing projects will remain in place, but the topical research projects will reflect new directions in both our public finance studies and our more general government policy research. Projects that might be included in the Commission's four-year work program for initiation after FY 1993 include the following:

Government Finance Research

- Analyze the Impact of International Competitiveness on Banking and Telecommunications
- Benefit Financing of Governmental Services
- Benefit Capture and Financing of Local Governments
- Examine Fiscal Disparities and the Crises of American Cities
- Impact of Legalized Gaming on State and Local Finances and Economic Development
- Interjurisdictional Tax and Policy Competition: Metropolitan Case Studies

- Interlocal Competition for Economic Development in Metropolitan Areas
- Update Representative Expenditures System Analysis

Government Policy Research

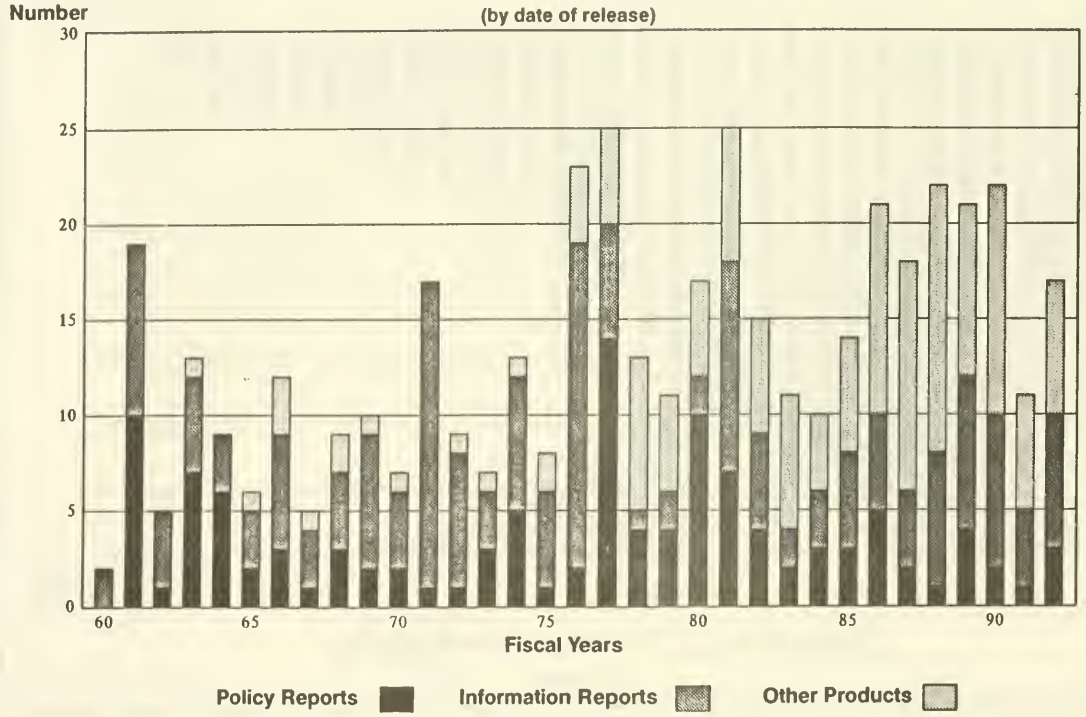
- Interstate Compacts and Agreements
- Geographic Information Systems and Data Networks in the American Federal System
- Enterprise Zones in the American Federal System
- Home Rule: A Survey of Local Usage
- Housing Assistance in the American Federal System
- Antitrust Policy in the Federal System
- Intergovernmental Personnel Policy: Portable Public Service Careers and Pensions
- Presidential Management of Intergovernmental Relations
- State Assumption of Local Functions
- Tribal Governments in the American Federal System

Conferences

- Federal Grant Formulas: Matching Variables and Structures to Objectives
- Intergovernmental Approaches to Work Force Preparation
- Intergovernmental Issues in the U.S. Health Care System
- International Competitiveness of U.S. Banking and Telecommunications (series)
- Solid and Hazardous Waste Management
- State-Local Relations: A Reconnaissance of Salient Issues

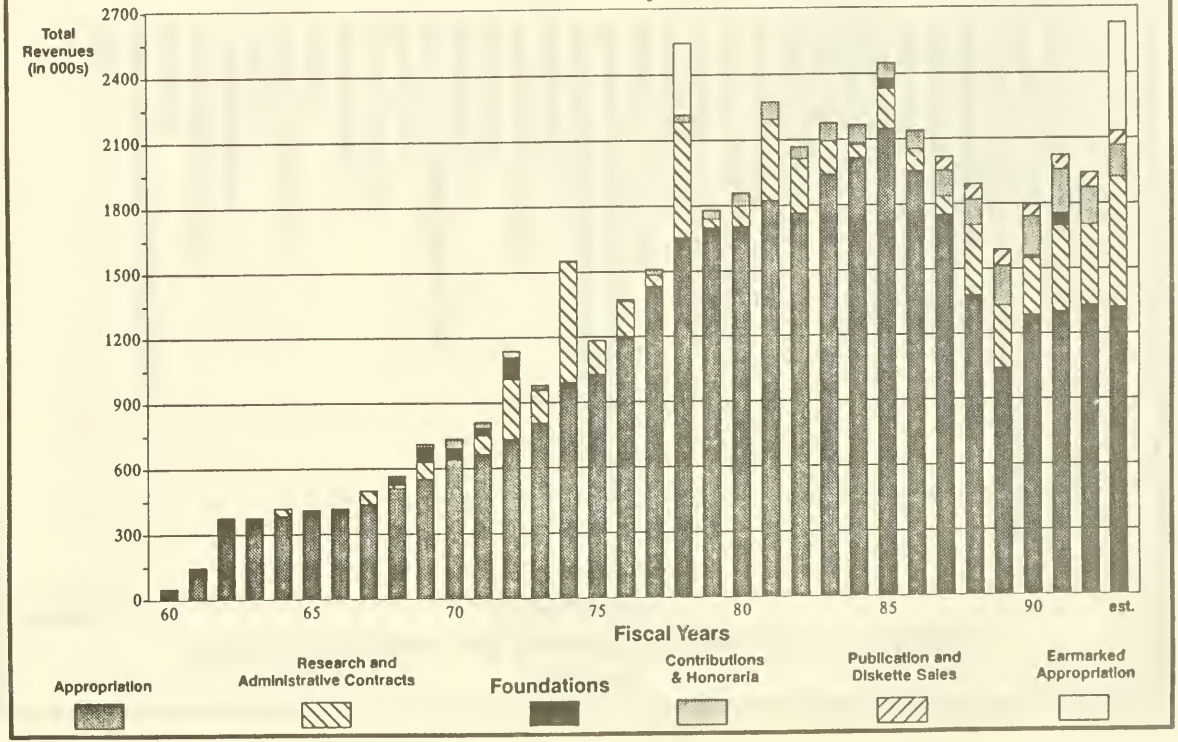
Appendix B

ACIR Publication and Product Production, FY 1960-92



Appendix C1

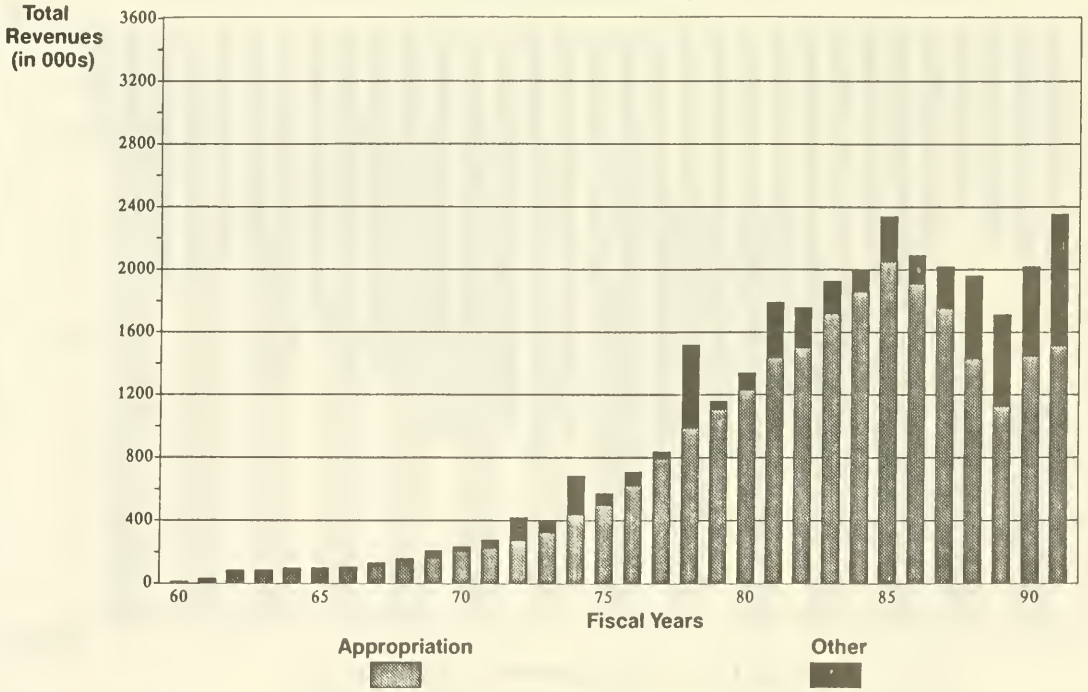
ACIR Revenue History, FY 1960-93



Appendix C2

ACIR Revenue History, FY 1960-92*

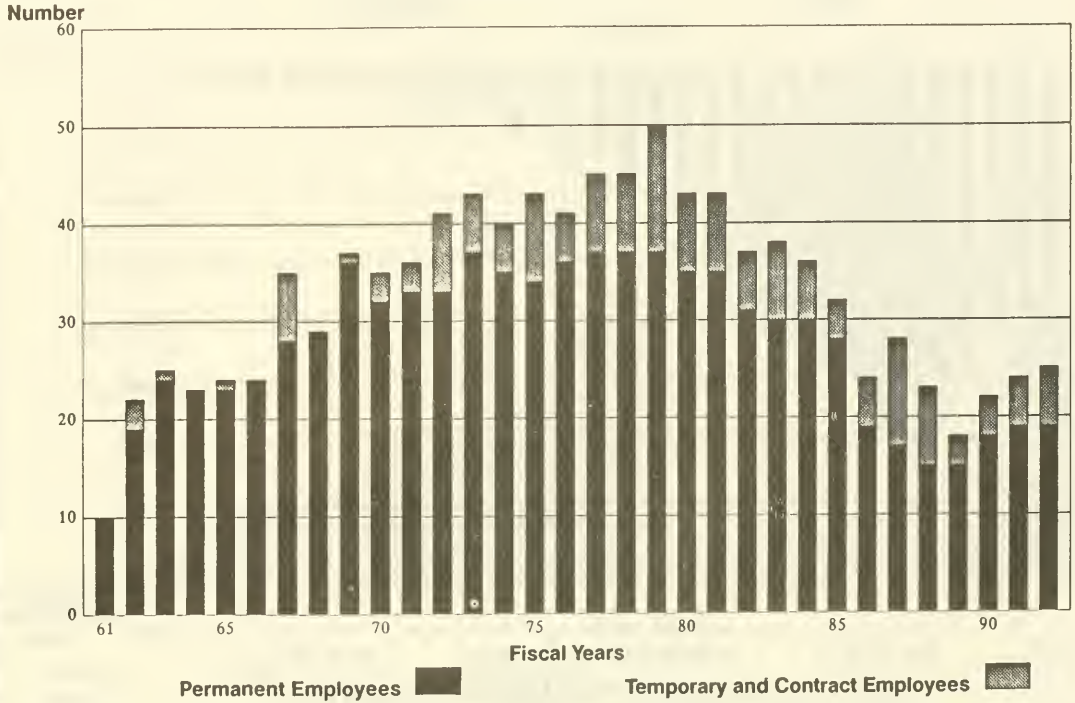
(in constant 1987 dollars)



*Total government purchases deflator used

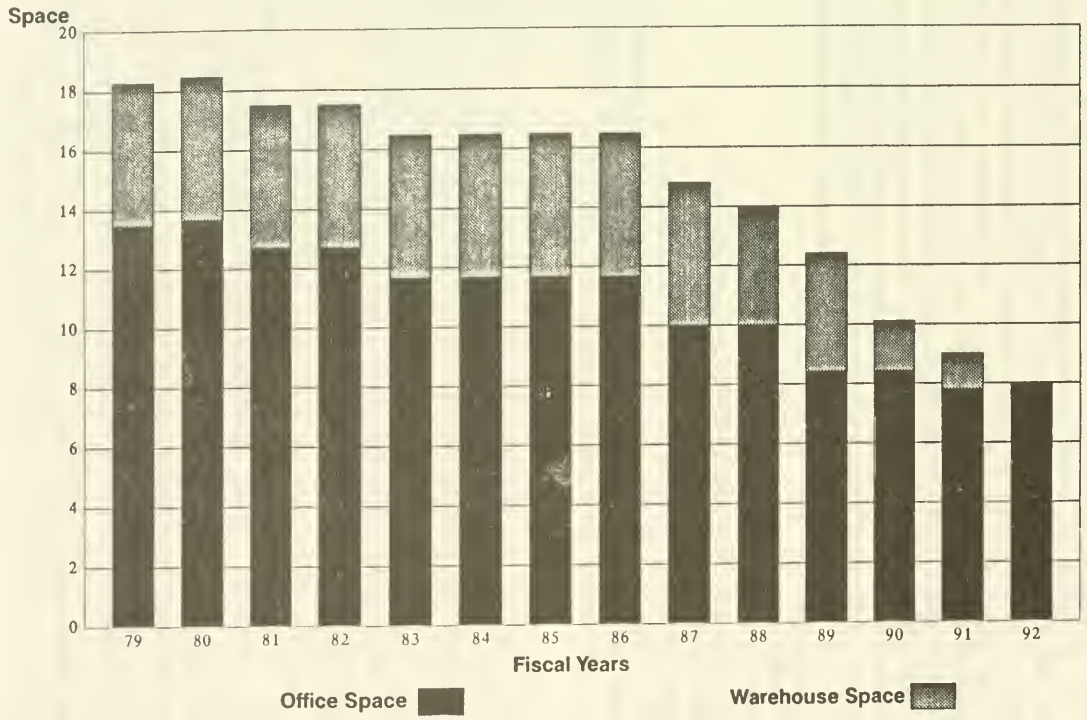
Appendix D

ACIR Personnel History, FY 1961-92



Appendix E

ACIR Office and Warehouse Space History, FY 1979-92



PRODUCTIVITY

Mr. HOYER. Thank you, Mr. Kincaid, I appreciate your statement very much. You obviously have sustained quite a reduction in your budget allocation over the last six years, and when you said productivity has increased, would it be fair to say that you are doing about the same level of work that you were doing in 1985?

Mr. KINCAID. At least and probably more in many respects. We are much more actively involved, for example, in helping agencies work with State and local governments. We are performing a facilitating kind of function, such as the projects we have with the Corps of Engineers and the U.S. Geological Survey. They are just two examples, and we see that as a rather important role for the Commission, especially since many of these agencies, surprisingly, do have difficulties talking with State and local officials. We can serve as a kind of a neutral forum to bring all the parties together, and so I think that is a growing and somewhat new role for the Commission.

Mr. HOYER. How many FTEs do you have?

Mr. KINCAID. We have 19.

Mr. HOYER. How many did you have in 1985?

Mr. STEINKO. Thirty-six.

Mr. HOYER. So you have half the personnel?

Mr. STEINKO. At the same time, we were authorized for 11 temporaries under the old personnel ceiling, so the total employment at that time could have been up to 47.

NONAPPROPRIATED FUNDS

Mr. HOYER. Approximately 40 percent of your 1993 operating budget is generated by charging customers for various ACIR products. You also mentioned the Freedom Support Act and the possibility of receiving funds through the Freedom Support Act or the advice that you might give to emerging democracies. What is your 1993 projection of income from purchasing sources? In other words, people who are purchasing your products?

Mr. STEINKO. Are we looking at the contract research that we do for others as well as the sale of products.

Mr. HOYER. All income attributable to nonappropriated funds.

Mr. STEINKO. About $600,000, out of which $440,000 would be dedicated to doing the actual research under contract. The rest would be for ACIR use.

Mr. HOYER. In other words, of the $600,000 half is, in effect, overhead costs for producing the product?

Mr. STEINKO. Or open-ended grants with no stipulation of conducting a certain number of meetings or paying for travel. The other $440,000 would be line items that are dedicated. We would have to expend them on behalf of the contracting agency.

WORK WITH EMERGING DEMOCRACIES

Mr. HOYER. Now, assuming you were successful in the Freedom Support Act, what kind of dollars are available under that act?

Mr. KINCAID. We are not sure yet of receiving any money from AID, but it could be in the range of $5 million. The Commission's position is that we would run the operation on a separate track so

it doesn't overwhelm the Commission. We would be the forum for marshaling State and local resources in the United States to put in place in Russia and the other republics. Relatively little of that money would be of direct benefit to the Commission in terms of its central mission. But we are trying to play a facilitating role and particularly to meet that need in the former Soviet Union.

Mr. HOYER. Now, how does that manifest itself? What have you been doing in playing a facilitating role?

Mr. KINCAID. Most recently we hosted the Chairman of the Russian Constitutional Commission and other leading members of the Commission for a workshop late last month at ACIR on Federalism and intergovernmental relations. Those are the top issues for them. The Constitution is full of Federal issues. As the Chairman said, that is our number one issue. How do we get a constitution approved across this diverse country? So we spent several days with them, and we made two visits to Moscow, working with them on intergovernmental relations.

The same way with the other republics. They are all trying to decentralize, much like our work with the Federal agencies here. The central government wants to know how to talk to local governments, and they want advice on whether they let local governments borrow money, what is the local role in economic development, and things like that. We have tried as best we can because they see us as a resource in that regard to meet those needs.

Mr. HOYER. Who pays the travel expenses in those instances? The Foundation or the country itself.

Mr. KINCAID. Or AID.

Mr. HOYER. In the specific instances you made, you say either a Foundation or the host country pain for travel?

Mr. KINCAID. Rockefeller Foundation paid in the case of travel to Moscow. AID or USIA covered the Russian Constitutional Commission coming here. We simply hosted them at ACIR. When we worked in Nigeria—we established an ACIR in Nigeria as they are shifting to civilian government—that was funded by the Ford Foundation. And we did some work in Spain—because they are federalizing—and that was paid for by the Government of Catalonia.

Mr. HOYER. Now, would that be in addition to the $600,000?

Mr. STEINKO. No.

Mr. HOYER. That is included in that?

Mr. STEINKO. Those are reimbursements and are a net offset against the obligations. They don't show up as an income line item. A lot of them, certain ones are billed to the funding agency or foundation.

Mr. HOYER. What would they total? Do you do that by calendar year or fiscal year?

Mr. STEINKO. It is done on a fiscal year. We just submitted the report to the Office of Government Ethics. It was about—it was under $5,000 on the reimbursed part that came through ACIR by the other agencies or the foundations.

Mr. HOYER. What I am trying to get at is how much would be available for the activities that you have just spoken of, such as travel to the Soviet Union? It would be substantially above $5,000? Or is $5,000 simply that which you accounted for?

Mr. STEINKO. Correct.

Mr. HOYER. If you total up what you are applied as expenses incurred by ACIR by foundations or AID or any other agencies of government or private sector entities, what kind of figure would that be?

Mr. STEINKO. You mean this year? $1.33 million.

Mr. HOYER. $1.33 million.

Mr. STEINKO. It was on a direct reimbursement basis with either the foundation or the agency, so those bills were not run through our books.

Mr. HOYER. I understand that.

Mr. KINCAID. Thinking back on what we have actually done, my guess would be less than $50,000.

Mr. HOYER. So relatively minimal income from foundations?

Mr. KINCAID. When the Constitutional Commission came, no money came to ACIR. USIA paid their travel. We simply hosted the seminar.

STATE CONTRIBUTIONS

Mr. HOYER. According to your statement, State contributions thus far in 1993 are down from 1992?

Mr. KINCAID. Right.

Mr. HOYER. To what do you attribute that?

Mr. KINCAID. The response we have gotten from the States is the fiscal problems they are facing. When you are looking at line items, ACIR is an easy one to cut. The State and local associations that rely on State support have also experienced drops since the fiscal crisis. We had gone up steadily to a little over $200,000 in 1991, then the fiscal front shifted, and we dropped off in 1992. We are expecting a slight drop off in 1993.

Mr. STEINKO. Give you two examples. Maryland, for example, though it did contribute, cut the amount of their contribution by about 20 percent. We also had the change in administrations in quite a few of the States where we are just getting into the budget process. Therefore, we hope for a late rush of contributions, but currently we are on schedule.

Mr. HOYER. Your contributions in 1992 were more than you projected in 1992.

Mr. STEINKO. Correct.

Mr. HOYER. But you don't expect that situation to recur in 1993?

Mr. STEINKO. No, $9,000 of that overage was a double payment by a State, part of which should have come in in the prior fiscal year, in 1991. It just happened that they fell within a single fiscal year of the Federal Government—both payments.

Mr. KINCAID. It is difficult to predict accurately because most State fiscal years start in July, and that is when they make their contributions. The end of our fiscal year is when most of the contributions come in from the States, in the summer near the end of the fiscal year.

Mr. HOYER. Last year you provided us with a list of States and their contributions. You will provide that for this year?

Mr. STEINKO. Yes.

[The information follows:]

Advisory Commission on Intergovernmental Relations—Fiscal year 1992, trust fund (contributions)

State contributions received:	*Amount*
Alaska	$ 5,000
Arkansas	6,000
California	13,000
Colorado	6,000
Connecticut	5,000
Delaware	5,000
Florida	3,000
Hawaii	5,000
Illinois	4,500
Indiana	7,000
Kansas	6,000
Kentucky	6,000
Louisiana	6,000
Maryland	4,500
Minnesota	3,000
Missouri	7,000
New Hampshire	5,000
New Mexico	4,959
New York	11,000
North Dakota	5,000
Ohio	7,960
Oklahoma	6,000
Rhode Island	5,000
South Carolina	6,000
Tennessee	6,000
Virginia	7,000
Wisconsin	7,000
27 States	162,919

Mr. HOYER. Thank you very much.

Mr. STEINKO. One clarification. Maybe I can give you an example. This year we are charged with doing a local government study by the committee. To show you how the grant works, and our contracts with other Federal agencies operate the same way, the amount to go into that project is $500,000. ACIR has no control over $397,000 of that, but it shows up as a revenue item for us, as part of our appropriation.

When we receive $500,000 from the Corps of Engineers, the same thing in effect would take place; $397,000 is dedicated to the project, and we are going to spend it on the project, and 26 percent or $103,000 is ACIR's overhead item and can be used for our own expenses. Basically when you see that contract total, you might just take 26 percent as normally usable by ACIR. The rest is dedicated to the research project contract.

SUPPORT FOR ACIR

Mr. HOYER. I am trying to remember in the statement, could you submit to us perhaps references of user groups that felt the work you have provided was particularly important so we will have some supportive data in the record?

Mr. KINCAID. Yes.

Mr. HOYER. On behalf of the Commission's work. I think that would be helpful if you could do that. We want to put something together and amplify that. I don't think I read that in the statement.

[The information follows:]

Letters of Support for ACIR

Key National Associations

Council of State Governments, Benjamin J. Jones, Washington Office Director
National Academy of Public Administration R. Scott Fosler, President
National Association of Counties, Larry E. Naake, Executive Director
National Association of Insurance Commissioners, Steven T. Poster, President
and Commissioner of Insurance, State of Virginia
National Conference of State Legislatures, William T. Pound, Executive Director
National Governors' Association, Raymond C. Scheppach, Executive Director
National League of Cities, Donald J. Borut, Executive Director
United States Conference of Mayors, J. Thomas Cochran, Executive Director

Selected State and Local Organizations

Alabama League of Municipalities, Perry C. Roquemore, Jr., Executive Director
Colorado Municipal League, Kenneth G. Bueche, Executive Director
Connecticut Conference of Municipalities, Kathryn Feidelson, Associate Director
Florida Advisory Council on Intergovernmental Relations, The Honorable Tracy Stafford, Chairman
Florida Advisory Council on Intergovernmental Relations, The Honorable Fred R. Dudley, Vice-Chairman
Florida Association of Counties, James C. Shipman, Executive Director
Florida League of Cities, Raymond C. Sittig, Executive Director
Dougherty County Commission, Georgia, Gil Barrett, Chairman
Georgia Municipal Association, James V. Burgess, Jr., Executive Director
Indiana Association of Cities and Towns, Michael J. Quinn, Executive Director
League of Iowa Municipalities, Thomas G. Bredeweg, Executive Director
League of Kansas Municipalities, Christopher McKenzie, Executive Director
Kentucky League of Cities, Sylvia L. Lovely, Executive Director
Louisiana Advisory Commission on Intergovernmental Relations, The Honorable Willie E. Crain, Chairman
Louisiana Municipal Association, Charles J. Pasqua, Executive Director
Maine Municipal Advisory Council, Dana F. Connors, Governor's Representative
Michigan Municipal League, George D. Goodman, Executive Director
League of Minnesota Cities, James F. Miller, Executive Director
Montana League of Cities and Towns, Alec Hansen, Executive Director
Missouri Commission on Intergovernmental Cooperation, Paul Ground, Chairman
Missouri Municipal League, Gary S. Markenson, Executive Director
Nevada League of Cities, Thomas J. Grady, Executive Director
New Hampshire Municipal Association, John B. Andrews, Executive Director
North Carolina League of Municipalities, David E. Reynolds, Executive Director
North Carolina Local Government Advocacy Council, Sara Y. Stuckey, Executive Director
North Dakota Advisory Commission on Intergovernmental Relations, The Honorable Jim Dotzenrod, Chairman
Ohio Municipal League, John P. Coleman, Executive Director
Ohio State and Local Government Commission, Richard J. Platt, Executive Director
Oklahoma Advisory Committee on Intergovernmental Relations, The Honorable Trish Weedn, Chairperson
Oklahoma Municipal League, William A. Moyer, Executive Director
South Carolina Advisory Commission on Intergovernmental Relations, Dan B. Mackey, II, Executive Director
Tennessee Advisory Commission on Intergovernmental Relations, The Honorable John T. Bragg, Chairman
Tennessee Advisory Commission on Intergovernmental Relations, Harry A. Green, Executive Director
State of Utah, Department of Human Services, D. Michael Stewart, Executive Director
Virginia Advisory Commission on Intergovernmental Relations, The Honorable Vincent F. Callahan, Jr., Chairman
Virginia Municipal League, R. Michael Amyx, Executive Director
Washington Department of Community Development, Barbara B. Gooding, Director
Wyoming Association of Municipalities, Carl Classen, Executive Director

Selected Individuals

Wayne F. Anderson, Alexandria, Virginia, Former Executive ACIR Director
The Honorable Reubin O'D. Askew, Orlando, Florida
The Honorable Dorothy Toth Beasley, Georgia Court of Appeals
The Honorable Michael E. Box, Alabama House of Representatives
William N. Cassella, Jr., Senior Associate, Institute of Public Administration, New York, New York
Richard L. Cole, Dean, School of Urban and Public Affairs, Univeristy of Texas, Arlington, Texas
William G. Colman, Potomac, Maryland, Former ACIR Executive Director
John M. DeGrove, Director, Joint Center for Environmental and Urban Problems, Florida Atlantic University
Tom Fink, Mayor, Anchorage, Alaska
The Honorable L. H. Fountain, Former ACIR Commission Member, Tarboro, North Carolina
Randy H. Hamilton, Institute of Governmental Studies, University of California, Berkeley, California
Melvin B. Hill, Jr., Director, Carl Vinson Institute of Government, University of Georgia, Athens, Georgia
A. E. Dick Howard, White Burkett Miller Professor of Law and Public Affairs, University of Virginia School of Law, Charlottesville, Virginia
Johnathan B. Howes, North Carolina Department of Environment, Health, and Natural Resources, Secretary
The Honorable Leonard Lance, New Jersey General Assemby
William Roderic MacDougall. Sacramento, California, Former ACIR Executive Director
The Honorable John J. Marchi, New York State Senate
The Honorable Edmund S. Muskie, Former ACIR Commission Member, Washington, DC
Will S. Myers, Former ACIR Staff Member, Washington, DC
Dawn Clark Netsch, State of Illinois, Comptroller
John Shannon, Arlington, Virginia, Former ACIR Executive Director
Dr. Carl W. Stenberg, Former ACIR Staff Member, Charlottesville, Virginia
The Honorable Richard Thornburgh, Former ACIR Commission Member, Washington, DC
The Honorable Robert F. Utter, Washington Supreme Court

Recent Work-Related Letters

American Bar Association, Central and East European Law Initiative, NIS Program, Malcolm Russell-Einhorn, Director
Australia, New South Wales, Business Development, Claire Kelley, Director
Consortium:
- National Governors' Association, Raymond C. Scheppach, Executive Director
- National Association of State Budget Officers, Brian Roherty, Executive Director
- Multistate Tax Commission, Dan Bucks,
- National Conference of State Legislatures, William T. Pound, Executive Director
- Federation of Tax Administrators, Harley Duncan, Executive Director

Delphi International Group, Marta Etienne, Voluntary Visitor Coordinator
Johns Hopkins University, Institute for Policy Studies, Lester M. Salamon, Director
National Conference of State Legislatures, Law and Justice Committee, Jon Felde, Director
Tennessee Advisory Commission on Intergovernmental Relations, Harry A. Green, Executive Director
U.S. Department of the Army, Corps of Engineers, Institute for Water Resources, Kyle E. Schilling, Director
U.S. Department of State, Jakarta, Melling Simanjuntak, Library Director
U.S. Department of State, Kaduna, Helen Weinland, Consul General
U.S. Information Agency, WORLDNET, William A. Eames, Acting Director
U.S. Senate, Honorable Bob Graham, Senator, Florida
Utah Insurance Department, Harold C. Yancey, Insurance Commissioner
Wyoming, Town of Jackson, Bill Westbrook, Mayor

MANDATES

Mr. HOYER. I was interested in your observation in reference to mandates. Have you done some work on that?

Mr. KINCAID. Yes, we have.

Mr. HOYER. Do you have a compilation of the mandates? I was interested in your statement that in the last 24 years 50 percent of the total mandates have been imposed, as opposed to the previous 204 years.

Mr. KINCAID. Those are preemption statutes, and we do have an inventory. It was 493 statutes in since 1789, and we have a complete inventory of those statutes. Not all preemptions are mandates, but some of them are. Mandates show up in other ways, and that is a more difficult concept to get a handle on in the catalog, but the Commission pioneered the investigation of mandates back in the early 1970s. We are getting a lot of requests now for estimating the costs of mandates because of all of the numbers that are being generated by various groups. Consequently, we are attempting to work on a methodology that might be able to produce credible estimates of the costs of mandates.

COMMISSION MEMBERSHIP

Mr. HOYER. How many members are there on your board?

Mr. KINCAID. Twenty-six.

Mr. HOYER. They are appointed by the President?

Mr. KINCAID. All but the Members of the Congress. There are three Members of the House and three Members of the Senate. Three private citizens are appointed directly by the President. The four Governors, four mayors, three State legislators and three county officials are appointed by the President through nominations from their national associations. It is also by law bipartisan. Both parties are represented in the categories.

Mr. HOYER. If you have not already submitted an updated list of the membership, I would appreciate it if you could do it. Is it on this book?

Mr. KINCAID. There is a reasonably updated list there. As you can see, we are waiting for appointments from President Clinton. The members of the Commission serve two-year terms. They also leave the Commission if they go out of elected office. A number of the Governors who were on the Commission, for example, left their Governorships at the end of last year, so they are no longer on the Commission.

Mr. HOYER. Am I correct in looking at this list there are no Governors currently serving on ACIR?

Mr. KINCAID. Not at the present time, because of expiring terms on the Commission and Governors leaving office.

[The following additional information was provided for the record:]

Advisory Commission on Intergovernmental Relations

SALARIES AND EXPENSES

Members of the Commission
3/7/93

Private Citizens

Daniel J. Elazar, Philadelphia, Pennsylvania
Robert B. Hawkins, Jr., *Chairman*, San Francisco, California
Mary Ellen Joyce, Arlington, Virginia

Members of the U.S. Senate

Daniel K. Akaka, Hawaii
Dave Durenberger, Minnesota
Vacancy

Members of the U.S. House of Representatives

Donald M. Payne, New Jersey
Craig Thomas, Wyoming
Vacancy

Officers of the Executive Branch, U.S. Government

Vacancy
Vacancy
Vacancy

Governors

Vacancy
Vacancy
Vacancy
Vacancy

Mayors

Victor H. Ashe, Knoxville, Tennessee
Robert M. Isaac, Colorado Springs, Colorado
Edward G. Rendell, Philadelphia, Pennsylvania
Bruce M. Todd, Austin, Texas

Members of State Legislatures

Paul Bud Burke, President, Kansas State Senate
Samuel B. Nunez, Jr., President, Louisiana Senate
Vacancy

Elected County Officials

Ann Klinger, Merced County, California, Board of Supervisors
Barbara Sheen Todd, Commissioner, Pinellas County Board of Commissioners, Florida
Vacancy

Mr. HOYER. Mr. Istook.

DOES ACIR COMPETE WITH PRIVATE SECTOR?

Mr. ISTOOK. Thank you, Mr. Chairman. Mr. Kincaid, in reviewing your testimony, I notice that you indicate a significant portion of the ACIR budget comes from revenue from State and local contributions and sale of various studies and documents. Are these, the ability to provide this information and these documents, is that ability also shared by the private sector and by other government agencies where they have the capability of providing that same information?

Mr. KINCAID. That is unlikely because the Commission, given its intergovernmental composition, addresses issues that are specifically intergovernmental in nature. We have less of a direct relationship with the private sector, per se, for that reason. Secondly, we try not to duplicate as much as possible either what other government agencies are doing or what the private sector may be doing, so that the fiscal data that we generate, for example, in our annual "Significant Features of Fiscal Federalism" is difficult to come by elsewhere. The public-private sector tends to pick that up, and so they use our material. We also try to coordinate with GAO, for example, because they do intergovernmental investigations, and we coordinate with the State and local government associations so as not to duplicate what they are doing.

Mr. ISTOOK. Having just come out of State government and local government before that, I am certainly aware that there is a multitude of information available through a multitude of government agencies and a multitude of private groups that do provide this very type of information. But you think all those other people are dropping the ball, they are missing something that you are picking up on?

Mr. KINCAID. Yes, a good example would be our report on Federal preemption, which no one else had been being attentive to. The work that we have done recently on intergovernmental decisionmaking and environmental protection has been of use to EPA in helping to facilitate their relationships with local governments and to raise the question of the costs that local governments have to face in the area of environmental protection. Given that the State and local officials who are appointed to the Commission by the President are ordinarily the leaders of the national associations of those officials, the commissioners, per se, are in a good position to focus attention on issues in the intergovernmental system that are of broad concern to State and local officials.

REQUIREMENT FOR A SEPARATE AGENCY

Mr. ISTOOK. You mentioned, for example, in EPA, do you believe that different Federal agencies are inherently incapable of themselves making coordination with other governmental entities at the State and local level? Is there any reason why these other Federal agencies should not have the ability and the foresight to do coordination with other governmental units in-house rather than establishing a separate Federal agency to tell them how to do it?

Mr. KINCAID. Well, as a matter of fact, we have found that to be the case. They do have difficulty doing that, and that is one of the reasons some of the agencies come to ACIR, to help them facilitate that coordination and to create a climate where conversation can take place.

Mr. ISTOOK. If we have people all through the Federal Government that are so incapable of doing these things, should we dismiss them and hire some people that have some common sense about coordinating with other governmental units then?

Mr. KINCAID. That is not really the issue. It is that agencies have their agendas; State and local governments have their agendas, and we try to get those to mesh. For example, in the Geographic Information Project that we are working on at the present time, it is simply somewhat difficult for Federal, State and local officials who have full agendas attending to their own agency needs to be able to see the larger picture and to realize the savings that could be obtained, for example, from much easier exchanges of data. Federal agencies, for example, have an interest in satellite data which is on a larger scale than what a property tax assessor in a local community needs, but the satellite data collected by the Federal Government can be resolved down to the lot size that a property tax assessor needs. It is just a matter of getting people together to talk about that and figure out how you do that. It is not necessarily an issue that people are incompetent or they are unable to do that.

Now, in some areas they are unable to do that because the Federal Advisory Committee Act imposes a number of requirements on Federal agencies that make it cumbersome and difficult to set up this kind of dialogue. ACIR is specifically exempted from that act, so we can facilitate bringing people together for agencies in a way which they cannot do because of the requirements of FACA, and we were exempted from FACA so we could perform that function.

Mr. ISTOOK. Of course, you are talking about advisory committees, and certainly you are aware that not every time that a Federal servant meets with a local government official does that require going to the notice and public meeting standards. So they could still accomplish those things in private discussions if need be, even without your agency.

Mr. KINCAID. And they do so, of course, yes.

Mr. ISTOOK. Well, is it—as I understand it, your testimony is that your agency is absolutely essential. Without it the other levels of government either cannot or will not consult with one another?

Mr. KINCAID. No, ACIR was established to perform a function of helping to improve intergovernmental cooperation and relationships between the Federal, State and local governments by specifically bringing together Governors and State legislators and so on to address those issues. That is a function which is very important in the system. As we have shown and noted in the testimony, the constraints that State and local governments are experiencing with respect to Federal preemption and mandates and rules and regulations have created some serious problems. When upwards of 25 percent of a State's budget is driven by Federal decision making, then there is a need—the Commission feels—to address those issues. In working with agencies, and with State and local governments, it depends on what issues you are being attentive to. This Commis-

sion was established specifically to be attentive to intergovernmental issues, and so we surface those issues in a way that often gets overlooked by other people. It is an important function for an agency which is rather small in size.

Mr. ISTOOK. If, as you seem to say, your agency has adopted the mission of protecting local and State governments from the onslaught of Federal mandates, would you agree that that defense has been rather unsuccessful?

Mr. KINCAID. Well, it has certainly been difficult. ACIR is the body that recommended the State and Local Cost Estimate Act, for example, which is responsible for the cost estimates that CBO produces on proposed legislation having financial effects on State and local governments. That recommendation was adopted by the Congress, and we have looked at that process, and it has not turned out to be particularly satisfactory.

Mr. ISTOOK. What year was that adopted?

Mr. KINCAID. That was 1981. That process might not even exist, I assume, if the Commission had not brought the idea forward. Senator Durenberger and Senator Carl Levin introduced a bill in the Senate last year, the Preemption Clarification and Information Act, which was a response to our report on preemption that the Chairman was just asking about. Again, as Senator Levin said, you know, I never thought about this issue until you brought it to our attention, and it is important. I would not expect Congress to act on this legislation within the near future because of the nature of the issue, but the Commission is the entity that tries to identify those issues and bring them to the attention of the decision-makers themselves.

Mr. ISTOOK. Well, I certainly would not agree that the facilitation process is necessarily so specialized as to require a separate agency for doing so, but I appreciate your comments.

Mr. HOYER. Mr. Visclosky.

VACANCIES

Mr. VISCLOSKY. Thank you, Mr. Chairman. On your winter 1993 publication, I would note that as of last month no Governors positions were filled on the Commission, all were vacant. What is that supposed to tell me in terms of the commitment of the Governors of this country?

Mr. KINCAID. It has no relationship. One Governor's term had expired on the Commission. Three of the Governors went out of office as Governors, and so that left us with four vacancies. The National Governors Association has submitted nominations to the President, and President Clinton needs to make the appointments of those Governors.

Historically, President Reagan and President Carter did not make their appointments to ACIR until early April. The Clinton administration is not running behind in terms of historical experience, so it doesn't reflect the Governors' commitment. It is only that they go off the Commission if they leave their office.

Mr. VISCLOSKY. And the three left in December?

Mr. KINCAID. Right.

Mr. VISCLOSKY. Is the Commission on a list that the President has prepared of those commissions he feels should be eliminated?

Mr. KINCAID. No, it is not. The President has indicated, as former Governor of Arkansas, that he is aware of ACIR, and we know for a fact that he appreciates the work the Commission does.

Mr. STEINKO. I think you see in our the budget justification from OMB that there is strong support within the administration.

PRODUCTIVITY INCREASES

Mr. VISCLOSKY [presiding]. Thank you very much. I am very interested in perusing productivity savings in the Federal Government, so I am intrigued by your ability to achieve productivity savings to offset a portion of your reductions in appropriated dollars. Specifically, what actions have you taken to increase productivity?

Mr. KINCAID. One is that we have worked more closely with people in the private sector and the academic sector to carry out research functions for the Commission. That is fairly easy for us to manage because we are a small agency and we work very closely with people with whom we contract to produce products. That is also a necessity, given that so many public policy areas are intergovernmental.

It is impossible to have a full-time staff that covers everything that will come to the attention of the Commission, so this helps us to extend the resources of the Commission. We have also tried to define what it is that we want to achieve and the audiences that we need to reach and to gear our work in those directions so that we are producing materials that are responsive to our audiences. One indication, for example, is that we get approximately 1,800 calls a month that are substantive calls for information.

Mr. HOYER. How many was that?

Mr. KINCAID. About 1,800 a month. People are constantly calling for the data we have, such as "Significant Features," for example, and other things, so we try to service those needs. Of course, for a staff of 19 people, of whom only half are professional research people, that is a pretty heavy load, and some of those questions take quite some time to respond to. A lot of public presentations, and much of our work is sort of invisible in the sense that it can be requests from the Governors Association or the National League of Cities or particular States or particular communities, for a staff member to come out and talk about this, that, or the other thing or provide tax information. We do a lot of that. Our professional staff made about 75 such presentations last year. We do those kinds of things while keeping the number of staff people within line.

Mr. HOYER [presiding]. Would you say you have maxed out your productivity savings that you can effect?

Mr. KINCAID. I think so with the resources. One indication of that is that we closed down all our warehouse space. The agency also had a vehicle for a number of years, and we have gotten rid of that. The staff is really down too. We can't cut staff anymore without cutting productivity.

Mr. STEINKO. Computerization differentials will be the route to create productivity increases. To give you an example—the first one, this got into how we handled the 52 percent cut—was GPO

was doing our typesetting and that was costing from $100- to $180,000 a year. We do it internally now on desk top publishing equipment where the initial outlay was $40,000 for a one-time charge, and the savings, annual savings has gone into budget reduction.

We reduced overall space down almost to—well, below the GSA standards now as a result of the last move, and as Mr. Kincaid said, we don't use the car to shuttle material from the warehouse. Everything went down to where we keep inventory at a very low in and out basis and we are relying on National Technical Information Service to provide the older publications which we used to keep in storage.

STATE AND LOCAL PRODUCTIVITY STUDIES

Mr. HOYER. Have you done any studies on productivity for the States or local government?

Mr. KINCAID. No. Most of the studies we have done for the States have been in the tax area and trying to reform and restructure State tax systems. That is the biggest request we get.

CONTRIBUTIONS FROM NATIONAL ASSOCATIONS

Mr. HOYER. Okay. There is not a contribution, am I correct, from the National Governors Association, NCSL or the mayors?

Mr. KINCAID. Financial?

Mr. HOYER. Financial.

Mr. KINCAID. No.

Mr. HOYER. Have there been any discussions about that? What I am thinking of, obviously, is that the work which is performed by ACIR is useful to the Federal Government, but equally in some respects more useful to the State and local governments. The mandate issue, for instance, which all the States are very concerned about, is of critical importance to them. I don't know whether Governors and NCSL are doing analogous parallel studies, but if they are not it seems to me that a joint, sort of Federal, State, and local government funding of ACIR may be a useful objective to pursue. Has there been any discussion about that?

Mr. KINCAID. We do have that in effect. The national associations and officials themselves rely on their own State support, so in effect that is what we have moved to in the State Contribution Program. There are two responses to that. One are the fiscal problems that State and local governments themselves have; and, secondly, particularly when we increased the program in 1986 in response to the congressional mandate—and I had just come on board the Commission at that time—the response I was getting from State officials was, gee, here is another cost being shifted to State governments. You have cut aid tremendously during the 1980s, and now Congress is coming along and saying that we now have to chip in to support ACIR, too. They have done that to some degree, but I am just communicating to you the reaction we got.

Mr. HOYER. Is it less than $50,000?

Mr. KINCAID. $160,000.

Mr. STEINKO. There was an attempt made prior to Mr. Kincaid's coming to ACIR to fund ACIR, rather than by State contributions,

through the seven public interest groups, and it was a Catch 22 situation among the groups. If one would do it, the other would do it. We ended up being blocked by one of the local government groups which made the whole house of cards fall, and the one time it was brought up after that, two years later when we reinitiated the contributions campaign, they killed it again, the same group.

Mr. HOYER. On what basis did they kill it?

Mr. STEINKO. That their people were contributing to them and the national group's resources should not be contributed to ACIR. If ACIR wanted to make a direct campaign to their members, fine.

Mr. HOYER. Any other questions? Mr. Istook?

Mr. ISTOOK. No.

Mr. VISCLOSKY. Nothing further, Mr. Chairman.

Mr. HOYER. Mr. Kincaid, thank you very much.

Mr. KINCAID. Thank you.

Mr. STEINKO. You asked whether ACIR did a productivity study for State and local governments. We do go into studies of who should provide what services. This is not only at the State and local level, particularly the local level, but between the levels of government, should you contract out garbage collection or run it yourself, this type of thing is under constant review at ACIR. We get a lot of questions on that now.

Mr. HOYER. You say contracting out garbage collection services, that is not necessarily an intergovernmental problem. That is a productivity issue from the local government perspective. Their concern is what is most cost-effective in terms of division of service?

Mr. STEINKO. Right. It is part of Robert Duncan's group study in Prince George's County, of what is the most productive way of doing things.

Mr. KINCAID. We do address the intergovernmental issues that come up when State law prevents local governments from engaging in certain kinds of activities that will increase productivity, and when Federal rules—so we are looking at education, for example—and Federal grant programs and other rules often stand in the way of integrating social services in the schools for children. So we do attend to those kinds of things.

CONCLUSION

Mr. HOYER. Thank you very much.

[Additional questions submitted for the record by the Committee and the answers thereto follow:]

Question: How does the Commission determine which projects will be completed in any given year?

Answer: The Commission balances projects that require completion within a very specific time period with projects that do not require a tight, specified completion date. The Commission establishes parameters for all work in progress.

A significant aspect of ACIR's legislative mandate is to examine long-range issues likely to require intergovernmental cooperation. Completion dates fixed at the outset of such projects are usually not workable because of numerous factors, such as alteration of project designs after initiation; input from external experts calling for changes; reclassification of a projects priority due to events and other factors; Congressional and Administration project requests for short-term deadlines; Commissioner comments on preliminary drafts of reports; and the Commission's usual desire to discuss and develop policy recommendations at more than one meeting.

Question: Does ACIR have a planning process which helps plan projects for five years into the future? If so, how often do you update this plan?

Answer: The Commission establishes a four-year work agenda with project priorities. Establishment of the agenda begins with extensive consultation with federal, state, and local officials; relevant academics; and other knowledgeable private citizens. ACIR solicits such input from across the country. A committee of the Commission, working with the staff, develops these ideas into a coherent agenda. The Commission as a whole reviews and approves the proposed four-year agenda. At the same time, allowance is made for the emergence of important, though unanticipated issues, and for Congressional and presidential requests that may arise in the interim. The Commission continually monitors the work agenda and makes adjustments that may be necessitated by financial considerations, new events, and timeliness.

Question: In general, does the current long-range plan require appropriated funds at a level greater than the 1993 level?

Answer: The Commission's funding level of $1,820,000 would be adequate to fund the ongoing operations of the Commission. We have sought this level of funding for several years, and we are looking forward to Administration and Congressional consideration of an amount in the $1.8 million range.

TUESDAY, FEBRUARY 23, 1993.

UNITED STATES TAX COURT

WITNESSES

LAPSLEY W. HAMBLEN, JR., CHIEF JUDGE
CHARLES S. CASAZZA, CLERK OF THE COURT

INTRODUCTION

Mr. HOYER. We will now hear from the U.S. Tax Court.

Judge Hamblen, we are pleased to have you with us. We look forward to hearing your testimony. We will include your entire statement for the record, and you can proceed in such a manner as you deem most appropriate.

Judge HAMBLEN. Thank you, Mr. Chairman, and Members of the Committee. I appreciate the opportunity to appear before you today to present for your consideration the fiscal year 1994 appropriations request of the United States Tax Court. I have with me Mr. Charles S. Casazza, Clerk of the Court.

Mr. Chairman, I was elected Chief Judge of the court in June of last year. I succeeded Judge Nims who was before the Committee at the last appropriations hearing.

In the interest of conserving time I will just go on and allude to some highlights of my statement with your permission.

Mr. HOYER. Certainly. We will include your entire statement in the record.

FISCAL YEAR 1994 BUDGET REQUEST

Judge HAMBLEN. Thank you, sir. As you know, our fiscal 1994 budget request is for $35,350,000, which represents an increase of $2,915,000 from fiscal year 1993 appropriation of $32,435,000. Thirty-nine percent of the increase would be for the replacement of personal computers throughout the court, which is necessitated by the installation of a network system within the judges' chambers, as well as in some of the administrative areas of the court. Twenty-four percent of the increase would be to fund the fiscal year 1994 pay raise, which is effective January 1994, as well as additional costs associated with salaries, benefits, and entitlements. No request is being made at this time with respect to locality based pay increases which I understand are scheduled to begin in fiscal 1994.

The 1994 budget request doesn't incorporate any new programs. The Tax Court has only one program, and that is the judicial resolution of Federal tax cases. During fiscal year 1992, the number of cases filed with the court increased 2 percent from the previous year. In fiscal year 1991, 29,636 cases were filed, whereas in fiscal year 1992, 30,345 new cases were commenced. Our budget justification, beginning on page 6 of the report there is a report on the Tax

Court's inventory which this committee directed be submitted at this time in the conference report that accompanied H.R. 5488 to make appropriations for the agencies subject to the committee's jurisdiction.

I believe the report reflects the need for the court to maintain the full complement of authorized judges so that we can continue to provide taxpayers with prompt resolution of the cases that are brought before the court.

That report states that the total dollars in dispute as of December 1992 amounted to about $34.3 billion. By comparison, the dollars in dispute at the end of the 1986 fiscal year, shortly before the court's inventory, reached its all time high of over 84,000 cases, amounted to about $16.3 billion. This increase is attributable to a dramatic rise in the number of large deficiency cases which has resulted in the court's dollar inventory more than doubling in the six-year period before referred to. Presently there are 1,392 cases involving a million or more dollars of which some 300 cases involve $10 million in dispute. Within this number, there are 24 cases pending with deficiencies exceeding $100 million, 13 cases with deficiencies exceeding $250 million, four cases with deficiencies exceeding $500 million, and three cases with deficiencies each exceeding a billion dollars.

The very nature of these large cases makes them factually and legally complex and impels early assignment to a judge. A tremendous amount of this court's resources are consumed by these large cases which may take from four to, in one instance, 15 weeks to try and which produce a record usually consisting of thousands of pages of transcript and hundreds, if not thousands, of documentary exhibits, and this does not include a great amount of time managing pretrial proceedings.

We believe the amount of total deficiencies in dispute with the Tax Court will tend to remain at historically high levels for the foreseeable future, and that a large portion of the court's resources and energy will be directed into management and resolution of those large cases over the next several years.

Nonetheless, we are committed, as always, to the convenient and expeditious resolution and disposition of those cases that involve only a small amount of tax dollars, as the bulk of our case inventory consists of those cases and small case taxpayers remain as significant as any petitioner in the Tax Court.

In closing, I would like to emphasize respectfully that the court's only mission is the judicial resolution of Federal tax cases, and consequently the court performs an essential role in the Federal revenue and tax system.

Mr. Chairman, that concludes my statement. I appreciate the consideration of the committee, and I will be pleased to endeavor to answer any questions the committee may have.

[The information follows:]

UNITED STATES TAX COURT

BEFORE THE SUBCOMMITTEE ON TREASURY, POSTAL SERVICE
AND GENERAL GOVERNMENT
COMMITTEE ON APPROPRIATIONS
U.S. HOUSE OF REPRESENTATIVES

Statement by Chief Judge Lapsley W. Hamblen, Jr on the U.S. Tax Court's Appropriation Request and Program for Fiscal Year 1994

February 23, 1993

Mr. Chairman and members of the committee, I appreciate the opportunity to appear before you and present for your consideration the appropriation request of the United States Tax Court for fiscal year 1994.

FISCAL YEAR 1994 BUDGET REQUEST

The Tax Court's fiscal year 1994 budget request is for $35,350,000 and 350 permanent positions. This amount represents an increase of $2,915,000 from the fiscal year 1993 appropriation of $32,435,000.

These increases include the following items for fiscal year 1994: $262,000 is required to finance the salaries and benefits associated with the anticipated appointment of one new judge and the additional staff personnel which will be required; $182,000 will be required to finance promotions and $144,000 will be required for within-grade salary increases for employees who will be eligible for advancement to the next step in salary during the year; $187,000 is required to provide for increased personnel related benefits; the fiscal year 1994 pay raise effective in January, 1994 will require an increase of $704,000 for additional costs associated with salaries and benefits during fiscal year 1994; $1,139,000 for replacement of the present personal computers necessitated by the installation of a network system within the judges' chamber; $209,000 is required to finance the higher rent payment to GSA due to increased rates; and $88,000 is required for transportation and subsistence expenses associated with the appointment of a new judge and continued activities as budgeted for in prior years.

FISCAL YEAR 1994 BUDGET REQUEST

For fiscal year 1994, the Court's budget request includes the following:

1. The fiscal year 1994 budget request does not incorporate or make provisions for any new programs. Rather, the amount requested for new requirements is the result of existing regulations or programs. The Court will have one judge assuming senior status which will require additional funds for his replacement and staff. The Court is not requesting additional personnel.

2. The automated docketing systems will continue to be modified and refined as required to comply with legislative changes. The Court will install a network system within the judges' chambers which will necessitate the replacement of the present personal computers. The remainder of the Court's request is simply to fund the normal day-to-day operations of processing cases from the time of filing through trial and final decision as well as funding the necessary related matters such as salary, rent, etc.

INVENTORY OF THE U.S. TAX COURT

Any discussion of the Court's workload must emphasize that, at the present time, the Tax Court handles approximately 95% of all substantive tax litigation, exclusive of collection actions, in the Federal courts. As the Committee knows, it is the only court where taxpayers can litigate their cases without prior payment of a tax deficiency determined by the Internal Revenue Service. Proceedings in the Tax Court are begun by the filing of a petition by a taxpayer who has been issued a notice from the Commissioner of Internal Revenue determining a deficiency in tax. The Tax Court has no control over the deficiency notice procedure.

During fiscal year 1992, the number of cases filed with the Court increased 2% from the previous year, from 29,636 cases filed in fiscal year 1991 with 30,345 filed in fiscal year 1992. The Court closed fiscal year 1992 with 44,376 pending cases, a 8% reduction from September 30, 1991.

Although the Court cannot predict with certainty the number of new cases that will be filed, the Court expects the number of petitions in fiscal year 1993 and 1994 to be somewhat more than the 30,345 filed in 1992. However, the Court continues to believe that the number of closings will continue to be significant, and therefore, the fiscal year 1993 and 1994 year-end inventory should continue declining from the 44,376 September 30, 1992 level to an estimated 33,576 on September 30, 1994. I want to emphasize that over half of the inventory consists of cases filed since 1991.

As directed by the Conference report which accompanied the Tax Court's 1993 budget authorization, the Court's 1994 budget request includes a report on the Court's inventory. This report shows that the Tax Court's inventory consisted of 43,229 cases as of

December 31, 1992. It also shows that the aggregate dollar amount in controversy has increased dramatically during the last few years and presently exceeds $34 billion. This increase is attributable to a rise in the number of multi-million dollar cases and the advent of the billion-dollar case. The jumbo cases, although relatively few in number, require a major investment of judicial resources because of their factual and legal complexity. It is crucial, however, that the Court remain equally attentive to the balance of its docket, and particularly to the small taxpayers who represent themselves. In this regard the Court's report shows that the non-million dollar cases account for nearly 97 percent of the Court's docket and that taxpayers represent themselves in about 50 percent of all cases.

SUMMARY

While manageable, the Tax Court inventory is substantial and will continue to be so because of its unique jurisdiction. The Tax Court's goal is to resolve cases expeditiously while giving careful consideration to the merits of each matter. The Court is also committed to providing taxpayers with a convenient forum for trial and simplifying the presentation of disputes involving relatively small amounts of tax dollars. The goals, as always, will remain constant as the Court endeavors to function as a safety valve in the self-assessment system, to assure a uniform interpretation of the Internal Revenue Code, and to provide a national forum for the resolution of disputes between the taxpayers and the Internal Revenue Service.

Unlike many other Government agencies with multiple programs, the Tax Court has only one program--the judicial resolution of Federal tax cases. To the extent of taxes owed, the revenue ultimately involved is these cases cannot be collected until they have been heard and decided or otherwise disposed of. To the extent that the determined tax liabilities are not in fact owed, they create financial uncertainties for corporations and individuals in making business, investment, and other decisions. The Court's role is thus a critical part of the revenue and tax systems. Its action on cases results in the collection of funds for the Treasury. Just as importantly, however, it resolves taxpayer disputes with the Government in a professional, expert, objective manner.

Mr. Chairman, that concludes my statement. I will be pleased to answer any questions the Committee may have.

Biography for Charles S. Casazza

Charles S. Casazza was born in 1932. He graduated from Villanova College and Fordham Law School.

Mr. Casazza was appointed Clerk of the United States Tax Court in 1971.

Mr. Casazza is married to Phyllis O'Callaghan.

Biography For Chief Judge Lapsley W. Hamblen, Jr.

Judge Hamblen was born on December 25, 1926, in Chattanooga, Tennessee. He graduated from McCallie School in 1943 and received a B.A. in 1949 and a LL.B. in 1953 from the University of Virginia, where he was elected as Law Class President and to the Order of Coif, O.D.K., Raven Society and served on the Honor Committee. He served in the United States Navy during 1945 and 1946.

Prior to his appointment to the Court in 1982 by President Reagan, Judge Hamblen served as Deputy Assistant Attorney General, Tax Division, United States Department of Justice. His other government service includes being an attorney in the office of Regional Counsel, Internal Revenue Service in Atlanta, Georgia during 1955 and serving as an attorney-advisor to the Honorable Craig S. Atkins, Judge, Tax Court of the United States, during 1956.

Judge Hamblen practiced law as a partner of Caskie, Frost, Hobbs, & Hamblen (now Caskie & Frost), Lynchburg, Virginia, and predecessor firms for 25 years prior to his appointment to the Tax Court. During his years in practice in Lynchburg, Judge Hamblen was a member of the Board of Directors and was a Vice President and General Counsel of Carter Glass & Sons Publishers, Inc. (now part of Worrell Enterprises, Inc.) and was President of the Greater Lynchburg Chamber of Commerce. He also was an Organizer and Director of Jefferson National Bank, which was merged into Virginia National Bank (now a part of NationsBank).

Judge Hamblen's professional affiliations include membership in the Virginia State Bar, the Virginia Bar Association, and the American Bar Association (Tax Section). He also has been admitted to the Bar of Ohio and West Virginia. Judge Hamblen is a Member of the American College of Tax Counsel and the American College of Trust and Estate Counsel. He is a former Trustee of the Southern Federal Tax Institute, Atlanta, Georgia, and a former Co-Director of the Annual Conference on Federal Taxation, University of Virginia. He presently is a member of the Advisory Committee of the Graduate Tax Program, Emory University Law School, Atlanta, Georgia.

Judge Hamblen was married to Claudia Royster Terrell in 1971, and has three sons by a previous marriage.

UNITED STATES TAX COURT

Fiscal Year 1994 Budget Justification

Lapsley W. Hamblen, Jr.
Chief Judge

UNITED STATES TAX COURT
FISCAL YEAR 1994 BUDGET ESTIMATES
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INTRODUCTION

The United States Tax Court is a Court of record established under Article I of the Constitution of the United States. The Court is composed of a Chief Judge and eighteen judges. Judges of the Tax Court are appointed by the President, by and with the advice and consent of the Senate, for 15 year terms. Decisions by the Court are reviewable by the United States Courts of Appeals and, if certiorari is granted, by the Supreme Court.

In their judicial duties, the judges are assisted by Senior Judges, who participate in the adjudication of regular cases, and by Special Trial Judges, who hear small tax cases and certain regular cases assigned to them by the Chief Judge. During fiscal year 1994, ten Senior Judges and up to fourteen Special Trial Judges will be serving on the Court.

The Court conducts trial sessions throughout the United States, including Hawaii and Alaska.

SALARIES AND EXPENSES
APPROPRIATION LANGUAGE

For necessary expenses, including contract reporting and other services as authorized by 5 U.S.C. 3109; [$32,435,000] $35,350,000: Provided, That travel expenses of the judges shall be paid upon the written certificate of the judge.

(Independent Agencies Appropriations Act, 1993)

NARRATIVE STATEMENT ON PROGRAM AND PERFORMANCE

The U.S. Tax Court hears and decides cases involving deficiencies in Federal income, estate and gift taxes and in excise taxes relating to public charities, private foundations, qualified pension plans, and real estate investment trusts. The Tax Court also renders declaratory judgments regarding the qualification or continuing qualification (including revocation of rulings on the exemptions) of retirement plans.

The Tax Court has jurisdiction to render declaratory judgments with respect to exempt organization status determinations pursuant to section 501(c)(3), Internal Revenue Code, and to enter declaratory judgments on the tax treatment of interest on proposed issues of governmental obligations. In addition, the Court has jurisdiction over actions to restrain disclosure and to obtain additional disclosure with respect to public inspection of written determinations issued by the Internal Revenue Service, and actions to compel the disclosure of the identity of third-party contacts relating to written determinations made by the Internal Revenue Service.

The Tax Court has jurisdiction to restrain the premature assessment and collection of any tax that is the subject of a petition before the Court, to review post-petition jeopardy levies and jeopardy assessments, to review Internal Revenue Service determinations to sell property seized pursuant to a jeopardy assessment, and to award administrative and litigation costs.

For 1994, the Court proposes a trial program of 390 weeks consisting of 250 weeks of regular trial sessions and 140 weeks of small tax case sessions. Trials are held in approximately 80 cities throughout the United States.

Statistics on the actual and estimated number of cases before the Court are presented in the following tabulation:

	1992 Actual	1993 Estimate	1994 Estimate
Pending, beginning of year . .	48,546	44,376	38,726
Docketed during year	30,345	32,500	33,000
Reopened during year	308	350	350
Disposed of during year	34,823	38,500	38,500
Pending, end of year	44,376	38,726	33,576

INVENTORY OF THE U.S. TAX COURT

During fiscal year 1992, the number of cases filed with the Court increased 2% from the previous year, from 29,636 cases filed in fiscal year 1991 to 30,345 cases filed in fiscal year 1992. The Court closed fiscal year 1992 with 44,376 pending cases, a 8% reduction from September 30, 1991.

The number of cases filed, closed, and pending the last ten fiscal years is as follows:

FISCAL YEAR	FILED	CLOSED	PENDING
1983	34,221	28,945	58,333
1984	42,024	37,098	63,598
1985	45,295	36,436	72,836
1986	48,398	37,937	83,686
1987	42,623	45,082	81,549
1988	32,701	47,165	67,491
1989	31,453	40,100	59,194
1990	28,507	36,325	51,708
1991	29,636	33,331	48,374
1992	30,345	34,823	44,376

Although the Court cannot predict with certainty the number of new cases that will be filed, the Court expects the number of petitions in fiscal year 1993 and 1994 to be somewhat more than the 30,345 filed in 1992. However, the Court continues to believe that the number of closings will continue to be significant, and therefore, the fiscal year 1993 and 1994 year-end inventory should continue declining from the 44,376 September 30, 1992 level to an estimated 33,576 on September 30, 1994.

Factors affecting the inventory of the Court include the following:

1. the partnership provisions contained in the Tax Equity and Fiscal Responsibility Act of 1982 eliminated the need for investors separately to litigate their individual interests. The statute and Court's rules governing partnership actions permit multiple interests to be considered in a single action;

2) the settlement policy of the Internal Revenue Service chief counsel's office encourages the resolution of cases prior to commencing an action in the Court;

3) the Tax Reform Act of 1986 substantially limited the deduction of interest on deficiencies in a non-business setting thereby contributing to the reduction in new filings;

4) the Court has made an effort to impose damages on taxpayers who assert positions that are frivolous and groundless thus discouraging the purely protestor type actions;

5) the number of closed cases has increased as a result of opinions being issued in lead cases that govern hundreds of other related cases; and,

6) the increase in settlements -- which are in part a product of effective case management by the Court -- has contributed to reductions in the Court's inventory.

The Court's inventory as of September 30, 1992, represented $34,484 billion in deficiencies determined by the Internal Revenue Service, up from $32,329 billion in deficiencies before the Court on September 30, 1991.

WORKLOAD DATA FOR FISCAL YEARS 1992 THROUGH 1994

	1992 ACTUAL	1993 ESTIMATE	1994 ESTIMATE
FILED	**30,345**	**32,500**	**33,000**
Regular cases	18,767	21,000	21,000
Small tax cases	11,578	11,500	12,000
REOPENED	**308**	**350**	**350**
Regular cases	269	300	300
Small tax cases	39	50	50
CLOSED	**34,823**	**38,500**	**38,500**
Regular cases	21,451	26,500	26,500
Small tax cases	13,372	12,000	12,000
TRANSFERRED	...	...	...
Regular cases	(1,971)	(1,500)	(1,500)
Small tax cases	1,971	1,500	1,500
PENDING AS OF SEPT. 30	**44,376**	**38,726**	**33,576**
Regular cases	34,653	30,206	26,189
Small tax cases	9,723	8,520	7,387

Report on the Tax Court's Inventory

On page 61 of Conference Report 102-919, 102d Cong., 2d Sess. (1992), which accompanied H.R. 5488 making various appropriations for the fiscal year ending September 30, 1993, the Tax Court was directed to include in its budget request for the 1994 fiscal year "an analysis of the number of backlog cases and the complexity of those cases."

As of December 31, 1992, the Tax Court's inventory consisted of 43,229 pending cases. This number included 33,889 regular cases, 9,269 small tax cases, and 71 declaratory judgment cases.

Insofar as the age of the cases is concerned, the Tax Court's inventory is reasonably current. At present, nearly 53 percent of the Court's pending inventory of regular (or non-"S") cases have been commenced since January 1, 1991. Insofar as the small tax cases are concerned, more than 94 percent have been commenced since January 1, 1991.

The closing of the Tax Court's older cases is generally dependent on action in some other court, such as action by a local probate court in an estate tax case, action by a Court of Appeals in a related tax shelter case, or action by a Bankruptcy Court. Regarding bankruptcy, it should be noted that the Bankruptcy Code specifically provides that the filing of a petition in bankruptcy operates as a stay of "the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor." 11 U.S.C. sec. 362(a)(8).

The Tax Court's inventory reached an historical high in October 1986 when it crested at 84,007 cases. Since that time the Court's inventory has consistently decreased. However, the decrease has been relatively modest during the last two calendar years, falling from 50,015 cases as of December 31, 1990, to 48,172 cases as of December 31, 1991, to the present number (43,229 cases as of December 31, 1992).

Although the Tax Court's inventory of cases has decreased in recent years, the aggregate dollar amount in controversy has increased dramatically. Thus, total deficiencies in dispute as of December 31, 1992, amounted to about $34.3 billion. By comparison, total deficiencies in dispute at the end of the 1986 fiscal year (shortly before the Tax Court's inventory reached its historical high) amounted to about $16.3 billion. The difference, some $18 billion, represents a 110 percent increase.

Most of the $18 billion increase in the aggregate amount in controversy has come during the last three years. Thus, at the end of the Tax Court's 1989 fiscal year (September 30, 1989), total deficiencies in dispute amounted to about $18.3 billion. The

increase since that time, $16 billion, represents an 87 percent rise.

The dramatic increase in the aggregate dollar amount in controversy is attributable to an increase in the number of large cases. There are presently 1,392 million-dollar cases pending before the Tax Court. Of this number, 258 involve deficiencies in dispute in excess of $10 million, 24 involve deficiencies in dispute in excess of $100 million, 13 involve deficiencies in dispute in excess of $250 million, and 4 involve deficiencies in dispute in excess of $500 million. There are also 3 billion-dollar cases presently pending before the Tax Court. The single biggest case involves over $6.5 billion.

The advent of the jumbo cases, and in particular the super-jumbo cases, is a recent phenomenon. Most of these cases have only been pending for a relatively short period of time. Thus, for example, the three billion dollar cases have all been commenced since 1989; the four half-billion dollar cases have all been commenced since 1990, and all but one of the 13 quarter-billion dollar cases have all been commenced since 1989.

The flow of large cases into the Tax Court is likely to continue, if not increase, for at least two reasons. First, many tax professionals believe that international tax compliance will be the tax issue of the 1990's. This belief is supported by the fact that already, more often than not, the jumbo cases in the Tax Court involve section 482 and present a variety of foreign source income and transfer pricing issues. During the recent presidential election, President Clinton suggested that tougher tax enforcement would yield an additional $40 to $50 billion over the next four years from foreign corporations doing business in the United States. It can be expected, therefore, that the Internal Revenue Service will maintain, if not increase, its audit activity in the international arena. In any event, the Tax Court understands that there are billions of dollars in potential tax adjustments currently pending in the IRS audit and administrative appeals pipeline. Although most tax controversies are settled without litigation, many will inevitably find their way into the Tax Court.

The second reason that the flow of large cases into the Tax Court is likely to continue, if not increase, has to do with the coordinated examination program ("CEP") of the Internal Revenue Service. Cases having their origins in this program involve deficiencies ranging upwards to $100,000,000 or more and involve domestic, as well as foreign, issues. In recent years the Internal Revenue Service has been emphasizing coordinated examinations and devoting increased resources to CEP cases.

Large cases generally present a multitude of both procedural and substantive issues. More often than not, these issues are factually and legally complex. Trials frequently consume four or more weeks, transcripts run for 1,000's of pages, and exhibits number in the

100's. The resolution of arcane factual issues typically requires the involvement of experts in fields such as economics, finance, banking, and valuation. Opinions resolving the issues in large cases can run several hundred pages and take months to prepare.

Large cases obviously require a major investment of judicial resources, both at trial and during the post-trial period when briefs are read, the record is analyzed, and opinions are written. However, large cases also require a major investment of judicial resources during the pre-trial period. This is because large cases become unwieldy without effective case management. The key to effective case management is the active involvement by a judge in the case. The Tax Court's experience demonstrates that the earlier a judge becomes involved in a case, the greater the benefits become. Of course, early and active involvement by a judge means that more time and greater resources must be devoted to a case during its pre-trial stage.

In October 1991, the Tax Court announced a procedure which permitted the assignment of a judge almost immediately after a large case is at issue. This procedure differs considerably from the traditional and routine practice of the Court, by which judicial officers become involved in cases only after the cases are calendared for trial. The involvement of a judge at the outset of a large case makes it possible to streamline the eventual trial by narrowing the issues, limiting discovery, and stipulating facts by informal agreement between the parties.

Notwithstanding the time-intensive nature of the large cases, the Tax Court must also be attentive to the balance of its docket. After all, the sub-million dollar cases account for nearly 97 percent of the Tax Court's docket, and the Court's mandate has always been to provide for the just, speedy, and inexpensive determination of every case that comes before it.

In particular, the Tax Court wants to remain "user friendly" to the small taxpayer who represents himself or herself and whose claim or contention is as important to such person as that of the largest corporation with a multi-million dollar deficiency. In this regard it should be noted that taxpayers represent themselves in over 90 percent of the small tax cases. Insofar as the regular (or non-"S") cases are concerned, taxpayers represent themselves in almost 40 percent of such cases. If all cases are considered in the aggregate, taxpayers represent themselves in nearly 50 percent of such cases.

In order to keep its docket current and minimize inconvenience to taxpayers, the Tax Court conducts regularly-scheduled trial sessions in 78 cities throughout the United States. Every effort is made to calendar cases for trial within a year after the petition is filed. In small tax cases the norm is about six months. In cities such as New York, Los Angeles, and San Francisco, where the Tax Court's inventory is the greatest, six 2-week trial sessions are

generally scheduled each year. In addition, special trial sessions are scheduled not only during the fall, winter, and spring terms of court, but also during the summer months.

As the foregoing indicates, one of the greatest challenges facing the Tax Court today is the balancing of its resources between the large cases and the smaller cases. Although the large cases are relatively few in number, they demand attention because of the substantial deficiencies at issue. In contrast, the dollar magnitude of the smaller cases is relatively modest. Nevertheless, these cases demand attention because of their very number. More importantly, the smaller cases demand attention in order to maintain the confidence of the taxpaying public in the judicial system in general and in the tax administration system in particular.

For the Committee's information, an appendix is attached to this report analyzing the Tax Court's current inventory by dollar amount in dispute.

A P P E N D I X

United States Tax Court

Inventory by Dollar Amount in Dispute

(as of December 31, 1992)

Dollar Amount in Issue	Number of Dockets	Percent of Total Dockets	Aggregate Dollar Total (in Billions)	Percent of Dollar Total
$ 1 - 1,000,000	41,837	96.78	$2.3	6.7
$ 1,000,000 - 10,000,000	1,090	2.52	$3.2	9.3
$ 10,000,000 - 100,000,000	258	0.597	$7.2	21.0
$ 100,000,000 - 250,000,000	24	0.056	$3.9	11.4
$ 250,000,000 - 500,000,000	13	0.031	$4.5	13.1
$ 500,000,000 - 1,000,000,000	4	0.009	$3.1	9.0
$1,000,000,000 -	3	0.007	$10.1	29.5
	43,229	100.000	$34.3	100.0

FISCAL YEAR 1992 ACCOMPLISHMENTS

In fiscal year 1992, the Court accomplished the following:

1. The Court continued to modify and refine the automated docketing system as required to comply with legislative changes in the Court's proceedings. Also, word processing and other computer capabilities were updated as necessary. The judges' offices now have access to automated legal research data bases. The Court continued to develop software for the Court's library to provide up-to-date access to legal databases and management of the library collection and materials. Implementation and improvements of computer applications in administrative functions including spreadsheets, communications, accounting and payroll processing were also made.

2. Enhancement to security for Tax Court sessions held outside Washington. Duress alarm systems have been installed in the Courtrooms and chambers of the Court's field facilities. The USMS assisted in this project by serving as a consultant to the contractors and the Tax Court as questions arose.

3. The Court did not know the full impact of the Technical and Miscellaneous Revenue Act that passed Congress in 1988. However, certain changes were apparent. For example, the Act required that the Court keep files for a longer time because taxpayers will be permitted to reopen cases for a redetermination of interest on deficiencies and the Court may reopen cases involving extensions of time for estate tax payments.

4. The Court continued to work with GSA on the installation of an independent chiller system for the Tax Court building. The system is operational and in the final stages of completion.

5. A study was performed to compare and evaluate new compatible telephone equipment to replace the present equipment that was installed in 1974.

6. The courtroom in Los Angeles was relocated to the new Edward R. Roybal Federal Building.

FISCAL YEAR 1993 PROGRAM

During fiscal year 1993, the Court's program is as follows:

1. The Court will continue to assess the effectiveness of the physical security systems in the main courthouse in Washington. New cameras and monitors have been installed to replace the older surveillance equipment.

   The Court expects to continue its arrangement with the United States Marshal Service in which they select a contractor to provide security personnel for the courthouse in Washington. The USMS trains the contractor's employees who are known as Court Security Officers or CSO's. The CSO's provide security for the Tax Court building 24 hours per day, seven days per week. The Tax Court funds all costs associated with this program.

   The Tax Court and United States Marshal Service have been assessing the Court's security requirements for sessions held throughout the country in order to determine how best to provide weapons screening and security officers in the courtroom when needed. Because the Court travels to a large number of cities, because of schedules for each city fluctuate, and because security needs change depending upon the cases involved, the Court concluded that it should utilize security personnel already located in the cities to which the Court travels. These factors, coupled with Tax Court's statutory authority to request Deputy Marshals to attend Court sessions (26 U.S.C. 7456(c)), made the United States Marshal Service the best source of assistance. The United States Marshal Service has agreed that its CSO's will attend Tax Court sessions when needed. The Tax Court will reimburse the United States Marshal Service for these contract personnel on an actual use basis.

2. The Court will maintain travel and transportation costs at near fiscal year 1993 levels. This action will have no effect on the number of trial sessions that the Court will hold in fiscal year 1994. Savings will occur from court sessions that conclude prior to the scheduled ending date.

3. The automated docketing systems will continue to be modified and refined as required to comply with legislative changes. The Court will install a network system within the judges' chambers. The Court has already connected the chambers with the automated docketing system. Additionally, word processing and other computer capabilities including the administrative areas will be updated as necessary.

4. New telephone equipment will be installed including new cabling. In fiscal year 1992, the Court performed a study which outlined the necessary equipment that would meet our requirements and be compatible with the Washington Interagency Telephone System.

5. Plans are being made to install network cabling concurrent with the telephone cabling to prepare for the computerized local area network.

6. The Court continues to work with GSA on the installation and completion of the chiller system for the Tax Court building. GSA's contractor is presently installing and testing the computerized energy monitoring control system that operates the chiller and associated equipment.

FISCAL YEAR 1994 BUDGET REQUEST

For fiscal year 1994, the Court's budget request includes the following:

1. The fiscal year 1994 budget request does not incorporate or make provisions for any new programs. Rather, the amount requested for new requirements is the result of existing regulations or programs. The Court will have one judge assuming senior status which will require additional funds for his replacement and staff. The Court is not requesting additional personnel.

2. The automated docketing systems will continue to be modified and refined as required to comply with legislative changes. The Court will install a network system within the judges' chambers which will necessitate the replacement of the present personal computers. The remainder of the Court's request is simply to fund the normal day-to-day operations of processing cases from the time of filing through trial and final decision as well as funding the necessary related matters such as salary, rent, etc.

3. The Court will continue the training program started in fiscal year 1986 for the Presidentially appointed judges. The Court has found that this training for the judges and other staff has been a success. The total amount requested for this training is $19,000, although much less is usually expended each fiscal year. The Court has not requested an increase in this amount since the inception of the judges training program.

SUMMARY OF FISCAL YEAR 1994 BUDGET REQUEST

A summary of the fiscal year 1994 funding requirements for conducting the Court's activities follows:

	1993	1994	Difference
Positions	350	350	0
Personnel Compensation and Benefits	$19,366,000	$20,845,000	+$1,479,000
Other Costs	$13,069,000	$14,505,000	+$1,436,000
Budget Authority/ Appropriation	$32,435,000	$35,350,000	+$2,915,000

The fiscal year 1994 request represents an increase of $2,915,000 over the fiscal year 1993 requirements. Changes in the 1994 program are summarized in the following:

PROGRAM CHANGES	AMOUNT
Personnel Compensation and Benefits:	
New Requirements	$ 262,000
Pay Adjustments	326,000
Other Cost Adjustments	187,000
FY 1994 Pay Raise	704,000
Other Objects:	
New Requirements	1,139,000
Other Cost Adjustments	297,000
Total Changes	$2,915,000

The following is a brief description of the above listed changes:

PERSONNEL COMPENSATION AND BENEFITS $1,479,000

New Requirements (+$262,000)

This increase of $262,000 is required to finance the salaries and benefits associated with the appointment of one new judge and the additional staff personnel which will be required. In fiscal year 1994 one judge of the Court will assume senior status. A new judge will presumably be nominated by the President during fiscal year 1994. No new additional positions are being requested, only the necessary funds for these positions.

Pay Adjustments (+$326,000)

During fiscal year 1994, $182,000 will be required to finance promotions and $144,000 will be required for within-grade salary increases for employees who will be eligible for advancement to the next step in salary during the year.

Other Cost Adjustments (+$187,000)

An additional $187,000 is required to provide for increased personnel related benefits such as social security, medicare, health and life insurance, retirement, judges' survivors annuity fund, and thrift.

FY 1994 Pay Raise (+$704,000)

The fiscal year 1994 pay raise effective in January, 1994 will require an increase of $704,000. These estimates do not reflect locality-based pay increases scheduled to begin in fiscal year 1994.

OTHER OBJECTS $1,436,000

New Requirements (+$1,139,000)

The Court will require $1,139,000 for ADP projects. The automated docketing systems will continue to be modified and refined as required to comply with legislative changes. The Court will install a network system within the judges' chambers which will necessitate the replacement of the present personal computers.

Other Cost Adjustments (+$297,000)

An increase in the amount of $209,000 is required to finance the higher rent payments to GSA due to increased rates. The Court has no control over the amount of this increase.

An increase in the amount of $88,000 is required for transportation and subsistence expenses associated with the appointment of a new judge and continued activities as budgeted for in prior years.

As required by Section 131(b) of the Supplemental Appropriation Act of 1955, as amended (31 U.S.C. 200(b)), it is hereby certified that all statements of obligations reported and furnished to the Office of Management and Budget, in connection with this request of the United States Tax Court for proposed appropriation for fiscal year 1994, consist of valid obligations as defined in Section 1311 of the Act.

STANDARD FORM 300
July 1964, Bureau of the Budget
Circular No. A-11, Revised.
300-101

UNITED STATES TAX COURT
SALARIES AND EXPENSES
Program and Financing (in thousands of dollars)

Identification code 23-0100-0-1-752	19 92 actual	19 93 estimate	19 94 estimate
Program by activities:			
10.00 Total obligations	29,993	32,435	35,350
Financing:			
25.00 Unobligated balance lapsing	2,057	...	...
40.00 Budget authority (appropriation)	32,050	32,435	35,350
Relation of obligations to outlays:			
71.00 Obligations incurred, net	29,993	32,435	35,350
72.40 Obligated balance, start of year	3,375	3,339	3,763
74.40 Obligated balance, end of year	-3,339	-3,763	-3,763
90.00 Outlays	30,029	32,011	35,350
	(Mono cast: 21.5)	(Mono cast: 5)	(Mono cast: 5)	(Mono cast: 4.9)

STANDARD FORM 300
July 1964, Bureau of the Budget
Circular No. A-11, Revised.
300-101

UNITED STATES TAX COURT
SALARIES AND EXPENSES
Object Classification (in thousands of dollars)

Identification code 23-0100-0-1-752	19 92 actual	19 93 estimate	19 94 estimate
Personnel compensation:			
11.1 Full-time permanent.....	14,733	15,197	16,421
11.3 Other than full-time permanent.....	82	89	90
11.5 Other personnel compensation..	25	26	27
11.9 Total personnel compensation..	14,840	15,312	16,538
Personnel benefits:			
12.1 Civilian personnel benefits.....	2,626	2,800	2,987
13.0 Benefits for former personnel.....	1,221	1,254	1,320
21.0 Travel and transportation of persons.....	578	924	1,000
22.0 Transportation of things....	66	77	89
23.1 Rental payments to GSA.....	6,524	7,473	7,682
23.2 Rental payments to others...	581	590	590
24.0 Printing and reproduction...	215	216	216
25.2 Other services.....	2,078	2,617	2,617
26.0 Supplies and materials.....	535	580	742
31.0 Equipment.....	729	592	1,569
99.9 Total obligations.....	29,993	32,435	35,350
19			
(Mono cost: 21.5)	(Mono cost: 5)	(Mono cost: 5)	(Mono cost: 4.9)

STANDARD FORM 306
July 1968, Bureau of the Budget
Circular No. A-11, Revised.
306-103

UNITED STATES TAX COURT
SALARIES AND EXPENSES

DETAIL OF PERMANENT POSITIONS

23-0100-0-1-752	19 92 actual	19 93 estimate	19 94 estimate
Judges, $133,600	28	28	29
Positions established under Section 7443A, IRC of 1986, as amended:			
Special Trial Judges, $120,240	14	14	14
Senior Level Positions	4	4	4
GS-15	11	11	11
GS-14	6	8	8
GS-13	37	37	37
GS-12	42	42	42
GS-11	50	50	50
GS-10	20	20	20
GS-09	38	38	37
GS-08	10	9	9
GS-07	20	20	20
GS-06	23	23	23
GS-05	20	23	23
GS-04	15	12	12
GS-03	5	5	5
GS-02	3	2	2
Ungraded	4	4	4
Total permanent positions	350	350	350
Unfilled positions, end of year	-31	-5	-5
Total permanent employment, end of year	319	345	345

(Mono cast: 16.3) (Mono cast: 4.9) (Mono cast: 4.9) (Mono cast: 4)

INDEPENDENT COUNSEL
INTRODUCTION

This fund was established pursuant to Public Law 99-514, the Tax Reform Act of 1986. Congress authorized the U.S. Tax Court to collect a periodic registration fee not to exceed $30.00 per year from its practitioners and to use such fees to employ independent counsel to pursue disciplinary matters involving practitioners admitted to practice before the Court. (26 U.S.C. 7475)

STANDARD FORM 300
July 1964, Bureau of the Budget
Circular No. A-11, Revised.
300-101

UNITED STATES TAX COURT INDEPENDENT COUNSEL
Program and Financing (in thousands of dollars)

Identification code 23-5023-0-2-752		19 92 actual	19 93 estimate	19 94 estimate
Program by activities:				
10.00	Total obligations (object class 25.2).....	3	10	10
Financing:				
21.40	Unobligated balance available, start of year.....	-308	-309	-309
24.40	Unobligated balance available, end of year.....	309	309	309
60.25	Budget authority (appropriation) (special fund, indefinite)....	3	10	10
Relation of obligations to outlays:				
71.00	Obligations incurred, net.....	3	10	10
90.00	Outlays.....	3	10	10
		22		
	(Mono cast: 21.5)	(Mono cast: 5)	(Mono cast: 5)	(Mono cast: 4.9)

TAX COURT JUDGES SURVIVORS ANNUITY FUND
INTRODUCTION

This fund, established under Title 26, U.S. Code, section 7448, is used to pay survivorship benefits to eligible surviving spouses and dependent children of deceased judges of the U.S. Tax Court. Participating judges pay 3.5% of their salaries or retired pay into the fund to cover creditable service for which payment is required. Additional funds, subject to a maximum of 11% of the participating judges salaries, are provided, as needed, through the annual appropriation of the U.S. Tax Court.

On September 30, 1992, 25 judges of the Court were participating in the fund, and 5 eligible widows were receiving survivorship annuity payments.

STANDARD FORM 300
July 1964, Bureau of the Budget
Circular No. A-11, Revised.
300-101

UNITED STATES TAX COURT TAX COURT JUDGES SURVIVORS ANNUITY FUND
Program and Financing (in thousands of dollars)

Identification code 23-8115-0-7-602		19 92 actual	19 93 estimate	19 94 estimate
Program by activities:				
10.00	Annuities (Cost-obligations) (object class 42.0).....	170	170	170
Financing:				
21.40	Unobligated balance available, start of year:			
	Treasury balance.....	-3	-1	-1
	U.S. Securities (par).....	-3,706	-4,042	-4,406
24.40	Unobligated balance available, end of year:			
	Treasury balance.....	1	1	1
	U.S. Securities (par).....	4,042	4,406	4,805
60.05	Budget authority (appropriation) (indefinite)	504	534	569
Relation of obligations to outlays:				
71.00	Obligations incurred, net...	170	170	170
90.00	Outlays.....	170	170	170
		24		
	(Mono cast: 21.5)	(Mono cast: 5)	(Mono cast: 5)	(Mono cast: 4.9)

PRESIDENT'S BUDGET REQUEST

Mr. HOYER. Do you know whether the budget request you are making this year is going to be included by the President at the requested amount of $35.3 million in the President's budget?

Judge HAMBLEN. It is included.

FOREIGN CONTROLLED CORPORATIONS

Mr. HOYER. Do you currently have jurisdiction over cases involving foreign corporations doing business in the United States? Are they failing to pay the full amount of taxes due?

Judge HAMBLEN. If the Internal Revenue Service issues a notice of deficiency to any foreign—any subsidiary of a foreign corporation that is in this country, we would have jurisdiction if they filed a petition in this court.

Mr. HOYER. Judge, this is a very controversial issue, as you know. Do you have any recent cases in which you are assessing deficiencies?

Judge HAMBLEN. Well, we have had—I have a list somewhere, I think, of some of the cases we have. I have 15 cases that I made a list of to bring up to the Committee. Ten of them are foreign income cases, and five of them are large estate tax cases. The largest case that we have in the court now involves Exxon and Texaco, and they consolidated those cases and Judge Whitaker has heard one part of those cases. The deficiency is $6,535,479,167. Then they combine that with the Texaco case and another Exxon issue, it totals about $8.6 billion. We do have before us the Yamaha case which I believe on motion of the parties they have requested that they be permitted to take that to what is known as competent authority.

Competent authority is established by treaties between the sovereign jurisdictions, and the head tax people of each of those sovereigns get together and try to resolve it. If they don't, they can come back and our court rules on the facts. I believe the Fujitsu case, if I am not mistaken, is another one that the parties have moved to take that to competent authority.

Mr. HOYER. Now, can you be more specific on who is the "competent authority"? Who do they go to actually? Not by definition, but who are they?

Judge HAMBLEN. Well, in the Internal Revenue Service they have an Assistant Commissioner who is in charge of that and works with someone in the Treasury Department. Then in the other nations it would be someone from their revenue authority, I suppose, and that is worked out by treaty between the nations. There has to be a treaty in force in order for competent authority.

Mr. HOYER. Is there a treaty between ourselves and the Japanese?

Judge HAMBLEN. I think there must be, Mr. Chairman.

Mr. HOYER. Okay. Now, would that mean that the treaty would provide how each country would treat foreign corporations doing business in the host country?

Judge HAMBLEN. I don't really know the answer to that.

Mr. HOYER. The President has discussed holding—as a matter of fact, he mentioned in his State of the Union speech—foreign corpo-

rations to a standard that U.S. corporations doing business in the United States are held to, which seems fair.

Mr. CASAZZA. This may be overly simplistic, Mr. Chairman, but my understanding is that the competent authority is the subject of a revenue procedure promulgated by Internal Revenue Service which basically says if this country and another country have entered into a tax treaty and the Internal Revenue Service as an agency asserts a deficiency against a foreign corporation, the taxpayer can request the assistance of competent authority on a theory that the treatment by the Internal Revenue Service may be inconsistent with the provisions of the treaty. That is basically the concept as I understand it.

If the case is before us, the parties have the right or at least the taxpayer has the right to request the assistance of competent authority. The court can proceed with the case if it chooses but normally we defer to the parties who have jointly requested the opportunity to see whether or not they can work it out.

Judge HAMBLEN. But we do retain jurisdiction in those cases and try to put deadlines on it so that—we don't have any jurisdiction over the sovereign, but we just can't let it hang around in the court's inventory forever, Mr. Chairman. Judge Gerber, for example, I believe required some sort of a stipulation and a time limit so that if they hadn't resolved it with competent authority within that designated time frame, then he is going to bring them back and try the case and get it resolved.

Mr. HOYER. So that ultimately your court would have jurisdiction?

Judge HAMBLEN. Yes, sir.

Mr. HOYER. Even though you have deferred to competent authority, that is more a comity than it is a requirement.

Judge HAMBLEN. Yes, sir.

Mr. HOYER. Unless, of course, another court would decide that there was a conflict between the treaty and the domestic law.

Judge HAMBLEN. That would be resolved, I think, at the competent authority level between the two sovereigns, and if they can't do it, it would come back to our court.

COMPUTER NETWORK SYSTEM

Mr. HOYER. You have requested $1.1 million for the installation of a network system to replace personal computers. Can you explain how this new system works and what the productivity savings will be.

Judge HAMBLEN. Mr. Casazza is our ADP guru.

Mr. CASAZZA. The judges have had personal computers, I believe, five years this coming summer, and there has been some interest in what is referred to as a LAN, a local area network within the chamber of a particular judge whose staff may include two law clerks, and perhaps networking the entire courthouse in Washington. We have requested these funds in the past, and quite frankly, of the $2.9 million increase we are asking for this year over last year, I believe it was $2.9——

Mr. HOYER. I see $1.1 here. That is just for computers. You mean the total increase of $2.915 million.

Mr. CASAZZA. A million one of that is for automation. In terms of productivity, it would help. I have to say I cannot say it is absolutely essential.

Judge HAMBLEN. I think it is really a convenience of the judges, and I would have to agree with Mr. Casazza that it is not absolutely essential, but they do think it would help them in reducing the time from the time of trial to the time they get an opinion out. In some of these large cases, that can be a couple of years, and——

Mr. HOYER. You mean from the conclusion of the trial to the issuing of the opinion?

Judge HAMBLEN. Yes, sir. The records are so large, they are so voluminous, like I say, thousands of pages of transcript and hundreds, if not thousands, of pages of documentary exhibits, and then the law is complex, and you have all these experts' reports. I am sure you gentlemen deal with economics all the time.

Mr. HOYER. Not very well.

Judge HAMBLEN. Well, neither do judges, and it is just a time-consuming and arduous task to go through one of these records to find your facts and apply the law to it, and the networking would help in that respect, mostly in these large cases, not so much in the small every-day cases.

Mr. HOYER. Judge, though, when you talk about convenience as opposed to productivity, you are talking not really in terms of productivity. If, in fact, it would have a substantial impact on reducing the time in which, or the timeliness with which, an opinion could be rendered that is productivity. I get the feeling that this may be a worthy objective but you are not too sure that this would result.

Judge HAMBLEN. You are quite correct.

ADMINISTRATIVE COSTS

Mr. HOYER. All right. The administration and the Congress have all agreed that they are going to try to cut 3 percent annually over the next four years from administrative costs. I would like you to, if you could, tell us that if this were applied uniformly, what action that would require you to take and whether there would be sustainable or adverse consequences it might have.

The reason I ask that clearly is we are in a time when the President and the Congress have both indicated we are trying to cut costs.

Judge HAMBLEN. Yes.

Mr. HOYER. And we want to see if everybody can contribute to that, including the Congress, but we want to do it based upon information, not just based upon arbitrary application. So if you would submit that information it would help.

Judge HAMBLEN. We will so do.

[The information follows:]

ADMINISTRATIVE COSTS

The Court has already taken steps in the present fiscal year to limit administrative costs by eliminating training of employees which we do not believe is absolutely essential. Furthermore, the Court has already cancelled it's plans to hold a Judicial Conference in fiscal year 1994.

Mr. HOYER. Thank you, gentlemen. Mr. Wolf.

PAY FREEZE

Mr. WOLF. Thank you, Mr. Chairman. I have a couple questions. Following up on what Mr. Hoyer said, the President recommended the other night a pay freeze. Would you be covered by that pay freeze as a judge?

Judge HAMBLEN. We are paid on the same basis that a United States District Court Judge is paid.

Mr. WOLF. So you would not be covered by the pay freeze?

Judge HAMBLEN. I don't think we would, but our staff would.

Mr. WOLF. Do you think the judges should be covered if your staff is covered?

Judge HAMBLEN. I haven't even thought about that, Mr. Wolf. If my staff is covered, I don't mind being covered.

Mr. WOLF. What about your colleague, what do you think?

Mr. CASAZZA. The judges should comply. Sure, I agree.

Mr. WOLF. If you would just submit it for the record and just think about it, if the Congress, if the administration is successful in its pay freeze, if you could just submit for the record do you think judges should also be included in that.

Judge HAMBLEN. Yes, everyone in the Federal Government should. It is the President's call.

Mr. CASAZZA. I believe the constitutional impediment to freezing of salaries of judges, the salaries of a judge cannot be diminished, and I am not quite sure what the law provided when it was passed concerning automatic increases in future years, and that might be one of the problems.

Mr. WOLF. They were frozen before. The judges weren't frozen.

Mr. HOYER. Off the record.

Back on the record.

Mr. WOLF. I appreciate your comment. I have some reservations about the pay freeze. I am not sure how it comes out. If it does come out that there is a pay freeze, then I think the Congress ought to freeze its pay and I think the judges ought to freeze theirs, so I appreciate your comment.

TRANSFER PRICING CASES

On the follow-up on the other question Mr. Hoyer asked, the committee has given IRS additional funds to go after the transfer of pricing. How many transfer of pricing cases do you have now before the court?

Judge HAMBLEN. I read into the record, we have over 1,300, I believe, cases in excess of a million dollars. Now how many of those are transfer pricing cases, we don't know. You would have to ask Mr. Casazza. There is one of the reporting services, and these reporting services come by and look at our public records every day and any petition that is filed in our court is a public record, and they, I think, BNA or one of the services prints a list of the foreign source income cases that we have.

Mr. WOLF. Could you submit that for the record and find out?

Judge HAMBLEN. We can endeavor to do that, yes, sir.

[The information follows:]

FOREIGN SOURCE INCOMES CASES
PENDING BEFORE THE U.S. TAX COURT

Amoco
Apple Computer Inc. et al.
Aristrain International
Bonus Wind Turbine Tech.
Bowater Inc.
Center Point Consortium
CenTra Inc.
Central de Gas De Chihuahua
Chevron Corp. et al.
Cram, Stephen H. et al.
Culnen, Daniel (Wedgewood Assoc.)
Daewoo Int. Corp.
Devco (J. Babbitt) et al.
Dobson & Johnson
Eisenberg, Calvin
Exxon Corp. et al.
Fujitsu America Inc. et al.
Halliburton Co. et al.
Harper Group Inc.
Hitachi America Ltd. et al.
Hospital Corp. of America
Intel Corp.
Investors Leasing Corp.
KMC Co.
The Manchester Group
Medieval Show Inc.
Mobil Corp.
Naegele Co., Inc.
National Semiconductor et al.
Nestle Foods Corp. et al.
Nippon Miniature Bearing et al.
Old DCL Inc. et al.
Perkin-Elmer Corp.
Rallis, John
Ralston Purina Co.
Rollins, John W.
S.C. Johnson & Son et al.
Seagate Technology
Sundstrand Corp. et al.
totes Inc. (B. Phillips)
Westward International et al.
Wireless Communications Co.
Wheaton Industries
Wynn's International Inc.
Yamaha Motor Corp. et al.

Mr. WOLF. Would it be an accurate number, do you think?

Mr. CASAZZA. I believe it would be approximately 75 to 80 pending so-called 482 cases at the present time. Since last year, if I recall correctly, you inquired as to how many of these cases we had decided at that time.

Mr. WOLF. Yes.

Mr. CASAZZA. Since last year, quite frankly, we decided one case by the name of Westreco, I recall it was decided primarily in favor of the taxpayer; is that correct?

Judge HAMBLEN. That was Judge Goffe.

Mr. CASAZZA. In another case, you referred to, Mr. Wolf, the Yamaha case, which was pending, is a case which has been referred to the competent authority that we referred to earlier, but that has been the only activity since roughly a year ago in terms of disposition of that type of case.

Mr. WOLF. So there really hasn't been very much activity at the court on this issue?

Mr. CASAZZA. Various judges have cases, but they are in various stages of preliminary matters right now.

Mr. WOLF. Excuse me, Judge.

Judge HAMBLEN. I was going to say, there is so much discovery in these cases, the government just cannot in the examination process obtain all the information that it needs to prepare one of these cases for trial, and sometimes—in the Sunstrand case we wrestled with that for well in excess of a year trying to get discovery resolved, and finally I just had to put a time limit on the government and say, look, we have got to get this case to trial. Well, when we did it was a three-week trial, a voluminous record with a 286-page findings of fact and opinion, and that is pretty standard for those type cases.

It takes a long time to get them combat ready, and the government wants to prepare as good a case as it can, and that is one reason for the inordinate amount of time that has to be devoted to these big cases.

Mr. WOLF. Do you think the government does a good job? Do you think the lawyers on the government side are skilled enough versus the lawyers for the foreign corporations?

Judge HAMBLEN. In the Sunstrand case I don't think they were adequately prepared, and that was because they changed counsel in the middle of the stream.

Mr. WOLF. The government did.

Judge HAMBLEN. The government did.

Mr. WOLF. Who was the counsel for the defendant?

Judge HAMBLEN. I think it was a fellow named Reed Huey who, I thought, was a very good lawyer.

Mr. WOLF. With what firm is that?

Judge HAMBLEN. The petitioner is the taxpayer. The defendant is the Internal Revenue Service.

Mr. WOLF. For the petitioner.

Judge HAMBLEN. The petitioner's lawyer was John Klotsche with that big firm, Baker and McKenzie.

FORMER EMPLOYEES WHO ARGUE CASES

Mr. WOLF. Do you find a lot of former IRS officials come before you to practice in defense of these foreign corporations? I understand that some former IRS commissioners have been retained. People whose job it was to collect taxes are now out working the other side of the street.

Judge HAMBLEN. I haven't had that before me. I am sure that maybe some of them have been before some of the other judges.

Mr. WOLF. Is there any resources that we should give the IRS to make sure that it can go head to head with these other big firms, law firms that are working for the corporations?

Judge HAMBLEN. That is a question I don't know how to answer. I have seen very good lawyers representing the government. I would love to have had them in my law firm in private practice. Sometimes I do think that the government is outresourced in some of these cases. The taxpayers will have better expert witnesses.

Mr. WOLF. Because they can pay them more?

Judge HAMBLEN. That doesn't always mean they are better.

Mr. WOLF. Well, the committee gave the IRS the authority last year to hire outside people. They were hampered up until that time.

Judge HAMBLEN. I don't know about that, sir, whether outside lawyers would help or hurt. As far as I am concerned, the lawyers I have seen for the Internal Revenue Service have been very adequate, very good. Some of the other judges might have another story to tell you, but I thought Reed Huey did as fine a job as a lawyer could do with the case he had to try, and I commended him for it.

Mr. WOLF. But he lost?

Judge HAMBLEN. He didn't lose. It wasn't that much of a case. They didn't have that much of a case. They won a good part of it.

Mr. WOLF. Well, I think you are going to have to face this issue. I think the Clinton administration is exactly right on the transfer of pricing, and I would urge the court to begin to process these things a little bit faster. If we are going to get any money—I am not so sure it is in the $40 billion range. It may be in the $5 or $6 billion range, but it also levels the playing field for those American businesses, and, frankly, the Bush administration did not do a very good job. Treasury was negligent, derelict in this and I hope the new crew over there will be better.

I would like to urge you to kind of look at this and get back to the committee to see what you think, from looking at your perspective, what we could do to assist the IRS in these types of cases, the transfer of pricing. As an observer looking at it, what do you think we could do to help IRS?

Judge HAMBLEN. Mr. Wolf, I think there is going to be a new crew over at Internal Revenue Service and I think one of the people being considered as Chief Counsel is Professor Thompson. He is from UCLA. I know Professor Thompson. He is an exceptional person, and I am sure he will do an outstanding job if he is the one who is selected by the President to head that office up.

Mr. WOLF. I hope so, too. But if you would give us the benefit of your thinking, being the Chief Judge, and if you would poll the

other judges to see what this committee could do from your own perspective what help we could be to the IRS, perhaps not more money, perhaps more money, perhaps beefing up the staff, perhaps changing the law, whatever the case may be, to give the Justice Department and to give the IRS and to give the government a better opportunity than perhaps that they have. My sense tells me that the government lawyers are at a disadvantage. They are generally younger, less experienced, don't have the resources. You bring us some of the larger firms, it is very, very difficult. They are up against people that they just don't have the resources, and they end up losing, and they get discouraged.

My sense also tells me there are a number of people at IRS that are being hired by these law firms that are going in and pulling these people out, the best people that IRS has, and now they are going out and crossing the other side and defending these people almost like a hired gun, if you will, in the city. Now it is just a feeling I have, I may be wrong, but I would like to have your sense of what we in the committee could do to help the U.S. Government to collect more of this.

Judge HAMBLEN. Yes, sir.

COLLECTION ACTIVITY

Mr. WOLF. The last question is do you have any sense of how many dollars there may be here that could be collected?

Judge HAMBLEN. I have no idea at all because it depends on how the case resolves. In the Exxon case, I don't know what is going to happen there. There might be things that the Internal Revenue Service will come up in the way of legislative recommendations that the Congress can consider and that would be very helpful to resolve some of the problems they have got in the 482 area. They are promulgating or they are at least considering promulgating new regulations.

Mr. WOLF. Weren't they out and then they pulled them back?

Judge HAMBLEN. Yes.

Mr. WOLF. Why did they pull them back?

Judge HAMBLEN. I have no idea. Because I think there were so many objections.

Mr. WOLF. Objections by?

Judge HAMBLEN. By outside people, I just don't know. I don't have the answer to that.

Mr. WOLF. Because they were too tough or they were too lenient?

Judge HAMBLEN. I haven't examined those regulations that closely myself.

Mr. WOLF. Was it your sense that they pulled them back—I don't want your comment as to why you think, but what was the word out on the street, that they pulled them back because they felt they went too far or they were not strong enough?

Judge HAMBLEN. I think the people that you should ask that question to, Mr. Wolf, would be the people in Treasury and at the Internal Revenue Service.

Mr. WOLF. Aren't they gone now?

Judge HAMBLEN. No, I don't think so. I think you still have people in tax legislative counsel in the Treasury, and people in the

Internal Revenue Service, career people, and they have some excellent people over there.

Mr. WOLF. Was it your sense that this was a toughening up or——

Judge HAMBLEN. I think that is what they were trying to do. They were trying to get it where they could resolve things better at the Appeals Division. They settle a great deal of these 482 cases. If they didn't, I don't think we could ever get them resolved.

DISPOSITION TIMETABLE

Mr. WOLF. The last question is how long does a case like this take that goes through the courts? What would be a normal length of time?

Judge HAMBLEN. Would you say that again?

Mr. WOLF. How long would a case like this normally take?

Judge HAMBLEN. Let's see. The Sundstrand case, the years I had before me were 1979 and 1980. Those years were extended by waivers to the statute of limitations between the parties for a number of years so that more examination and exchange of information could take place. I would have to go back and look at the record. I can't recall it now exactly when the petition was filed, but let's say in 1987 or 1988, and the case finally was disposed of in, I think, 1990 or 1991, but these cases are time-consuming and resource-consuming and energy-consuming because anything that takes anywhere from three to four weeks to two or three months to try, you build up quite a record, and you have got to wait for parties to brief that, and with that kind of a record you have got to give them adequate time to brief it, and the briefs look like volumes of an encyclopedia, and you have got expert reports in there, too, and it just takes a lot of labor to resolve one of those big cases, and it requires a lot of work with law clerks, a lot of work by the judge. There is a lot of work in managing these cases, getting them up to trial through the discovery stage, but there has to be a limit on everything, Mr. Wolf, and sooner or later you have got to get people into the arena and let them fight it out, and a judge has to resolve it.

Mr. WOLF. Thank you, Judge. I have no further questions, Mr. Chairman.

Mr. HOYER. Thank you. Mr. Visclosky.

SENIOR JUDGES

Mr. VISCLOSKY. Judge, thank you very much for your appearance here today. Am I correct in understanding that there are a number of different types of judges we are talking about. Senior judges, those at the compensation level of $133,000, are active judges.

Judge HAMBLEN. That is one.

Mr. VISCLOSKY. Then you have senior judges on recall.

Judge HAMBLEN. Yes.

Mr. VISCLOSKY. Then you have retired judges who essentially are not part of the positions that you are requesting in this year's budget?

Judge HAMBLEN. No, for the retired judges, we pay them out of our budget.

Mr. VISCLOSKY. Okay. They would not be considered part of your request for 29 positions in 1994?

Judge HAMBLEN. No, sir.

Mr. VISCLOSKY. Okay. Then you also have special trial judges.

Judge HAMBLEN. Yes.

Mr. VISCLOSKY. Last year, I understand, at the time of the hearing there were 19 active judges, there were nine senior judges on recall, and there were seven retired judges.

Judge HAMBLEN. Is that right, Mr. Casazza?

Mr. CASAZZA. Last year, yes, I think that is right. I am trying to pinpoint the exact time because we had two judges added in November.

Mr. VISCLOSKY. Well, I was going to get around to November. At the time of the hearing, which was last spring, you indicated that in 1991 you had nine senior judges, which I again characterize senior on recall, and 19 active judges, 19 and 9. Then in response to its add a term figure for 1992, Judge Nims said—well, I will get to that in a second. Then the special judges you had 14. There was a line of questioning relative to two new judges who were to be appointed last year, apparently the two you referred to in November, because two judges who were active at the time of the hearing were going to go senior on recall.

I then asked Judge Nims—so in July, apparently this case in November, you are anticipating 19 active judges and 11 senior on recall. Judge Nims says that would be right. Then my question, then in 1993 you are anticipating 19 and 11, and he said, yes, sir. Then further indicated a few questions down that they had 14 special trial judges. Nineteen and 11 is 30, but you have 28 listed. Could I ask what, in terms of judges active, senior, on recall and retired, that picture looks like today?

Judge HAMBLEN. Mr. Visclosky, I believe we have 19 active judges. Two of the 11, I think, Judge Goffe has not been—his recall has been terminated, so one of those 11 has been, his recall has been terminated.

Mr. VISCLOSKY. So he would be considered retired?

Judge HAMBLEN. He is retired. I don't know who is the other one.

Mr. CASAZZA. Judge Featherston was on senior status, but he is now in retired status.

Mr. VISCLOSKY. So now you still have a ratio of 19 and 9, and you have still 9 retired judges?

Judge HAMBLEN. Yes.

SPECIAL TRIAL JUDGES

Mr. VISCLOSKY. Do you have any vacancies in terms of the positions you enumerated for special trial judge or do you have 14 slots?

Judge HAMBLEN. We have 14 slots.

NEW JUDGE

Mr. VISCLOSKY. You indicated, and in your total figures it is borne out that you are not asking for any additional personnel, but you are asking for an additional senior judge.

Judge HAMBLEN. No, sir. What is going to happen is we will have a senior judge in fiscal year 1994. He is going to retire. He becomes 70 in December, Judge Clapp does, and he will go into senior status at that time. We will assume the President will appoint a judge to replace him who will come on the court as an active judge, so we will keep our 19.

Mr. VISCLOSKY. That position would be authorized, but it would not be mandated?

Judge HAMBLEN. It is up to the President.

Mr. VISCLOSKY. So it is a discretionary appointment?

Judge HAMBLEN. Yes.

Mr. VISCLOSKY. And the President has not sent to the Senate a nomination for that because at this time there is no vacancy?

Judge HAMBLEN. Yes.

DESCRIPTION OF JUDGES

Mr. VISCLOSKY. Could I ask for a general description of the difference in the activities of the special trial judges and active and senior on-call judges, their compensation level and their status? What is the differentiation?

Judge HAMBLEN. The special trial judges serve at the pleasure of the chief judge. We have some really fine people over there, exceptional, talented, very well-talented people, but they handle most of what we call our S cases. There are certain cases that if a taxpayer elects, if he has not much in dispute, he can designate his case to be an S case, and that automatically is referred to a special trial judge. They sit in places like North Dakota and places we generally don't sit in, as well as New York City and Los Angeles, but they handle these S cases sort of like a people's court, like Judge Wapner. That is the way they handle it. They can give more—they can be a little bit more relaxed with the rules of evidence and the procedural requirements in that court, these special trial judges can, than we can in a regular case.

Mr. VISCLOSKY. So the differentiation in terms of cases is the type of case, the case you would differentiate as an S case.

Judge HAMBLEN. Generally. Now we can assign some cases to them. For example, during the tax shelter era, when we had those 84,000 cases on the docket, I would expect at least 50 percent of those cases were shelter cases or more, and we decided a great number of those cases through test cases, which we figured would establish such a body of law that we can now clean up those shelter cases, let the special trial judges help clean those up, show cause orders, and even with the trial of some of the cases where the people won't agree to be bound by the precedent that we have out there, and they do a good job with it.

WORKLOAD

Mr. VISCLOSKY. Judge, in your testimony on page 5, you indicate the workload, and you differentiate the workload relative to regular and small tax cases. Are the small tax cases the S cases?

Judge HAMBLEN. Yes, sir.

NEW JUDGE

Mr. VISCLOSKY. If a judge was not appointed later this year, do you have an estimate as to how much we could save?

Judge HAMBLEN. Well, you have got his salary and his staff, and then there is subsistence that has been enacted by Congress. Let's say if we got a judge from Indiana, the government would pay his moving expenses to Washington because he is required to live here. We would have that, then whatever amount of travel he would have in going out and riding the circuit like the other judges do.

FISCAL YEAR 1983 JUDGES

Mr. VISCLOSKY. Judge, finally, for the record, on page 4 you indicate what the case filings were. How many were open and how many were disposed on an annual basis at the beginning of 1983? Could you again, for the record, indicate to us how many active judges there were for 1983, senior judges on recall, and how many special trial judges there were, again for the record?

Judge HAMBLEN. In 1983. Mr. Visclosky, I don't have that information.

Mr. VISCLOSKY. No, for the record.

Mr. CASAZZA. We can get it.

Judge HAMBLEN. We will furnish that for the record. Could we furnish that to you?

Mr. VISCLOSKY. That is all I am asking.

Judge HAMBLEN. We will be glad to.

[The information follows:]

CASELOAD AND JUDGES

The Court closed 24,204 cases during the fiscal year 1982 and at the end of that fiscal year there were 52,773 pending cases. In fiscal year 1983 there were 19 active judges, 6 senior judges on recall and 14 special trial judges.

Mr. VISCLOSKY. Thank you, Mr. Chairman.

Mr. HOYER. Mr. Darden.

CASES ON APPEAL

Mr. DARDEN. Judge, good to have you here today. Hearing you commend a lawyer awhile ago about his presentation before the court and ruling against him reminds me of our congressional equivalent which is to congratulate a colleague on giving a great speech and vote against him. I guess the same thing is true here.

A couple of questions I want to ask. First of all, I have been out of the tax practice of law a long time. The appeals from the Tax Court go to what?

Judge HAMBLEN. They go to the Circuit Court where individuals and corporations reside. In Tennessee individuals would go to the Sixth Circuit. If you lived out in California you would go to the Ninth Circuit. If you lived in Texas you would go to the Fifth Circuit.

Mr. DARDEN. What percentage of the cases from Tax Court are further appealed to another level?

Judge HAMBLEN. Not too many. We have about a 90 percent winning record up in those courts of appeal. Do you know how many are appealed, Mr. Casazza?

Mr. CASAZZA. I believe we have at any given time several hundred cases on appeal, and our present inventory of pending cases is approximately 43, 44,000, I believe.

ELECTION OF CHIEF JUDGE

Mr. DARDEN. Are you appointed as chief judge or as judge, then you become chief judge due to your term of service?

Judge HAMBLEN. It is an elective process, Mr. Darden. I was elected by my colleagues.

Mr. DARDEN. By your colleagues. Your appointment is to the court, then you are elected by your colleagues.

Judge HAMBLEN. Yes, sir.

Mr. DARDEN. Very well. Well, that is all I have to say. Give Judge Wells my regards.

Judge HAMBLEN. I certainly shall.

Mr. DARDEN. When he was a law student, I was a district attorney in a neighboring circuit. He interned in our office.

Judge HAMBLEN. Well, that is great.

CASE INVENTORY

Mr. HOYER. Judge, in 1992 the number of cases filed increased by 2 percent, and yet you were able to reduce the backlog in your cases by 8 percent. How did you achieve that?

Judge HAMBLEN. Well, a good settlement rate always helps, and then we have gotten help from the Congress on the TEFRA partnership proceedings you enacted up here in 1986. There could be a partnership with 100 partners, and as far as the partnership tax matters are concerned, that is litigated in a single proceeding under the partnership name, and that could cover a myriad of cases below that, and there could be several cases below that. That is one thing that has helped.

Another thing that has helped is the fact that you authorized us to impose sanctions on frivolous petitions and statements and positions that people take, and that has helped to cut down on the tax protestor onslaught that we had for a while. Whether that is going to help when you consider hard economic times, I don't know.

Mr. HOYER. What are the sanctions which were authorized?

Judge HAMBLEN. Well, we can—for one, we can award attorneys fees to.

Mr. HOYER. The responding party?

Judge HAMBLEN. The responding party, and we can also put a penalty on taxpayers for frivolous petitions, up to $25,000. It is like a fine.

ASSIGNMENT OF CASES

Mr. HOYER. You mentioned you have some very large cases. Are these cases specifically assigned by expertise or experience of the judges or are they just assigned in some sort of a rote assignment process?

Judge HAMBLEN. Mr. Chairman, how we do that is generally, we have asked people who filed big cases, and we put out a notice to this effect, when a large case is filed in the court, especially in the foreign source area, we ask them to request assignment of that

case to a judge so that the judge can get on it, get it rolling, get discovery started, and bring it on the way to be culminated. In the assignment process we look around to see who we think can give it the best attention the quickest. We tend to think that all of our judges are pretty equal as far as expertise is concerned, although in some instances you have people who worked maybe in one area like taxation of insurance companies while they have been in practice, other people that had the broad range of experience, former Internal Revenue Service people, Department of Justice people, people who came from small areas like I did, and then we—but we find that whoever takes it, they are about as good on these cases as any other judge.

Mr. HOYER. So essentially your main interest is in who can process it as quickly as possible.

Judge HAMBLEN. Yes, sir.

Mr. HOYER. So that you wouldn't double up on giving one judge two big cases? You would try to spread it out more like workload?

Judge HAMBLEN. Yes, sir.

DISPOSITION OF CASES

Mr. HOYER. In your projections you have not projected an increase in the number of cases disposed of from 1992 to 1993 when historically you have been able to achieve that result. Why is that?

Judge HAMBLEN. Could you state that question again.

Mr. HOYER. Yes. Why have you not projected an increase in the number of cases disposed of from 1992 to 1993 when historically you have shown an increase in the cases disposed of?

Judge HAMBLEN. I will let Mr. Casazza answer that. He put these figures together.

Mr. CASAZZA. During the tax shelter era when we had the approximately 85,000 cases pending, closings of that type of case were very numerous. We are reaching a point now where the shelter case is not around anymore, and I don't anticipate with the filings running approximately 30,000 that there will continue to be a large number of closings.

What we want to do, obviously, is not run in the red and close more than are filed, but I don't think there will be a substantial difference as there has been in prior years.

Mr. HOYER. So you will stay even in terms of inventory. You alluded to this in saying that 90 percent were sustained on appeal, but how many Tax Court decisions were appealed? Do you have that or you can submit it for the record?

Judge HAMBLEN. We could submit that for the record.

Mr. CASAZZA. A couple hundred, Mr. Chairman, but I would rather submit the exact figure.

[The information follows:]

CASES APPEALED

During fiscal year 1992, 324 cases were appealed, of which 7 percent or 18 cases were reversed. For your information, the reversal rate over a 10 year period, 1983 through 1992 was 7 percent

Mr. HOYER. Then if you could provide the disposition of the appeal, which would give us—you say it is about 90 percent sustained?

Judge HAMBLEN. Yes.

Mr. HOYER. Now, do you monitor those statistics by individual judges?

Judge HAMBLEN. Yes, sir, I think we do, don't we? On appeal? Where a case is on appeal, yes, we would do that.

Mr. HOYER. So you would be able to say that judge A, for instance, has had 100 percent sustained, while judge B has had 50 percent overruled or something.

Judge HAMBLEN. I doubt if any of them would be 100 percent.

CASELOAD MANAGEMENT

Mr. HOYER. In your case load management, and your assignment of cases to judges, presumably your objective is, as you have expressed it, to equalize the case loads.

Judge HAMBLEN. Yes, sir.

Mr. HOYER. Do you have a way of measuring that?

Judge HAMBLEN. Yes, sir, because we know just about what each judge has in his inventory, and we know especially if he has got one of these jumbo cases, and the jumbo cases he might have, might not be a 482 case. It could be an estate tax case. I think the Firestone case is—they are close to a billion dollar cases, over $500 million, and that is estate tax. There was a case Judge Williams had that involved Newhouse, the estate of Newhouse. That started out over a billion dollars, so some of these estate tax cases are very large and very difficult to try.

Mr. CASAZZA. Mr. Chairman, 97 percent of our cases are under a million dollars.

Mr. HOYER. Ninety-seven percent?

Judge HAMBLEN. Ninety-seven percent are under a million. That is the inordinate thing. It is these big cases, 2 or 3 percent of our inventory takes up the great bulk of the dollar amount that is involved in the court. It is either estate tax generally or foreign-source income case.

Mr. HOYER. If you assess that number not by taxpayer but by money at stake, however, you would probably get a pretty even distribution? In other words, if you got a case that is a lot of money, you spend a lot of time on it, so your time applied to money would be much more even than your time applied to numbers of cases.

Judge HAMBLEN. Generally that is true, but I will never forget a little case I had out in Iowa that involved a pig farm. It was one of the most complicated cases I ever ran into because he was leasing his herd to his corporation, and the inventory problems and how he paid rent to the corporation is a very challenging case. It took a little while to figure it out, so you can never tell. Some of the small cases can be very tough, but they don't take anywhere near the time that the large cases do.

GOVERNMENT RECOVERY RATE

Mr. HOYER. Do you have statistics, Judge, or Mr. Casazza, on your findings as it relates to the taxpayer versus the IRS? You

have those? Could you submit those for the record? Are they in your presentation in the blue book?

Mr. CASAZZA. They are here. We could submit them in terms of category of closing, whether they settled. If I understand you correctly, you would also like to know the won-lost record.

Mr. HOYER. Yes. Do you know off the top of your head about what that is percentage-wise, service versus the taxpayer?

Mr. CASAZZA. As Chief Judge Hamblen knows, probably 85 percent of the cases closed are closed by virtue of, your term, compromise, what we refer to as settlement. The remaining cases which are tried go to opinion. Very few cases are won entirely by the government or by the taxpayer. The bulk of the cases which go to trial and opinion are resolved under what we refer to as Rule 155 which basically means if there were three issues in the case and the government won one and the taxpayer two, the ultimate decision would reflect some dollars on both sides.

Unfortunately we do not keep statistics with respect to actual dollars. If you had hypothetical issues in a case and issue one involved a thousand dollars and issue two and three involved $50 each, if one side won a thousand-dollar issue and the other side won the two other issues, we would refer to that as split, so to speak, but as a practical matter, the big dollars were in my hypothetical issue one, so it is somewhat misleading when we say to you that 80 percent of the cases were a result of a split decision because so much more would have to go into analyzing it by issue. We just don't do it.

IRS ENFORCEMENT

Mr. HOYER. Judge, you were in private practice for some period of time.

Judge HAMBLEN. Yes.

Mr. HOYER. Based upon your service now on the court, how do you believe IRS is treating the American taxpayer from your perspective on the court?

Judge HAMBLEN. You know, as a tax lawyer, I went down to Lynchburg. I had been a law clerk to Judge Atkins on this court. I never had too many problems with the Internal Revenue Service, and I did it all. I did criminal tax. I did controversy. I did an awful lot of planning and transaction work, and I used to take cases to the Appeals Division and get what I thought were very, very fair results. I think that can still happen.

I have been up here for ten years, almost 11, but as a country lawyer, I used to come up here and ask for rulings on complicated acquisitive or dispositive transactions and get pretty fair treatment, I thought. I think one thing in dealing with anyone is your attitude in going to them, but I never had any real problem with the Internal Revenue Service in practice, but I also did my homework. I think a lot of times people might complain because maybe they haven't done their homework, and maybe that is a problem.

Mr. HOYER. But basically from your review at this point in time—you have closed thousands of cases, most of which are relatively small cases—and your feeling is that IRS is giving fair treatment to the tax-paying public?

Judge HAMBLEN. I think they are trying from what I have seen. I don't think they could settle the number of cases that they do if they didn't do that. Like I say, a great multitude and majority of cases are settled, but I think probably where some of the problems come in with the Internal Revenue Service might be in the collection area from what I understand, but that is just from what I understand. I don't know that. I never even had any problems with collections before when I was in practice. I could usually work out things with them, but again then I practiced in a small town, and I had an awful lot of tax work, but I didn't have many problems with the government. I am sure that some people do. I am sure that some people do, especially in the larger metropolitan areas, but I am just talking from a personal experience, Mr. Chairman. I haven't had that problem.

CONCLUSION

Mr. HOYER. Any other questions? Judge, thank you very much. Mr. Istook had a question he wanted to submit for the record. So we will submit those to you.

[Questions and answers for the record follow:]

UNITED STATES TAX COURT

QUESTIONS FOR THE RECORD FROM CONGRESSMAN ISTOOK

CASELOAD BREAKDOWN

Mr. ISTOOK. Your budget document (page 10) indicates that 97% of the Tax Court's caseload involves cases with less that $1 million at issue, but these cases only affect 7% of the total tax dollars at issue before your court. Can you provide us with a breakdown of these under $1 million cases, into smaller brackets (examples: under $100,000; $100,000 - $250,000, etc.) by number of cases and aggregate dollar totals?

Chief Judge HAMBLEN. The breakdown is as follows:

DOLLAR AMOUNT	CASES	AGGREGATE AMOUNT
$ 0 - 100,000	35,405	$606,980,000
100,000 - 250,000	3,135	493,815,000
250,000 - 500,000	1,395	489,000,000
500,000 - 750,000	555	342,000,000
750,000 - 1,000,000	331	285,000,000

JURISDICTION

Mr. ISTOOK. Also, might it be cost-effective (as well as popular with taxpayers) if the jurisdictions were changed, so that smaller tax disputes (perhaps those with under $100,000 at issue) could be resolved via district court jury trials, even without prior payment of the tax by the taxpayer? Would that also permit the Tax Court to focus on the more complex cases, where more tax revenue is at stake?

Chief Judge HAMBLEN. The processing of the "smaller case", i.e. those involving $100,000 or less, does not constitute an unreasonable drain on the Court's resources. We believe we are able to dispose of these cases promptly. Furthermore, any shift of more cases to what is apparently an overburdened federal court trial system may not be in the best interests of the district courts or the litigants. I believe it preferable to continue the intent of Congress that district courts handle all refund suits.

TUESDAY, FEBRUARY 23, 1993.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

WITNESSES

RAYMOND A. MOSLEY, ACTING DEPUTY ARCHIVIST OF THE UNITED STATES

JAMES C. MEGRONIGLE, ASSISTANT ARCHIVIST FOR MANAGEMENT AND ADMINISTRATION

DAVID M. MILLANE, DIRECTOR, BUDGET AND FINANCE DIVISION

OPENING REMARKS

Mr. HOYER. The Committee will come to order. We will now hear from the National Archives and Records Administration. Mr. Mosley, we appreciate your being with us.

OPENING STATEMENT

Mr. MOSLEY. Thank you, Mr. Chairman. Mr. Chairman, I am pleased to have this opportunity to appear before the committee today. I have with me today Mr. Jim Megronigle, who is the Assistant Archivist for Management and Administration. With your permission I would like to submit Dr. Wilson's formal statement for the record and to summarize my statement.

At this time I would like to make five comments. First, Dr. Wilson, the Archivist of the United States, was, of course, scheduled to appear today but is unable to be here. As you know, he has resigned as Archivist of the United States, effective March 31, 1993. He wanted me to express to the Committee his appreciation and thanks for the support of the Committee for the National Archives during his five-year tenure as Archivist. Without your help, we would not have a new archives facility located in College Park, Maryland, and our accomplishments would not be as far-reaching as they have been.

Second, Mr. Chairman, we would like to extend our congratulations to you in assuming the Chairmanship of this Subcommittee. I assure you that you will have the fullest cooperation of the National Archives and our staff in working with you and your staff in meeting the important budget and financial challenges we are facing.

Third, I would like to address our strategic planning efforts. Beginning last summer, Dr. Wilson initiated strategic planning for the National Archives. Our purpose is to reevaluate the National Archives' mission, operating principles, and priorities in order to concentrate on future directions and initiatives over the long term. Clearly, we are renewing our commitment of service and leadership to the Federal Government and the American people and are

defining our expectations for the National Archives as we prepare for the 21st Century.

The planning process encompasses all the major functions and activities of the agency. Our goal is a model strategic plan with a carefully thought through mission statement and a set of principles and fundamental values for the National Archives as an institution. We intend to integrate these with our budget and personnel planning and allocation mechanisms. I think we have done that, and I would like to provide to you and to the Committee a copy of the plan.

The six areas we intend to emphasize are, first, quality service to the Federal Government and the American people; second, strong leadership in the archival, records and information management disciplines; third, effective management of the programs and resources entrusted to us; fourth, aggressive pursuit of the opportunities and challenges presented to us by changing information technology and electronic record keeping; fifth, broadened preservation of the records of the Federal Government and other historical materials; and, sixth, full and open communications about our priorities, policies, services, and holdings with the American people, the Federal Government, and our staff.

The fourth point, in addition to continuing administration of the Presidential library system, is a 1993 supplemental budget request currently being considered by the Office of Management and Budget for President Bush's Presidential and Vice Presidential records. These funds will be used to move, store and process the papers in preparation for the new Presidential Library in College Station, Texas.

Finally, we are very excited and eager to move to our new facility in College Park, and I have brought along today a couple of recent photographs which show the progress of that building. Thank you for the opportunity to make this brief statement. I will be pleased to respond to your questions.

[The statement and strategic plan follows:]

OPENING STATEMENT

DON W. WILSON
Archivist of the United States

before the
House Committee on Appropriations
Subcommittee on Treasury, Postal Service, and General Government

FY 1993 Current Services Budget Hearings

February 23, 1993

Mr. Chairman and members of the Committee, I am Don Wilson, Archivist of the United States, and I am pleased to have this opportunity to appear before the Committee to discuss the National Archives and Records Administration's (NARA) 1993 Current Services Budget and other major issues regarding our operations. I have with me today Mr. Raymond Mosley, Acting Deputy Archivist of the United States, and Mr. James Megronigle, Assistant Archivist for Management and Administration.

First of all, I would like to extend my congratulations to you in your assuming Chairmanship of this Subcommittee. You will have the fullest cooperation of the National Archives and its staff in working with you and your staff in meeting the challenges of these important budget and financial times we are facing.

Strategic Planning

I would like to report to the Committee at this time on the recent strategic planning process that I have initiated for the National Archives and Records Administration. This process identifies and reevaluates our principles so that we can measure our progress as an institution. We are concentrating on future directions and priorities over the long term, and are renewing our commitment to the Federal Government, the American people, and the expectations for the National Archives in the twenty-first century.

To ensure sufficient scope and support for the planning process, we structured the project to include participation of all the National Archives and Records Administration senior management officials and also formed a working group composed of mid-level staff (both field and Central Office). We relied heavily on the fact findings of this group.

The working group analyzed and prepared recommendations along four areas of responsibility: (1) Agency Mission; (2) Internal NARA Environment; (3) History and Research; and (4) External Environment. The working group also provided input to the top management committee in determining agency mission, critical success factors, goals and objectives. In addition, we have held open forums on strategic planning in the Washington, DC area to incorporate employees into the process.

We also invited a broad range of external constituents and Federal oversight groups to give testimony and make recommendations. We will continue to work with these groups as the plan is implemented.

As highlighted in the plan, the strategic agenda for the National Archives and Records Administration is composed of six critical success factors. They are as follows:

1. Serve the records and information requirements of the Government and the people.
2. Manage the National Archives and Records Administration effectively to ensure mission accomplishment.
3. Aggressively pursue the National Archives mission in all areas being impacted by changing information technology and electronic records.
4. Preserve the records of the Federal government and other historical materials.
5. Provide leadership in the archival, records, and information fields.
6. Communicate information about the National Archives and Records Administration's priorities, policies, services, and holdings.

Our strategic planning process encompasses all the major functions and activities of the agency. The goal is to have a model strategic plan with a mission statement and a set of principles and fundamental values for the National Archives as an institution, then to integrate these with both budget and personnel planning and allocation. I think we have done that and I would now like to give you and the other Members of the Committee a copy of the Plan.

1993 Issues

I will briefly review NARA's primary activities for you and Members of the Committee, go over some of the current major issues facing the institution, and then highlight our responses to those challenges.

We establish policies and procedures for managing U. S. Government records. We assist Federal agencies in documenting their activities, administering records management programs, scheduling records, and retiring noncurrent records to Federal Records Centers. We appraise, accession, arrange, describe, preserve and make available to the public the historically valuable records of the three branches of Government. We manage the Presidential Library system. We assist non-Federal institutions through a grants program administered by the National Historical Publications and Records Commission. We publish the Statues at Large, regulations, Presidential and other public documents through the Federal Register system. Also, NARA reviews for declassification, security classified permanently valuable records and historical material.

Archives II Facility

In 1993, we are continuing to prepare for the beginning of the relocation of many of our functions to the new Archives facility located in College Park, Maryland, which is currently under construction. New 1993 funds are allowing us to prepare for the move of textual records to that facility; relocate the declassification, machine readable, and archival information systems there; continue the first phase of the Master Location Register; begin to staff the new research complex; acquire the ADP administrative support system; and to purchase some of the office furnishings and equipment.

Back in 1988, we contracted for design of this new Archives facility in Maryland. It will enable NARA to consolidate activities in the Washington metropolitan area and meet state-of-the-art environmental specifications required for long-term preservation of a variety of historical records. Site clearing and grading began in November 1989. Construction of the parking garage began in May 1990 and was completed in April 1991. Building design was completed in September 1990 and the contract to construct the new National Archives Building was let on January 11, 1991. Construction is well underway and is scheduled to be completed in the fall of 1993. We begin moving functions into the new facility late in calendar year 1993, a process which will be accomplished over several years. The project is ahead of schedule and is being accomplished within the budget authorized.

National Archives

We are also continuing our very important electronic records research efforts on a number of fronts. We are working with the National Institute of Standards and Technology (NIST) to conduct a study for the transfer of database structures between agencies. We are continuing our major objective to make information about the records available to users. The National Archives is developing a new Archival Information System (AIS) which will serve as the primary information source for researchers for what is available now, and in the future.

Another important effort is the enhancement of government-wide records management programs. NARA is responsible for ensuring that agencies are properly identifying and preserving records designated for eventual transfer to the National Archives. Additional funds are being used for monitoring the implementation of approved schedules, preparing special appraisal studies, and revising and updating the General Records Schedules.

Records Centers

We are completing the establishment of the Silvio O. Conte National Long Term Records Center (as authorized and directed by Public Law 101-509) in Pittsfield, Massachusetts. This Federal facility will be used for specialized storage of Federal agency records by NARA as well as provide public space for a satellite facility of the New England Regional Archives.

Presidential Libraries

NARA also administers the system of Presidential libraries where papers and historical materials of Presidents and their associates are preserved and made available for research. Each year a large number of visitors view significant historical materials displayed in major exhibits in the Presidential libraries. In addition, Presidential materials are administered by NARA pending the establishment of Presidential libraries. A 1993 Supplemental Budget request is currently being considered by the Office of Management and Budget (OMB) for President Bush's Presidential and Vice-Presidential Records. These funds will be used to move, store, and process the papers in preparation for the new Presidential Library in College Station, Texas.

Another issue for this fiscal year is the John F. Kennedy assassination materials project (Public Law 102-526), mandates the expeditious public disclosure of all records concerning the assassination of President Kennedy. The act requires that NARA develop a common document identification format that each agency will use to identify each record in its custody and establish the Kennedy Assassination Records Collection. These requirements have been completed.

All Government agencies must complete a review of all assassination records in their custody to determine if the records can be released. A Review Board will review agency findings and can reverse an agency decision. All assassination records, whether open or closed to the public, will eventually be a part of the collection.

National Historical Publications and Records Commission

The National Historical Publications and Records Commission is an organization under the auspices of NARA which reviews and recommends project grants to Federal and state governments, and private non-profit institutions, chiefly universities and research libraries. It makes plans, estimates, and recommendations for the publication of important historical documents, and works with various public and private institutions in collecting, editing, and publishing papers significant to the history of the United States.

The grants program has been reauthorized through 1993 as a result of Public Law 100-365. Reauthorization is now pending for 1994 and beyond. The 1993 request for the grants program was $4,000,000. The grants portion of our appropriation was approved for $5,000,000.

Summary

In summary, this 1993 current services budget is allowing NARA to continue its many current operations as well as meet critical needs to fund preparations for the relocation of some of its functions to the new Archives facility, to support the electronic records program,

to provide for a new Federal Records Center in Pittsfield, Massachusetts, and to enhance government-wide records management programs.

Thank you for the opportunity to make this statement, Mr. Chairman. I will be pleased to respond to your questions.

The National Archives and Records Administration

Strategic Plan for a Challenging Federal Environment

1993–2001

Washington, DC

February 23, 1993

The National Archives and Records Administration
Strategic Plan for a Challenging Federal Environment
1993–2001

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FOREWORD

The National Archives and Records Administration is the guardian of our Nation's memory. The records in our custody document the origins and evolution of the United States Government and the history of the American people across three centuries. As an archival institution, we bear witness to the past by identifying, preserving, and making available the documentary materials of our Nation. In our role as a central management agency, the National Archives and Records Administration establishes regulatory policies and procedures for records and information management and publishes the laws, Presidential documents, regulations, and other official notices. Our constituents include the Federal Government, a history-minded public, the archival community, and a broad array of professional associations and individuals in the fields of history, political science, law, library and information services, and genealogy.

The National Archives and Records Administration is singular among the world's archives as a unified Federal institution that accessions and preserves materials from all three branches of Government. Because we are so uniquely positioned to provide essential services, the agency has been a fundamental component of the Nation's historical resources from the time it began operations in 1935.

The National Archives was originally established as an independent Federal agency by an act of June 19, 1934. In 1949, the agency was absorbed into the General Services Administration (GSA) and became the National Archives and Records Service (NARS). The National Archives and Records Administration was reestablished as an independent Federal agency by act of Congress on October 19, 1984. Although the agency emerged from GSA control in April 1985, the broad range of responsibilities placed upon the agency were not matched by the resources it was given. In 1981 NARS experienced severe budget cuts and a staff reduction in force. Seven years after independence, the National Archives and Records Administration is just now approaching the pre-1981 staffing levels.

While the National Archives and Records Administration has regained autonomy and resources, the world has not remained the same. Since 1981 we have seen sweeping changes in the way knowledge is organized, communicated, and stored. It is our challenge, as we look toward the fourth century of our history as a nation, to secure the physical and intellectual resources to keep pace with technological changes that have fundamentally altered the ways our Government and Nation organize and disseminate information.

As we begin 1993, the National Archives and Records Administration is poised to take on this challenge. We realize meeting the challenge will mean change for the National Archives. We acknowledge that there is an inherent risk in responding to change. We have traditionally emphasized our role as a national cultural institution, striving to inspire as well as to serve. We must incorporate into our cultural mission the promise that ever more powerful information systems hold for expanding the realm of human knowledge. Today technology is an integral part of our national culture.

Recognizing the need to transform our agency over the long term, we resolved in 1992 to begin a strategic planning process. Our purpose has been to review our progress as an institution, to reexamine directions and priorities for the future, and to renew our commitment to serve the Federal Government and the American people.

In the course of the strategic planning process, we have reexamined the cardinal principles that have traditionally served as our guideposts. We have found that the mission of the agency remains remarkably close to the original expression of our mandate. Our guiding principle then and now is that the National Archives and Records Administration is, above all else, a public service institution, entrusted with providing services required by law. Ensuring access to Government information is not a luxury; it is essential to maintaining a system of Government accountable to the American people. But we have also recognized that our methods must be capable of meeting public expectations for the 21st century.

The strategic planning process promotes disciplined, critical self-analysis. To ensure sufficient scope and support for the planning process, we structured the project to include participation of all the National Archives and Records Administration senior management officials. Then we formed a work group composed of mid-level staff and relied heavily on the findings of this group. And we invited a broad range of external constituents to give advice and make recommendations.

We have listened as our peers in the archival, records, and information communities have urged us to take on a larger role and to offer a broader range of services. We understand these demands, but our desire to accomplish more is tempered by the stark reality of current limitations on our fiscal resources and our uncertain prospects. Consequently, in this document we have committed the agency to devising strategies for concentrating resources in ways that will first maximize the value of the services that we must provide by law and then for supporting other activities that are central to our cultural and educational mission. Significant new initiatives will require additional resources, and if we seek them we will need to call on our constituents and oversight groups to support new sources of funding.

The close of the initial phase of the planning process is an opportune moment, not only to move forward in resolving long-pending issues but also to confront the choices we must make in grappling with newly emerging technologies. Both will bring more cohesion to our efforts through focused, effective, results-oriented management and accountability in reaching measurable long-term goals.

The National Archives and Records Administration Strategic Plan for a Challenging Federal Environment 1993-2001 describes these issues, our priorities, and our initial decisions. The Strategic Agenda (section II. D.) sets forth our vision for the National Archives and Records Administration for the year 2001. The agency is presently developing a detailed work plan for implementing the Strategic Agenda. The work plan will further define the goals and specific

objectives of the Strategic Agenda and will include some ambitious time lines for accomplishing projects. Both the Strategic Agenda and the detailed work plan are predicated on certain assumptions as to the Federal environment and resources.

The document that follows represents the combined efforts of many members of the staff and management of the National Archives and Records Administration. It represents the end of the first phase of the institutionalization of the strategic management process in the agency. The plan's true test will come in its implementation and refinement in the months and years ahead.

The National Archives and Records Administration Strategic Plan for a Challenging Federal Environment 1993–2001

I. Executive Summary

Confronted by the challenges of information technology in an era of declining resources, the Archivist of the United States instituted a strategic planning process in 1992. In the course of the process, we have reevaluated the cardinal principles that have traditionally served as our guideposts. Our purpose has been to measure our progress as an institution, to reexamine directions and priorities for the future, and to renew our commitment to serve the Federal Government and the American people. The strategic planning process promotes disciplined, critical self-analysis. In the resulting strategic plan, our guiding principle remains public service enhanced by the acknowledgment that our methods must be capable of meeting public expectations in the 21st century.

Mission: The National Archives and Records Administration serves the American people and their Government by safeguarding their interests in Federal records and other documentary materials, by promoting effectiveness and efficiency in the administration of those materials, and by advancing the knowledge of the history of the Nation.

The National Archives and Records Administration establishes policies and procedures for managing U.S. Government records. We assist Federal agencies in documenting their activities, administering records management programs, scheduling records, and retiring noncurrent records to Federal records centers. We appraise, accession, arrange, describe, preserve, and make available to the public the historically valuable records of the three branches of Government. We manage the Presidential Libraries system. We assist non-Federal institutions through a grants program administered by the National Historical Publications and Records Commission. We publish the *Statutes at Large*, regulations, and Presidential and other public documents through the *Federal Register* system.

The National Archives and Records Administration's strategic agenda is composed of six critical success factors. Our challenge is to succeed in all six of these areas.

We must:

1. **Serve the records and information requirements of the Government and the people.** We will provide for timely availability of records in our custody; provide guidance and assistance to Federal agencies to ensure adequate and proper documentation of agency policies, decisions, and transactions and to ensure timely and proper disposition of records; manage a coordinated, nationwide system of exhibits, educational programs, publications, and other activities that inform the American people and the Federal Government of their documentary heritage; and establish an ongoing means to identify the public's and the Federal Government's expectations of our services and to evaluate our effectiveness in meeting those expectations.

2. **Manage the National Archives and Records Administration effectively to ensure mission accomplishment.** We will develop, establish, and institutionalize the strategic management process; complete the move to our new facility (Archives II) with a minimum disruption to services and other activities; maintain and develop a diverse staff of the highest quality; manage the agency as a nationwide system; and manage space and facility needs on an integrated basis.

3. **Aggressively pursue the National Archives and Records Administration's mission in all areas being impacted by changing information technology and electronic records.** We will develop and implement a formal strategy to address the complex and dynamic issues presented by the use of changing information technology in the Government, and integrate technology into our management and service delivery systems.

4. **Preserve the records of the Federal Government and other historical materials.** We will revise and expand our long-range preservation plans into an integrated, comprehensive, agencywide plan; provide guidance to agencies in preserving records throughout their life cycle; and provide leadership in preservation to organizations outside the Federal sector.

5. **Provide leadership in the archival, records, and information fields.** We will emphasize our role as a national leader in archives and records management; develop mutually beneficial partnerships with Federal agencies and other institutions and organizations with which we share common records and information interests; and operate and promote Archives II as a model archival facility.

6. **Communicate information about the National Archives and Records Administration's priorities, policies, services, and holdings.** We will improve internal communication; publicize our mission, programs, holdings, and services through education and outreach; and establish and maintain an open dialogue with our constituents.

The National Archives and Records Administration Strategic Plan for a Challenging Federal Environment 1993–2001

A. Background

Anyone who has cleaned out a family attic knows the difficulty of deciding what is worth keeping and what can be discarded. Imagine the task of sifting through the accumulated documents of the Nation's official life--growing by millions of pieces each year--and determining what to retain and what to destroy.

This function is performed by the National Archives and Records Administration, a Federal institution that selects and preserves the small portion--less than 2%--of the vast mountain of records created annually by the Federal Government that has enduring value. But this is only part of the mission of the National Archives. A greater part includes advancing the history of the Nation through the dissemination of information by publication, exhibit, use, and reproduction of records and by promotion of economy and efficiency in the administration of Federal records.

In a free society the people have a right to know. This concept, a basic principle of the archival profession, was born in the midst of the French Revolution with the creation of the first truly national archives. A complete archives, made open and accessible to the fullest extent possible, is a hallmark of a free society.

Thomas Jefferson understood the importance of preserving a full and accurate record of the workings of the government. As the official keeper of the record, the first Secretary of State warned, "Time and accident are committing daily havoc on the originals deposited in our public offices." This warning went unheeded, however, until tentative plans for an archives developed following a number of damaging fires in Federal buildings before World War I. The outbreak of the war delayed plans, and it was not until the Great Depression that a group of historians and others saw the dream of a national archives for the United States realized.

Although not created until 1934, the National Archives and Records Administration holds records dating back to 1775. In these records the entire sweep of our Nation's past is captured: from slave ship manifests to the Emancipation Proclamation; from the richly bound Louisiana Purchase Treaty that doubled the size of the new nation to individual homestead files dispersing the land to the families who settled the vast continent; from the maps of the Lewis and Clark Expedition to World War II aerial photographs; and from Matthew Brady's glass plate negatives of slain Civil War soldiers to color video recordings from the verdant jungles of Vietnam. These are the Nation's archives.

Although the National Archives keeps only a small portion of Federal records, these add up to a formidable number, diverse in form as well as in content. To date, the National Archives has taken custody of over 4 billion textual pages, 6 million still photographs, 100 million feet of motion picture film, 9 million aerial photographs, and 5,000 datasets. These records are preserved because they are important to the workings of the Government. They document how the policies that shaped our great Nation were formulated. This gives them long-term research value not only to the Government but also to historians, journalists, lawyers, and others. The lives of private citizens are also documented in the records of the population censuses, ship passenger lists, and military service and pension files.

When the National Archives was established in 1934, it had a building and little else. Most important to the new agency was its professional staff. Carefully recruited and trained, it faced in those early years the mammoth task of devising policies and operating procedures for the new institution and of collecting and inventorying a 160- year backlog of records, many of them packed helter-skelter into scattered attics and basements. In less than a generation, the National Archives became a model for preserving the permanently valuable records of the Nation. This achievement is the more remarkable given the undreamed-of growth of the Federal Government and the proliferation of paperwork during this period.

The New Deal, followed closely by World War II, caused an explosion in the size and work-load of the Federal Government. Along with this growth in the volume of records came new responsibilities. Responsibility for publishing the *Federal Register*, a daily record of Federal proclamations, orders, and regulations, was appropriately given to the Nation's recordkeeper, the National Archives. The concept for the Presidential Library system, which holds the documentation of the administrations of the Government's Chief Executives, was established when the Roosevelt Library came under the National Archive's control in 1940. The concept of the life cycle of records was developed and implemented in an aggressive records management program and the creation of Federal records centers. These programs were designed to provide guidance and assistance to agencies in effective management of their records and to provide inexpensive storage for their records before to transfer to the archives or before disposal. The National Historical Publications Commission was given authority to distribute grants, first for publications in 1964 and then for significant records projects in 1974, along with a change in name to the National Historical Publications and Records Commission.

The National Archives and Records Administration has grown over time. Each President since Hoover has a Library/Museum or a Presidential Project, including the newest for George Bush in College Station, TX. There are now 12 regional archives and 14 federal records centers, with another center and microfilm research room under construction in Pittsfield, MA. Grants totaling nearly 5 million dollars are distributed annually to State, local, and private institutions to support historical publication or records projects and educational endeavors. Approximately one million visitors tour the main exhibit hall in the National Archives Building each year. We receive nearly one million letters, calls, and researcher visits in the regional archives and the National Archives in Washington, DC. Three million requests for information about military or

civilian personnel reach the National Personnel Records Centers in St. Louis. Records administrators from over 100 Federal agencies participate in training courses to improve their recordkeeping practices and efficiency. Hundreds of genealogists, educators, archivists, and manuscript curators participate in institutes, seminars, and workshops.

As we move toward the 21st century, we are confronted with a number of challenges. The world of records, information, and archival management is changing. Just as World War II's explosive growth in Government records resulted in an expanded role for the archivist in the area of records management, so the changes in information technology require a broader perspective if we are to ensure that the Nation's archives remains complete. Electronic mail, optical disk storage, CD ROM, and the plethora of new records creation, storage techniques, and media present challenges. But these are challenges that the National Archives and Records Administration can meet.

Moreover, these are challenges that we want to meet. Ever mindful of our fundamental responsibilities for service and preservation, we want to move ahead, to confront these issues, to provide leadership, and to manage for change. The National Archives and Records Administration is uniquely positioned to address these issues. We are the only Federal agency whose sole concern is with Government records and other documentary materials. We serve all three branches of the Government. Our broad mandate encompasses identifying, preserving, and making available those records of the Federal Government that have permanent interest. It also includes determining which records are not of permanent value and ensuring that they are retained for appropriate time periods and then disposed of efficiently. We further the understanding of American history by providing grants for the preservation or publication of other historical materials and by bringing our holdings and expertise to the people through exhibits and educational programs. This work gives our staff a unique knowledge, experience, and insight about how the Government operates, how its documentation has been and can be used, and how to explain the values and benefits of both Government records and records programs. Our perspective gives us an opportunity to see beyond our functional mission to a greater goal of service to the American people and their Government.

History, accountability, and efficiency are all interests that are safeguarded by the National Archives and Records Administration. Our new mission statement reflects this.

B. Mission and Fundamental Values

Mission Statement

The National Archives and Records Administration serves the American people and their Government by safeguarding their interests in Federal records and other documentary materials, by promoting effectiveness and efficiency in the administration of those materials, and by advancing the knowledge of the history of the Nation.

Statement of Fundamental Values

The central values of an organization are the unspoken principles upon which much of its decisionmaking and larger corporate culture are based. The National Archives and Records Administration holds values that are founded in tradition and that reflect our concern for accomplishing our unique mission.

Values

We value our mission of service to the American people and their Government.

We value our role as the keeper of our national documentary heritage and our responsibility to posterity to make informed and unbiased decisions in the selection of valuable historical records, regardless of age or physical format.

We value the right of the American people to a well-documented national memory and the trust placed in us by them and their Federal Government as the judges of the historical significance of records.

We value the records in our care and the information they contain and respect the right of a free people to have access to that information.

We value the nationwide scope of our program because it provides the opportunity to reach across the country with a variety of programs that enrich and enlighten.

We value the work of the Federal Government and the other Federal entities that are the authors of the history.

We value effective management as a means of accomplishing our mission for the benefit of all, and we recognize the importance of communication as a tool in effective management.

We value our coworkers and colleagues and their contributions to the success of the mission of the agency and to the professions of archives administration and records and information management; they provide leadership in these related professions.

We value the expertise and advice of our non-Federal professional colleagues and the collaboration and contributions of other institutions to the pursuit of our shared goals.

C. Planning Assumptions

The development of this plan and its approaches to carrying forward the mission and fundamental values of the agency have been based upon a number of specific planning assumptions about the current environment, both internal and external, and the challenges and expectations facing the National Archives and Records Administration.

Workload and Resources

The workload of the National Archives and Records Administration will continue to grow as agency and public expectations for service increase and as the volume and complexity of Government records and information continue to grow. Resource allocation could be a more significant problem in the next few years than it has been in the past few years because of the pressure to reduce the Federal deficit. Space availability and personnel ceilings are likely to present more of a challenge than dollar limitations.

External Relationships

Our external constituents should have a significant influence on our operations. We are increasingly involved in sensitive records issues and litigation and need to express publicly our positions on complex records and information issues. We will be expected by Congress, the Office of Management and Budget, and the General Accounting Office to improve our planning, make hard choices prioritizing our work, and justify the benefits of our activities. There will be pressure to recruit and develop a staff at all levels that is more diverse both in terms of ethnic and cultural backgrounds and in terms of professional and technical skills related to emerging records and information technologies.

Service Expectations/Resource Restrictions

Public and Government expectations for service from the National Archives and Records Administration will continue to grow, generally faster than resources for providing those services; for example, the increasing demand for immediate availability of records for use in litigation or Government investigations. Both Federal agencies and the public will expect--more likely demand--electronic data access, both incoming and outgoing. Some elements of the public will see electronically delivered information as an intrinsic right, but the Government may not have the resources to provide it without charging fees.

Preservation

Preservation of information in the records and other documentary materials within our sphere of responsibility, and in many cases preservation of the records or documentary materials themselves, will remain the primary concern of the National Archives and Records Administration. We must work with other information agencies to develop a consensus among policy-makers that much Government documentation is part of the Nation's informational infrastructure and that it is a responsibility of Government, not just the National Archives, to protect, preserve, and provide access to that documentation.

We will find it necessary to review and adapt the records-appraisal process to deal with multiple, rather than single, choices for selecting the media and formats appropriate for retaining and preserving Government records and information. It will also be necessary to reconsider approaches to scheduling and appraisal and the concept of what is a "record" in light of recent legislation and litigation. We will also have to consider whether it remains feasible for the National Archives to attempt to be the eventual depository for all permanent data.

Technology and Information

Technologies related to records creation, maintenance, disposition, and use will continue to change rapidly. Government programs will continue to be automated in ways that increase the production of paper but reduce the utility of the paper record. The creation of new records systems will result in long-term maintenance and preservation costs for which no resources are currently planned or budgeted. The National Archives and Records Administration will continue to be uniquely positioned to provide leadership in this area. Changing information technologies will also provide opportunities for the development of new approaches for preservation of our current paper and electronic records and for improved, more efficient, and more effective services to the public, to agencies, and internally.

D. Strategic Agenda

In this strategic plan, our guiding principle remains public service enhanced by the acknowledgment that our methods must be capable of meeting public expectations in the 21st century. The National Archives and Records Administration has analyzed its internal and external environments, fundamental values, and planning assumptions and has developed a mission statement of service. We have identified six critical areas that we must address in order to achieve our mission. These critical success factors form the basis of our strategic agenda. We have defined our goals in each of these areas and have set specific, measurable objectives. We are resolved to meet these objectives and move forward to meet the challenges we face.

Critical Success Factors:

1. Serve the records and information requirements of the Government and the people.

As is any archives, the National Archives is both costly and priceless. Serving a Nation's documentary heritage is a multifaceted mission. It includes ensuring that adequate documentation is created, properly identified, transferred to appropriate storage, and made available in a timely fashion. This is an expensive, labor-intensive, but essential undertaking. The result of an active archival program is a well-documented national memory available to a history-minded public and to other Federal agencies. An accessible national archives is the hallmark of a free society. It provides the means for Government accountability and historical understanding.

Services we currently provide

We currently provide a variety of services to our users. We provide information about the institution, information about the records and historical materials, information from the records, information about preservation and technical matters, and information about regulation and policy. We provide inexpensive records storage for noncurrent records. Through the National Historical Publications and Records Commission, we provide grant funding for worthwhile archival and records management projects. We also provide publications, exhibits, training courses, and reproductions, and we operate facilities for the storage and use of permanently valuable records and historical materials.

We must improve and expand our services. The National Archives and Records Administration must by the year 2000 have a model integrated system of information dissemination supported by effective management of strong programs of preservation and outreach, and by technology. The ultimate mission of an archives in a democratic society is to make the information available to users. All other functions support this ultimate mission.

GOALS

Provide timely availability of records

We must move ahead with technology and improved services to ensure timely availability of the records and information in the National Archives' sphere. We will improve the intellectual and physical control of all accessioned records. Efforts at automating basic description, begun in recent years to prepare for the relocation to our new facility, will be expanded and continued. We will survey and appraise unscheduled records in our centers. We will evaluate our current services to ensure that we are meeting measurable standards of timeliness in our responses. We will ensure that the accessioning of permanently valuable records is done in a more timely fashion to speed their availability to users and to fill gaps in our records holdings nationwide.

Provide guidance and assistance

The National Archives and Records Administration must provide guidance and assistance to Federal agencies to ensure adequate and proper documentation of agency policies, decisions, and transactions, and to ensure timely and proper disposition of records. To achieve this, we will revise the long-range plan for a Governmentwide program for the scheduling of agency records with specific target dates to ensure measurable success. We will institute a program to ensure that all Federal agencies are aware of comprehensive recordkeeping requirements and will monitor their implementation. We will develop and initiate new strategies to increase the effectiveness of records and information managers through regulation, education, and evaluation.

Inform the American people and the Government

We must manage a coordinated, nationwide system of exhibits, educational programs, publications, and other activities that inform the American people and the Federal Government about our documentary heritage. We will accomplish this by establishing a mechanism for nationwide sharing of plans and resources for public and agency outreach by all units involved in these functions. We will establish an automated, centralized information source to facilitate the sharing of public and agency outreach activities.

Assess expectations and evaluate progress

We must establish an ongoing means to determine what the public and the Federal Government expect of the National Archives and Records Administration in the area of records and information and to evaluate our effectiveness in meeting those expectations. We will begin by evaluating the General Accounting Office's report on services at the National Archives and Records Administration. We will develop an implementation plan in response to the report. The Management Council, composed of the heads of the functional areas in the agency, will develop mechanisms to accomplish ongoing assessment, including consulting with the National Archives Advisory Council and developing specific strategies for the various program areas.

2. Manage the National Archives and Records Administration effectively to ensure mission accomplishment.

Management Functions

Overall direction for the National Archives and Records Administration lies with the Archivist of the United States and his immediate staff. Each of the program activities has specific management responsibilities. The agency establishes policies and procedures for managing U.S. Government records. We assist Federal agencies in documenting their activities, administering records management programs, scheduling records, and retiring noncurrent records to Federal records centers. We appraise, accession, arrange, describe, preserve, and make available to the public the historically valuable records of the three branches of Government. We manage the Presidential Libraries system. We assist non-Federal institutions through a grants program administered by the National Historical Publications and Records Commission. We publish the *Statutes at Large*, regulations, and Presidential and other public documents through the Federal Register system.

GOALS

We must look beyond this functional approach and fulfill a mission of broader scope and commitment to service. Ours is a unique position in the Federal Government. We alone are primarily concerned with the Nation's documentary heritage. We alone service the records of all three branches of the Government. Our perspective gives us an opportunity to see beyond our functional mission to a greater goal of service to the American people and their Government.

Develop, establish, and institutionalize strategic management

To accomplish our mission of service, in an era of declining resources, we must manage more effectively. We must develop, establish, and institutionalize a strategic management process in the National Archives and Records Administration, including a complete review of the organizational structure to ensure that it is designed to efficiently and ecomonically accomplish the agency's mission. We will establish procedures for initiating continuous implementation of the plan. This will include the creation of the Archivist's Management Council as the ongoing body responsible for implementation of the plan and assignment of responsibilities for accomplishing plan objectives. It will include incorporating the strategic plan into all agency planning processes and the establishment of an annual strategic review process.

Move to Archives II with a minimum of disruption to services

The National Archives and Records Administration must complete the move of staff and records to Archives II with a minimum disruption to services and other agency activities. We will implement the existing plans that are designed to move the national archives safely without damage or loss, procure the necessary supplies to ensure a smooth transition, and keep our users informed of any disruptions to normal service.

Maintain and develop a diverse staff of the highest quality

The National Archives and Records Administration must maintain and develop a diverse staff of the highest quality to ensure accomplishment of the mission of the agency. We will explore new methods and opportunities to include staff participation in carrying out the mission of the agency. We will develop and implement a plan for recruitment, management development, and skills enhancement required to increase workforce diversity at all levels. We will enhance and expand recognition of employees who provide outstanding service to the public and the Government.

Manage the agency as a nationwide system

We must manage this agency strategically as an integrated nationwide system. We will develop a uniform, meaningful system of workload performance measures for the National Archives and Records Administration. We will build into appraisal, accessioning, and disposal plans and operations a requirement for estimating and accounting for the resource implications of all records disposition actions and will use that data to determine future space and resource requirements. Finally, in times of declining resources, we will consider alternative sources of funding for some of our activities.

Integrated management of space and facilities

We must manage National Archives and Records Administration space and facility needs on an integrated basis. We will begin by implementing as appropriate the recommendations in two recently completed studies on space for the National Archives regions and the Federal records centers and by addressing our post-move needs in the Washington, DC, area. We will also reevaluate our position on authorizing affiliated archives for the storage of records that are legally part of the National Archives of the United States.

3. Aggressively pursue the National Archives and Records Administration's mission in all areas being impacted by changing information technology and electronic records.

Background

The serious issue of computerized records in the Federal Government and its implications for the National Archives have been the subject of study and publication for a number of years. Two publications--*Taking A Byte Out of History: The Archival Preservation of Federal Computer Records*, a report issued in 1990 by the House of Representatives Committee on Government Operations, and a study conducted a year earlier for the National Archives and Records Administration by the National Academy of Public Administrator--identified serious problems in the preservation of electronic records and called for immediate, positive action.

Actions taken

We responded by issuing *A National Archives Strategy for the Development and Implementation of Standards for the Creation, Transfer, Access and Long-Term Storage of Electronic Records of the Federal Government* (National Archives

long-range plan for permanently valuable electronic records. A second study conducted for us by the National Association of Public Administrators surveyed Federal agencies and, using expert panels of advisors, identified the most significant electronic records series in the Federal Government. This became the core of our action plan. Appraisal and transfer of the permanently valuable systems identified by the expert panels along with an aggressive accessioning program for previously appraised record systems have been our program focus for the past two years.

These actions are important but they only begin to address the serious problems of electronic mail, optical disk, and other technologies being applied daily by various agencies. They do not begin to address the challenges we face in the area of scientific and technical data appraisal and preservation.

GOALS

Develop a strategy and a plan to address changing information technology

The National Archives and Records Administration must, by 1994, develop a formal strategy to address the complex and dynamic issues related to the use of changing information technology by other Federal agencies. We will establish an agencywide task force to identify strategies needed in the areas of records management, records storage, preservation, delivery of records and information, and outreach in the area of electronic records. We will devise a plan for the accomplishment of our mission in these areas by 1994 and will fully implement the plan by 1997.

But our concerns over the changing technology are not limited to the impact on our archival program. The National Archives and Records Administration is also a records creator and a service provider. A recent report issued by the Government Operations Committee of the House of Representatives: *Federal Register: Better Electronic Technology Planning Could Improve Production and Dissemination* called upon the Archivist to increase use of technology to improve the production and delivery of this important Government information. Through concerted efforts at coordination with the Government Printing Office as well as specific direction form the Administrative Committee of the Federal Register, we are developing long-range strategies for electronic submission and dissemination. We must look not only at how other agencies use electronic formats, which will impact on us, but also to the use of technology in our internal operation and service delivery systems.

Integrate technology into internal management and service delivery

We must integrate information technology into our administration, management, and service delivery systems. We will establish a task force to identify the records and other information currently in paper for conversion to electronic format for research and dissemination. We will establish an agencywide automated data processing management group to ensure that acquisition and use of information technology are driven by mission requirements. We will design and implement

programs that enable automated life-cycle tracking and descriptive systems to interface. We will determine where employees do not have adequate access to systems, equipment, or software to perform their duties efficiently and effectively and will develop a plan to provide access. To further ensure that staff can use technology, we will include provisions for adequate training in information technology in the National Archives and Records Administration's training plan.

4. Preserve the records of the Federal Government and other historical materials

Preservation as a concept rather than a function

Preservation is critical to the success of the National Archives and Records Administration. It is the foundation of our mandated activities. Preservation is more than an archival function, it is a basic concept. We strive to preserve a full and accurate record through all of our activities. We assist agencies in creating and maintaining good records systems to ensure that the activities of the Federal Government are adequately documented. We store noncurrent records in records centers to facilitate the timely transfer of the permanent records and to ensure that records without enduring value are disposed of in a timely manner. We serve as the repository for originals of all Federal regulations, Executive Orders, and Presidential Proclamations, and we receive the originals of laws passed by the Congress of the United States and constitutional amendments approved by the States. We accession records into the Nation's archives and perform physical conservation on the records. We provide guidance, education, and funding for preservation and publications in non-Federal institutions. In all these activities we safeguard the Nation's memory.

Preservation is a worthwhile Endeavor

We preserve information

Dissemination is an aspect of preservation

There are three principles inherent in a broad interpretation of preservation. First is the concept that the collection and preservation of Federal documents is a worthwhile endeavor. The second and more expansive concept is that information is worthy of preservation without regard to its physical form. Implied here is a third concept that distribution to the widest possible audience is a logical extension of preservation. It is from this broader concept of preservation that the archival program for the 21st century will grow. We will continue to uphold our sacred trust of conserving traditional records through systematic, careful, and proper handling, treatment, and storage, but we must focus on new Federal information formats and look toward broader accessibility of that information.

GOALS

Revise and expand long range preservation plan

To ensure the preservation of the records of the Federal Government and other historical materials, the National Archives and Records Administration must revise and expand the existing long-range preservation plan. We will create an integrated, agencywide plan that addresses all records regardless of physical format. This plan will identify the highest preservation priorities throughout the agency on the basis of value, use, and condition. These priorities will address facilities, standards, education, and research as well as direct actions taken on records. The plan will include strategies relating to the use of emerging technologies. The long-range preservation plan must be founded in the realities of the budget process and will include specific objectives in order to demonstrate measurable progress.

Preserve during all phases of the life-cycle

The National Archives and Records Administration must expand preservation efforts in other Federal agencies to ensure that the records are maintained properly throughout their life cycle. We will issue written guidance relating to preservation of all records media. We will establish a preservation education program for agencies, including courses, guidance, publications, and evaluations. We will develop a coordinated disaster prevention and recovery training program for Federal recordkeepers. We will identify partnerships and other resources for the preservation of records still in agency custody.

Lead in Preservation

The National Archives and Records Administration must provide leadership in the preservation of archival materials. We will disseminate information through technical literature and educational activities. We will participate and lead in the formulation of national and international standards. We will support and coordinate mutually beneficial efforts with other archival repositories, especially through the National Historical Publications and Records Commission.

5. Provide leadership in the archival, records, and information fields.

Background

At the time of its creation in 1934, the National Archives and archival management in the United States were virtually synonymous. National Archives staff translated existing works on the principles and practices of Archives from the original European texts. Other employees went on to write new texts expanding on concepts developed by the new agency in processing the valuable records of the Federal Government. The creation of a professional association, the Society of American Archivists, was a direct result of the work of the first Archivist of the United States, R.D.W. Connor. His successor, Solon Buck, was the acknowledged premier educator in the field of archives. Buck was also largely responsible for the creation of Federal records management in response to the explosion in the size and workload of the Federal Government in World War II. Wayne C. Grover, the third Archivist of the United States, oversaw the expansion of our responsibilities

for records and information management. His administration also created the Federal Records Center system. Responsibility for our national historical heritage beyond the confines of Federal records took on new meaning when the National Historical Publications Commission was given authority to distribute grants, first for publications in 1964 and then for significant records projects in 1974, with a change in name to the National Historical Publications and Records Commission. These are all concepts that were revolutionary in their times, and the National Archives and Records Administration was an acknowledged leader in all.

GOALS

Lead in archives, records, and information management

The National Archives and Records Administration must be a national leader in archives and records management, especially in policy development on adequacy of documentation and access-related issues. We will draft legislation that will give the Archivist of the United States the authority to issue binding regulations on the interpretation of the definition of the term "records." We will actively support reauthorization of the National Historical Publications and Records Commission. The Commission has just approved a strategic plan for grant funding directions, *To Protect A Priceless Legacy: The Preservation and Use of America's Historical Records*. By supporting the plan we can assist in the assurance of adequacy of documentation on a national scale. We will join with the Information Security Oversight Office to aggressively advocate a new Executive Order on national security information to include an automatic declassification date and mandatory development of declassification guidelines by all executive agencies with classification authority. We will establish a project in cooperation with the Advisory Committee on the Records of Congress to address the issue of adequacy of documentation of the legislative process.

Develop interagency strategic partnerships

The National Archives and Records Administration must develop mutually beneficial strategic partnerships with the many Federal agencies with which we share common records and information interests. With these agencies we will strive to establish new partnerships in the areas of information management and Federal Government access policy. We will continue and expand existing partnerships with other agencies that deal with aspects of information management that are crucial to our mission. We will continue and coordinate existing working partnerships with the Library of Congress to work toward mutually beneficial goals and to avoid duplication of effort.

Develop partnerships with other institutions

We must establish mutually beneficial partnerships with other institutions with similar goals and interests. We will support the objectives presented in the National Historical Publications and Records Commission's strategic plan that envision a national documentary program achieved through close associations with other institutions and organizations. We will identify the myriad regional, State, national, and international institutions and organizations with which the National Archives and Records Administration shares common interests. We will evaluate previous and existing partnerships and collaborative efforts that we have undertaken with outside organizations. We will continue to engage in joint sponsorship of conventions, exhibits, conferences, workshops, and other special events.

Operate and promote Archives II as a model

As a leader in the profession of archival management, the National Archives and Records Administration must operate and promote Archives II as a model archival facility. We have designed a state-of-the-art archival facility. We will now share with others the lessons that we have learned. We will publish and disseminate information to the archival and museum communities on the technologies, procedures, and testing used in the design, planning, and construction of Archives II. Internally, we will establish procedures that ensure coordinated information and services between Archives I and II.

6. Communicate information about the National Archives and Records Administration's priorities, policies, services, and holdings.

Communication is a tool in the accomplishment of our mission. Through open internal communication, our colleagues and coworkers can make significant contributions to the success of the agency and to the archival profession. Through open external communication, we can benefit from the expertise and advice of our users and our colleagues in the professions of archives administration and records and information management. Through effective communication we can educate and inform the American people and their Government. These are all forms of communication that will permit us to accomplish our mission of service.

GOALS

Improve internal communication

The National Archives and Records Administration must improve internal communication. Any duplication of services, inconsistent application of policy, and redundancy of effort will further drain already scarce agency resources. Only by breaking down internal barriers and refocusing on the basic mission of service can the agency meet the challenges of the future. Toward that end the Archivist's Management Council will immediately address the issue of internal communication. The council is charged with responsibility for coordinating and expanding

communication within the agency. As a first step, we will review and evaluate the internal information distribution system with the objective of improving the system.

Publicize the mission, program, holdings, and services

The National Archives and Records Administration must publicize the mission, programs, holdings, and services provided to the Federal Government and the public through a coordinated program of education and outreach. To publicize our holdings, we will implement the Archival Information System, an online, automated descriptive database containing information about the Federal records in our custody. More than a descriptive database, the Archival Information System will provide researchers with online, dial-in access to descriptive information about the records nationwide. We will also promote an active systemwide public information program that targets nationwide audiences in the public and the Government.

Dialogue with constituents

If we are to succeed in our mission of service, we must be able to evaluate our progress. The National Archives and Records Administration must establish and maintain an effective and open dialogue with our constituents. We believe that this is so critical to our success that we will develop an agencywide, coordinated, formal communications policy. We will expand and improve communication with our external constituents. We will evaluate the relationship of other advisory groups to the National Archives Advisory Council. To facilitate internal and external communication, we will provide to our staffs in the Washington, DC, area and in the field direct access to existing commerical and Government online network systems that share information of interest to archivists and records managers. We will expand our reporting to the Congress on the overall benefits of the services we provide to Federal agencies.

ARCHIVES II FACILITY

Mr. HOYER. Thank you very much, Mr. Mosley, and thank you for presenting this report on the National Archives and Records Administration Strategic Plan, also for the pictures. I have been out to College Park relatively recently and driven out on the site. I look forward to going through the facility when that is possible. I don't know how close we are to that. When do we expect it to open?

Mr. MOSLEY. We are close to having the building finished now, and we expect to begin moving staff out in substantial numbers this fall. This summer it should be completed. We will start moving them out this fall.

Mr. HOYER. Everybody that has visited the site and has talked to me has been very, very impressed with it. I think it is going to be a very impressive facility, not only for College Park, but for Archives, for our country, and for the employees who will be working there. How many employees are we going to have there?

Mr. MEGRONIGLE. Six hundred.

Mr. HOYER. Six hundred. Is that less—900 was the number I was thinking of.

Mr. MEGRONIGLE. We have consistently talked about starting with 600 and then ultimately expect to expand over the years to about 800, but we will also employ several contracts to operate the building, so the total building population will probably be close to 1,000

Mr. HOYER. What do we estimate will be our user population on a daily basis?

Mr. MEGRONIGLE. About 150 researchers a day is what we are estimating now.

Mr. HOYER. Somebody had mentioned to me a far higher number, and I thought that was inaccurate.

Mr. MEGRONIGLE. It is probably going to grow over time, but initially we had estimated 150 a day.

Mr. HOYER. Well, I know the University of Maryland is very excited about the development of this facility, as am I. I appreciate what the Archives is doing to make this project run as well as it has in terms of construction, dealing with the community and the contractor.

1993 BUSH RECORDS SUPPLEMENTAL

Your statement indicates you are working on a fiscal year 1993 supplemental request for former President Bush's Presidential and Vice Presidential records. What do you anticipate will be the amount you will need for this?

Mr. MOSLEY. Mr. Chairman, unfortunately we are not able to provide numbers to you today on instruction from OMB. I can say that up to this point we have spent about a million and a half dollars in actually moving these materials down to College Station, Texas, but we will be presenting that supplemental request soon, I understand.

AGREEMENT ON PRESIDENTIAL MATERIALS

Mr. HOYER. I want to get into some broader questions. Obviously some controversy has arisen with reference to Mr. Wilson's new job and his actions taken just prior to President Bush leaving office. Are you conversant enough with the agreement to summarize it for us? Would you do that, please?

Mr. MOSLEY. Yes, I will. The agreement is signed by four parties: President Bush, the Executive Secretary of the National Security Council, and the Director of the Office of Administration in the White House, and the Archivist of the United States. The agreement arose out of a need to provide for orderly and systematic access to computer materials that were the subject of a court order of January 6, 1993. That court order requires the Archivist and the two heads of the agencies, the National Security Council and the Office of Administration, to preserve Federal records on back-up E mail computer tapes. The government, Mr. Chairman, has contended that these back-up tapes were not designed as a record keeping system, that they were designed to provide for security in the event of failure of the E mail systems that they were operating on.

Also on the material with Federal records are Presidential materials. The agreement applies to both Presidential materials and to Federal materials. Since it was the contention of the government that these materials were not records, the agreement does not refer to them as records. It refers to them as materials and information. It was the feeling of myself and the attorneys who participated with me, as we crafted this agreement, that it was important that the Archivist balance the respective needs of the Presidential materials and the Federal materials that were found on these computer tapes. It was our feeling that the Archivist was in the best position to play a significant role in balancing what ultimately could be competing interests between those two types of materials.

Under the Presidential Records Act, under the Court of Appeals decision of January 1991, and under Judge Richey's order of January 6th of this year, it is clear that neither the Archivist nor citizens nor the Congress have a say regarding the President's record keeping practices or the President's decisions regarding Presidential records, and the President's lawyers were effective in presenting that point of view as we were arriving at this agreement. At the same time, we wanted to be in a position to make a case that these materials should be preserved if, on appeal, the finding of the Appeal Court is that these materials are records. That essentially is what the agreement says and what were the events that led up to that agreement——

Mr. HOYER. So it provides for protection and keeping of these records or materials pending the outcome of a judicial determination?

Mr. MOSLEY. That is right.

Mr. HOYER. Is there currently an appeal pending?

Mr. MOSLEY. Yes. The government has filed for expedited appeal with the Court of Appeals, and hopefully we will get an expedited appeal and decision, and it will resolve the status of these materials and will indicate both to the government and to the plaintiffs what the next step would be in handling these materials.

Mr. HOYER. Who are the plaintiffs?

Mr. MOSLEY. The plaintiffs are Public Citizen, the National Security Archive, and a group of historians and archivists and other scholars who are interested in these materials, and who filed a Freedom of Information Act request for some of them.

Mr. Chairman, I might add that there are approximately 5,000 back-up tapes and hard disks which we have taken into our custody and are in our possession in the National Archives Building here in Washington. It was our belief that the single most effective act that we could take to fulfill the court order was to take this material into our possession, and we did that beginning January 19th. The bulk of the material was obtained on January 20th, but we continued to obtain materials from the White House up until January 28th, at which time we filed our notice of compliance with the court.

Mr. HOYER. Had there been agreements that are analogous to this with previous Presidents, as far as you know?

Mr. MOSLEY. Yes, in 1989 we entered into a similar agreement with former President Reagan. This actually is the action out of which this case arose. In 1989 the plaintiffs were successful in obtaining a temporary restraining order regarding former President Reagan's intention to dispose of the back-up tapes that were in existence at that time. Again, in order to provide access to the materials, we entered into an agreement with former President Reagan.

At that time the materials were left in the White House, primarily because that is where the computer facility is located that can process and handle these materials. With the change in administrations this year, the materials of former President Reagan were also obtained, and we have those in our custody in the National Archives Building.

Mr. HOYER. Okay. That is subject still to the prior agreement or the restraining order still applies to the previous agreement?

Mr. MOSLEY. Yes, that is right.

Mr. HOYER. The previous agreement has, in effect, been held in limbo by the court, am I correct? When you say a restraining order was issued by the court, the substance of the restraining order was to do what?

Mr. MOSLEY. Was to ensure that these materials were preserved pending the outcome of the litigation. Judge Richey's order of January 6th would ensure that these materials are continued to be preserved until the final outcome of the litigation.

Mr. HOYER. Now, we have read and heard that education and archivist organizations, some of which are plaintiffs in the case, are concerned about the precedent this agreement sets. It may or may not be a precedent if the Reagan agreement is similar.

Mr. MOSLEY. The Reagan agreement would be similar, and that, I think, would be precedent to what we entered into with former President Bush. I do not recall if the Bush agreement would be essentially the same regarding what we entered into with former President Reagan.

Mr. HOYER. Now, other than Reagan and Bush were there any previous agreements with either Presidents Carter or Ford or Nixon?

Mr. MOSLEY. None that I am aware of. I think perhaps because the circumstances were different, the materials of those Presidents were not subject to a restraining order or to request for access from a group of citizens.

DIFFERENCE BETWEEN FEDERAL AND PRESIDENTIAL RECORDS

Mr. HOYER. Would you tell me the difference between Presidential records and Federal records?

Mr. MOSLEY. Yes. Presidential records and Federal records are both defined in statute. The Presidential Records Act defines Presidential records as those documentary materials of an individual or an organization which are used by the President in carrying out his constitutional duties as President, and which are used to advise or assist him in carrying out those duties or which relate to his constitutional duties.

The Federal Records Act defines federal records as those documentary materials of a Federal agency which are preserved or appropriate for preservation as evidence of the organization and policies decisions, transactions of the Federal Government or because of the information in them.

PROVISIONS OF PRESIDENTIAL RECORDS ACT

Mr. HOYER. Apparently it was your conclusion or were you advised that the agreement with former President Bush, as it relates to records or materials, does not violate the provisions of the Presidential Records Act?

Mr. MOSLEY. In my opinion, no, not at all. It was the contention of the White House that, of course, only the President decides what is a presidential record and only the President determines the record keeping practices of the President, under the Presidential Records Act. There was some sense that perhaps all of these computer tapes could be considered Presidential records.

The White House counsel did not take that approach. Rather, they recognized that these computer tapes had both Presidential and Federal material or information on them. They expressed the opinion that but for this court order, the President could choose to dispose of that part of these computer tapes which were Presidential materials or Presidential information.

They also expressed the hope or fact that they would consider allowing the National Archives to take this part that is Presidential into the Bush Library as Presidential materials or donated historical materials if it was our finding that these things were not duplicated in other Presidential records which are already in College Station, and it was appropriate to have them as Presidential materials.

INVOLVEMENT IN THE AGREEMENT

Mr. HOYER. I presume we will be looking at this further as the court cases resolve themselves. Clearly the fact that Dr. Wilson has now gone down to Texas A&M University has raised very substantial questions. It may not be anything inappropriate, but it has raised questions with respect to the objectivity that was applied at the time these decisions were made in January.

Mr. MOSLEY. Mr. Chairman, if I might just offer a comment there. I, of course, am not in a position to comment for Dr. Wilson, but I can comment regarding my own involvement in this matter, and as one of the three primary National Archives employees who were responsible for negotiating and entering into this agreement, I can say very clearly that Dr. Wilson did not give us instructions regarding the terms of this agreement. He did not question us regarding any terms that we felt were appropriate or that could be entered into.

He did not interject himself in any way into negotiating the terms of this agreement, if I could summarize it that way. I think it is important that you and all others who are interested in that know that and understand it because I think that there is a perception that somehow he was intimately involved in negotiating these terms and would be in a position to give favorable terms to the former President. Again, he did not interject himself in any way. He did sign the agreement. He was kept informed regarding the negotiations. He was aware of what he was signing, but certainly I think speaking for myself I did not foresee any potential controversy regarding the terms of the agreement as, of course, we have since learned otherwise.

Mr. HOYER. I have a lot of other questions, but I will yield a minute to Mr. Visclosky.

PRECEDENCE OF REAGAN AGREEMENT

Mr. VISCLOSKY. Dr. Wilson was appointed by President Reagan, if I am correct.

Mr. MOSLEY. That is correct.

Mr. VISCLOSKY. Was it the decision made relative to President Reagan's administration that is the precedence upon which this decision was based for President Bush?

Mr. MOSLEY. Well, I want to be careful about characterizing that as a precedent because I think you have to look at each one of them as unique and separate circumstances. Entering into an agreement with President Reagan in 1989 to provide for access to Iran-Contra materials, we did do. The specific terms of the two agreements I am not familiar enough with today to say that all of the terms that are in the agreement that we entered into with former President Bush are the same as those that we entered into with former President Reagan, but it is a fact that we did have an agreement with former President Reagan in 1989 to provide for access to Reagan materials.

NATIONAL HISTORICAL PUBLICATIONS AND RECORDS COMMISSION

Mr. VISCLOSKY. In this fiscal year's appropriation, a $5 million figure was included for the National Historical Publications and Records Commission for grants. What is the role of the Commission and how are the grants administered?

Mr. MOSLEY. Well, the role of the Commission is to encourage preservation of documentary materials and publication of historically significant collections. The Commission, of course, receives its granting authority and appropriations in the same manner as we, and then receives proposals from various State and local archival

and scholarly organizations, from other private institutions, universities, libraries, and based on the merits of those proposals the Commission will meet generally twice a year and will make grants to organizations who have worthy proposals.

Mr. VISCLOSKY. Are the Commission's operating expenses funded through the grant program, through the $5 million appropriation?

Mr. MEGRONIGLE. No, it is an add-on. It is about an additional $1 million above the $5 million to cover the staff of approximately 17 employees to administer the program.

Mr. VISCLOSKY. What is the status of the authorization of the Commission?

Mr. MOSLEY. There is legislation pending to be introduced that will reauthorize the Commission.

Mr. VISCLOSKY. Is the Commission currently authorized?

Mr. MEGRONIGLE. It is currently authorized through this fiscal year, fiscal year 1993, and an authorization is pending for next fiscal year and several years beyond.

Mr. VISCLOSKY. Which Committee in the House, if I could ask you, is responsible for that authorization legislation?

Mr. MEGRONIGLE. Government Operations.

Mr. VISCLOSKY. Is that Commission on the list that is proposed by President Clinton in terms of termination?

Mr. MEGRONIGLE. No, it is not.

Mr. VISCLOSKY. The funds are to be used for specific projects in terms of the grant, and I assume the grant applications are reviewed to ensure the projects are funded and not operational expenses. Is there an audit conducted to determine the proper expenditure of these funds?

Mr. MOSLEY. Yes, there are audits that are carried out regarding the funds.

Mr. VISCLOSKY. Could you, for the record, provide a list of recipients and the grants funded and the amounts received for 1992?

Mr. MOSLEY. Yes, we will do that.

[The information follows:]

NATIONAL HISTORICAL PUBLICATIONS AND RECORDS COMMISSION

FISCAL YEAR 1992 GRANTS

Publications Grants

Continuing Projects:

- *The Adams Papers* (Massachusetts Historical Society, Boston, MA): $90,300.
- *The Jane Addams Papers* (Duke University, Durham, NC): $58,550.
- *The Black Abolitionist Papers* (The Florida State University, Tallahassee, FL): $29,580.
- *The Papers of John C. Calhoun* (University of South Carolina, Columbia, SC): $36,548.
- *The Papers of Charles Carroll of Carrollton* (University of Maryland, College Park, MD): $15,000.
- *The Papers of Salmon P. Chase* (Claremont Graduate School, Claremont, CA): $69,000.
- *The Papers of Jefferson Davis* (Rice University, Houston, TX): $63,000.
- *The Papers of Thomas A. Edison* (Rutgers, The State University of New Jersey, New Brunswick, NJ): $45,610.
- *The Papers of Dwight David Eisenhower* (The Johns Hopkins University, Baltimore, MD): $34,955.
- *Documentary History of the First Federal Congress of the United States of America, March 4, 1789 - March 3, 1791* (The George Washington University, Washington, DC): $175,000.
- *The Papers of Benjamin Franklin* (Yale University, New Haven, CT): $90,300.
- *Freedom: A Documentary History of Emancipation, 1861-1867 [Freedmen and Southern Society]*, (University of Maryland, College Park, MD): $93,931.
- *The Papers of Albert Gallatin* (Baruch College and the Research Foundation of the City University of New York, New York, NY): $45,000.
- *The Marcus Garvey and Universal Negro Improvement Association Papers* (Regents of the University of California, Los Angeles, CA): $42,958.
- *The Papers of Emma Goldman* (Regents of the University of California, Berkeley, CA): $68,000.

- *The Samuel Gompers Papers* (University of Maryland, College Park, MD): $68,000.
- *The Papers of Ulysses S. Grant* (Ulysses S. Grant Association, Carbondale, IL): $64,000.
- *The Papers of Nathanael Greene* (Rhode Island Historical Society, Providence, RI): $67,000.
- *The Papers of Andrew Jackson* (University of Tennessee, Knoxville, TN): $60,900.
- *J. Franklin Jameson and the Development of Humanistic Scholarship in America* (American Historical Association, Washington, DC): $50,000.
- *The Papers of Thomas Jefferson* (Princeton University, Princeton, NJ): $90,300.
- *The Papers of Andrew Johnson* (University of Tennessee, Knoxville, TN): $73,000.
- *The Papers of Martin Luther King, Jr.* (The Martin Luther King, Jr. Center for Nonviolent Social Change, Atlanta, GA): $52,000.
- *The Papers of Henry Laurens* (South Carolina Historical Society, Charleston, SC): $41,000.
- *The Papers of Jacob Leisler* (New York University, New York, NY): $10,000.
- *The Lincoln Legal Papers: A Documentary History of the Law Practice of Abraham Lincoln, 1836-1861* (Illinois Historic Preservation Agency, Springfield, IL): $33,600.
- *The Papers of James Madison* (University of Virginia, Charlottesville, VA): $90,300.
- *The Papers of George Catlett Marshall* (George C. Marshall Foundation, Lexington, VA): $54,000.
- *The Papers of John Marshall* (Institute of Early American History and Culture, Williamsburg, VA): $23,448.
- *The Papers of Robert Morris* (Queens College and the Research Foundation of the City University of New York, New York, NY): $35,000.
- *The Papers of Frederick Law Olmsted* (The American University, Washington, DC): $22,000.
- *Correspondence of James K. Polk* (University of Tennessee, Knoxville, TN): $37,800.
- *Race, Slavery, and Free Blacks: Petitions to Southern Legislatures and County Courts, 1775-1866* (University of North Carolina at Greensboro, Greensboro, NC): $23,100.
- *The Documentary History of the Ratification of the Constitution* (Board of Regents, University of Wisconsin, Madison, WI): $119,600.
- *The Margaret Sanger Papers* (New York University, New York, NY): $43,000.

- *Documentary Relations of the Southwest Civil/Military Series* (University of Arizona, Arizona State Museum, Tucson, AZ): $29,500.

- *The Papers of Thaddeus Stevens* (Pomona College, Claremont, CA): $21,000.

- *Documentary History of the Supreme Court of the United States, 1789-1800* (Supreme Court Historical Society, Washington, DC): $91,000.

- *A Narrative of the Captivity and Adventures of John Tanner* (John T. Fierst, Minneapolis, MN): $12,000.

- *The Journals of Diego de Vargas* (University of New Mexico, Albuquerque, NM): $45,000.

- *The Papers of George Washington* (University of Virginia, Charlottesville, VA): $40,960.

- *The Journals of Frances E. Willard* (Carolyn De Swarte Gifford, Evanston, IL): $10,500.

Subvention Grants:

- *The Black Abolitionist Papers* (University of North Carolina Press, Chapel Hill, NC): $12,000 for volume 5; 12,000 for volume 6.

- *The Papers of Henry Bouquet* (Pennsylvania Historical and Museum Commission, Harrisburg, PA): $12,000 for volume 6.

- *William Cullen Bryant Letters* (Fordham University Press, New York, NY): $12,000 for volume 5 and $12,000 for volume 6.

- *The Papers of John C. Calhoun* (University of South Carolina Press, Columbia, SC): $12,000 for volume 21.

- *The Papers of Salmon P. Chase* (Kent State University Press, Kent, OH): $12,000 for volume 1.

- *The Papers of Henry Clay* (University Press of Kentucky, Lexington, KY): $12,000 for supplement volume.

- *The Papers of Jefferson Davis* (Louisiana State University Press, Baton Rouge, LA): $12,000 for volume 7 and $3,000 for a reprint of volume 1.

- *The Papers of Frederick Douglass* (Yale University Press, New Haven, CT): $12,000 for volume 5.

- *The Papers of Thomas A. Edison* (The Johns Hopkins University Press, Baltimore, MD): $12,000 for volume 2.

- *Documentary History of the First Federal Congress of the United States of America, March 4, 1789 - March 3, 1791* (The Johns Hopkins University Press, Baltimore, MD): $10,320 for volume 10 and $8,870 for volume 11.

- *The Papers of Benjamin Franklin* (Yale University Press, New Haven, CT): $12,000 for volume 29 and 10 grants totalling $19,686 to help defray costs of reprinting volumes 1, 2, 4, 8, 9, 12, 13, 14, 18 and 22.

- *Freedom: A Documentary History of Emancipation* (Cambridge University Press, NY): $12,000 for series 2, volume 3.

- *The Letters of Jessie Benton Fremont* (University of Illinois Press, Champaign, IL): $12,000 for volume 1.

- *The Papers of Nathanael Greene* (University of North Carolina Press, Chapel Hill, NC): $12,000 for volume 6.

- *The Papers of Andrew Jackson* (University of Tennessee Press, Knoxville, TN): $12,000 for volume 3.

- *J. Franklin Jameson and the Development of Humanistic Scholarship in America* (University of Georgia Press, Athens, GA): $11,000 for volume 1.

- *The Papers of Andrew Johnson* (University of Tennessee Press, Knoxville, TN): $12,000 for volume 9.

- *The Martin Luther King, Jr., Papers* (University of California Press, Berkeley, CA): $12,000 for volume 1.

- *The Papers of Benjamin Henry Latrobe* (Yale University Press, New Haven, CT): $12,000 for series 2, volume 2.

- *The Papers of Henry Laurens* (University of South Carolina Press, Columbia, SC): $12,000 for volume 14.

- *The Papers of James Madison* (University Press of Virginia, Charlottesville, VA): $11,500 for volume 2 of the *Presidential Series*.

- *The Papers of George Catlett Marshall* (The Johns Hopkins University Press, Baltimore, MD): $2,600 for volume 3.

- *The Papers of Frederick Law Olmsted* (The Johns Hopkins University Press, Baltimore, MD): $12,000 for volume 6.

- *The Papers of Charles Willson Peale* (Yale University Press, New Haven, CT): $12,000 for volume 3.

- *The Documentary History of the Ratification of the Constitution* (State Historical Society of Wisconsin, Madison, WI): $10,000 for volume 10.

- *The Journals of Diego de Vargas* (University of New Mexico Press, Albuquerque, NM): $4,000 for volume 2.

- *The Papers of George Washington* (University Press of Virginia, Charlottesville, VA): $10,800 for volume 1 of the *Confederation Series*, $10,600 for volume 2 of the *Confederation Series*, and $12,000 for volume 8 of the *Colonial Series*.

Fellowships in Historical Editing (Jointly funded by the NHPRC and The Andrew W. Mellon Foundation):

- James R. Tracy (Ph.D. candidate at Stanford University): A fellowship grant of $25,000 for 10 months at *The Papers of Martin Luther King, Jr.*, Stanford University, Stanford, CA.

- José Ignacio Avellaneda (Ph.D., University of Florida, 1990): A fellowship grant of $25,000 for 10 months at *The Journals of Diego de Vargas*, University of New Mexico, Albuquerque, NM.

- Gregory D. Massey (Ph.D. candidate at the University of South Carolina): A fellowship grant of $25,000 for 10 months at *Naval Documents of the American Revolution* and *The Naval War of 1812*, Naval Historical Center, Washington, DC.

Institute Grant (Jointly funded by the NHPRC and the Andrew W. Mellon Foundation):

- Institute for the Editing of Historical Documents (University of Wisconsin, Madison, WI): $7,500. The 21st annual institute was held June 14-25, 1992.

Records Grants

National and Regional Projects:

- Arizona Department of Library, Archives, and Public Records: $76,763 in partial fulfillment of a cooperative agreement with the Council of State Historical Records Coordinators to support a number of national and regional meetings of State Historical Records Advisory Board Coordinators.

- Duke University, Perkins Library, Durham, NC: $29,813 to support a conference, in partnership with the Smithsonian Institution, to initiate work toward the development of a documentation strategy for American advertising.

State Board-sponsored Projects:

- Florida Department of State, Division of Library & Information Services, Bureau of Archives and Records Management (Florida State Historical Records Advisory Board), Tallahassee, FL: $150,000 ($50,000 matching), for a two-year regrant project focusing on the state's local organizations to develop archival and records management programs; plan for archival facilities; prepare preservation and disaster preparedness plans; process collections; conduct preservation microfilming; hire consultants; and develop databases of holdings.

- State Historical Society of Wisconsin (Wisconsin State Historical Records Advisory Board), Madison, WI: $250,000 ($84,000 matching), for a two-year regrant project focused on revitalizing the state's local government records program. The project provides regrants to local governments to develop records management programs; prepare records inventories and retention schedules; develop disaster plans; microfilm records; create local records manuals; process and describe archival records; and conduct planning studies.

- Maine State Archives (Maine State Historical Records Advisory Board), Augusta, ME: $5,000 for state board travel and meeting expenses.

- State Historical Society of North Dakota (North Dakota State Historical Records Advisory Board), Bismarck, ND: $7,776 for state board travel and meeting expenses.

- Oklahoma Department of Libraries (Oklahoma State Historical Records Advisory Board), Oklahoma City, OK: $4,584 for state board travel and meeting expenses.

- Governor's Office of Administration, Commonwealth of Pennsylvania, Harrisburg, PA: $116,230 to enable the executive branch of state government to develop an electronic records program.

- Rhode Island Office of the Secretary of State, Division of State Archives and Public Records Administration, Providence, RI: $97,125 to establish a local government records program in the state.

- Michigan State Historical Records Advisory Board, Lansing, MI: $10,365 to support the travel and meeting expenses of the Michigan Board, including a special board meeting to review progress on the state assessment report's recommendations, assess changes in historical records needs, and develop priorities and a strategy for addressing these needs.

- North Carolina Central University, Durham, NC: $63,035 to conduct a statewide survey and needs assessment, using a questionnaire and site visits, of repositories holding African-American records.

- North Carolina State Historical Records Advisory Board, Raleigh, NC: $8,880 to support the travel and meeting expenses of the North Carolina Board, including a board-sponsored statewide conference on records issues and the development of a statewide plan.

- New Mexico State Historical Records Advisory Board, Santa Fe, NM: $9,403 to support the travel and meeting expenses of the New Mexico Board.

- New York State Archives and Records Administration, Albany, NY: $185,398 for a two-year project to analyze information management practices in New York State agencies and to determine how agency policies, procedures, and tools can support electronic records management and archival objectives.

- Wyoming State Historical Records Advisory Board, Cheyenne, WY: $9,720 to support the travel and meeting expenses of the Wyoming Board.

- Minnesota State Historical Records Advisory Board, St. Paul, MN: $6,082 to support the travel and meeting expenses of the Minnesota State Historical Records Advisory Board.

- South Carolina State Historical Records Advisory Board, Columbia, SC: $18,646 to support the travel and meeting expenses of the South Carolina State Historical Records Advisory Board, including the development of an updated report on the conditions and needs of the state's historical records programs and a videotape to be used to increase interest in and support for historical records programs in the state.

- Virginia State Historical Records Advisory Board, Richmond, VA: $7,608 to support the travel and meeting expenses of the Virginia State Historical Records Advisory Board, including the development of a statewide strategic plan addressing archives and manuscripts programming in Virginia.

Native American Initiative:

- Association of Village Council Presidents, Bethel, AK: $67,200 for a two-year project to translate, transcribe, and catalogue 110 hours of oral history interviews. Another ninety hours of interviews which have already been translated and transcribed will be reviewed and corrected, if necessary.

- Minnesota Historical Society, St. Paul, MN: $64,588 to survey the records of more than one hundred organizations that serve the cultural, social service, civic, political, religious, and communication needs of the urban Native American communities in the Twin Cities metropolitan area, Duluth, Bemidji, and International Falls. The plan of work includes hiring and training a surveyor, holding informational meetings with target organizations, conducting on-site surveys, preparing a guide to the records surveyed, and conducting workshops to train organization staff to manage their records.

- Little Big Horn College, Crow Agency, MT: $32,202 to create an ongoing oral history program. After conducting a needs assessment and creating a training handbook, faculty members will be responsible for training students at the college to travel to the various reservation districts, to

conduct interviews, and prepare abstracts of the interviews. A transcriber will be responsible for transcribing and translating into English fifty of the planned 140 interviews. The archivist at the college will catalogue the interviews and prepare descriptions to be entered into the Western Library Network (WLN).

- Ramah Navajo School Board, Pine Hill, NM: $5,000 to hire a consultant to assist the Ramah Band of Navajos with the development of an archives and records management program and to provide training for records creators and an archivist.

Development of Archival Programs, Local Governments:

- City of Fayetteville, Fayetteville, NC: $3720 for a consultant to provide advice on the development of an archives program and the further development of the city's records management program.

- Oakland City Government, Office of the City Clerk, Oakland, CA: $138,253 to develop an archives and records management program. Project staff will be responsible for preparing an inventory of the city's records, developing schedules, and identifying vital records.

- City of Gloucester, Gloucester, MA: $30,333 to develop an archives and records management program for the city's records.

- Town of New Shoreham, RI: $3,450 to hire a consultant to assist the town in evaluating its current records policies and to provide advice on the establishment of an archives and records management program.

- Town of Jamestown, RI: $3,500 to hire a consultant to advise on the establishment of an archives and records management program.

Development of Archival Programs, Colleges and Universities:

- The Naropa Institute, Boulder, CO: $4,973 to hire an archives and records management consultant and an audio preservation consultant. The consultants will make recommendations for the establishment of a records management and archives program and for the preservation of and provision of access to audio tapes documenting readings, lectures, and panel discussions that have taken place at the school.

- Northern Michigan University, Marquette, MI: $72,285 to establish a records management and archival program.

- University of New Hampshire, Durham, NH: $93,517 to establish a university archives and records management program. Activities include surveying records, developing retention schedules, transferring and processing archival materials, holding workshops for individuals who maintain university records, and processing materials already housed in the university archives.

Development of Archival Programs in Museums, Religious Institutions, and Non-profit Organizations:

- Buddhist Churches of America, San Francisco, CA: $58,992 to appraise, arrange, and describe the church's institutional records and to develop a records management program.

- American Association for the Advancement of Science, Washington, DC: $15,491 to develop a records management program and to write and distribute a records management manual for American scientific societies to improve the quality of scientific society records in the United States that are preserved because of their archival value.

- Friends of Mount Auburn Cemetery, Cambridge, MA: $19,600 to establish a formal archival program at the cemetery, arrange and describe the archival records of the cemetery, and prepare a procedures manual for the care of garden cemetery records.

- President and Fellows of Harvard College, Cambridge, MA: $85,164 to appraise, arrange, and describe 1,400 cubic feet of the archives of the Unitarian Universalist Association (UUA) and two predecessor organizations, the Universalist Church of America (UCA) and the American Unitarian Association (AUA), and to prepare retention guidelines for the active records.

- Epilepsy Foundation of America, Landover, MD: $3,420 for a consultant to provide guidance on developing an archival program pertaining to the history of efforts to deal with epilepsy in the United States.

Collections Projects for Textual Materials and Electronic Records:

- Colorado Historical Society, Denver, CO: $67,673 to process 190 collections (450 linear feet) and to create MARC AMC (MAchine-Readable Cataloging Archival and Manuscripts Control) format records for all 1,500 of its manuscript collections.

- Central Michigan University, Mt. Pleasant, MI: $83,179 to appraise, arrange, describe, or upgrade to contemporary archival standards existing descriptions of its 3,000 linear feet of manuscript collections documenting Michigan life and culture.

- Lauderdale County Department of Archives & History, Meridian, MS: $15,168 to microfilm selected records of Lauderdale County, the City of Meridian, the Lauderdale County School System, and the Meridian Separate School System. The records total approximately 107 linear feet.

- North Carolina Department of Cultural Resources, Raleigh, NC: $50,024 to create MARC-(MAchine-Readable Cataloging) compatible descriptions in its local automated Manuscript and Archives Reference System (MARS) for 232 state agency record groups and 2,200 series; to convert and load the descriptions into the Research Libraries Information Network (RLIN) and into OCLC (Online Computer Library Center); and to produce a *Guide to State Agency Records* in both printed format and on diskette.

- University of Pennsylvania, Philadelphia, PA: $66,040 to arrange, describe, and publicize to researchers 350 cubic feet of records (1915-1988) of the Philadelphia Art Alliance.

- Historical Society of Western Pennsylvania, Pittsburgh, PA: $101,412 to appraise, arrange, describe, and catalog seven unprocessed manuscript collections (759 linear feet), reflecting recent collecting initiatives, and to upgrade the housing, arrangement, description, and cataloging of 160 manuscript collections (450 linear feet) representing the core of its manuscript holdings.

- Balch Institute for Ethnic Studies, Philadelphia, PA: $56,555 to inventory all of its minority collections and arrange and describe the four largest and most important.

- University of Wyoming, American Heritage Center, Laramie, WY: $169,125 to select and catalog 3,500 of its Western History collections representing about 20,000 cubic feet (approximately one-third of its total archival holdings) of personal papers, and both corporate and not-for-profit institutional archives.

Photographs:

- Tampa-Hillsborough County Public Library, Tampa, FL: $58,500 to complete the preservation of the 18,000-item Burgert Brothers Photographic Collection by duplicating, printing, and cataloging 4,000 nitrate and acetate photonegatives not currently available to the public.

Motion Pictures, Television, and Sound Recordings:

- State Historical Society of North Dakota, Bismarck, ND: $87,900 ($25,000 matching) to preserve, organize, and provide access to television newsfilm dating from 1953 to 1978.

- Georgia State University, Atlanta, GA: $22,244 to create preservation copies of selected unpublished, non-commercial audio tapes (ca. 1956-1974) relating to the career of Johnny Mercer and audio tapes and unique disc recordings created by radio stations WSB and WGST in Atlanta (ca. 1942-1960s).

- Utah State University, Logan, UT: $11,615 to preserve and make accessible 199 acetate and paper discs and 98 reel-to-reel tapes resulting from fieldwork activities of folklore scholars Austin and Alta Fife from 1939 to the 1970s.

Fellows in Archival Administration (Jointly funded by the NHPRC and the Andrew W. Mellon Foundation):

- State Historical Society of Wisconsin, Division of Archives and Research Services, Madison, WI. Anne Marie Baker. $35,000, with up to $7,000 in fringe benefits. The fellow will serve on the administrative staff of the State Archivist.

- The University of Wyoming, American Heritage Center, Laramie, WY. Kris A. White. $35,000, with up to $7,000 in fringe benefits. Working with the Associate Director/Operations, the fellow will be involved with personnel supervision, budgeting, planning and fundraising.

Supplemental Funding:

- Shorter College, Rome, GA: $7,205 to reproduce the finding aid and make four copies of the microfilm produced by the Northwest Georgia Documents Preservation Project, which selectively microfilmed historical documents in nine northwest Georgia counties.

- American Council of Learned Societies, New York, NY: $8,821 for follow-up public information work relating to the Historical Documents Study (HDS).

Mr. VISCLOSKY. Thank you. Thank you, Mr. Chairman.

FISCAL YEAR 1994 BUDGET

Mr. HOYER. Have you received a Presidential, at this point in time? Do you know what your employment level is going to be or your budget request?

Mr. MOSLEY. For 1994?

Mr. HOYER. Yes.

Mr. MOSLEY. Yes, we do, but again OMB has instructed us not to discuss that until the President's budget has been submitted to the Congress which, of course, it is not at this time.

EMPLOYMENT LEVEL AND FUNDING REDUCTIONS

Mr. HOYER. What are your FTEs at this point in time, do you know?

Mr. MEGRONIGLE. We have a currently authorized ceiling of 2,750 in fiscal year 1993.

Mr. HOYER. Are you at that?

Mr. MEGRONIGLE. No, right now we are probably projecting about 2,640.

Mr. HOYER. Now, as you know, President Clinton has indicated that he is going to ask each agency to take a 3 percent cut in administrative costs. Have you reviewed that proposal and do you have a plan to apply it?

Mr. MOSLEY. We have reviewed it, and we are in the process of developing a plan. While it requires sacrifice, we will be able to live with that.

Mr. HOYER. Presumably that will be applied prior to submission?

Mr. MEGRONIGLE. Yes.

FUNDING REDUCTIONS

Mr. HOYER. Now, for my information, are you applying that 3 percent to your fiscal year 1993 number?

Mr. MEGRONIGLE. It is an adjusted fiscal year 1993 base line that will be used, current services base line that will be used to calculate the administrative reduction.

Mr. HOYER. What are we using as the adjustment figure—3.7 percent—to get the base line? What are we applying?

Mr. MEGRONIGLE. The inflationary adjustment?

Mr. HOYER. Yes, the 3.7 percent inflation adjustment.

Mr. MEGRONIGLE. I think it is less. I think it is just under 3.

Mr. HOYER. A 3.1 percent adjustment? So effectively the 3.1 percent increase would be applied to your 1993 figure. What are you calculating as your administrative expense? What do you contemplate is included in administrative expense, which is what I understand the President is talking about reducing?

Mr. MEGRONIGLE. That is right.

Mr. HOYER. Which presumably does not mean your entire fiscal year 1993 number.

Mr. MEGRONIGLE. No, it doesn't. In the case of the National Archives, it excludes personnel expenditures, rent paid to the General Services Administration and expenditures for equipment, grants, and interest for the new Archives II facility.

Mr. HOYER. So other than rent and personnel expenses, all other expenses are designated as administrative expenses?

Mr. MEGRONIGLE. Together, with the other categories I cited, that is my understanding.

Mr. HOYER. Just to give me a ballpark, if you know, and you may not know this, what are your administrative expenses? What is the number?

Mr. MEGRONIGLE. If we exclude personnel and rent from our budget, that probably leaves us with perhaps $30 million.

Mr. HOYER. So we are talking about $900,000.

Mr. MEGRONIGLE. I am sure your arithmetic is very close.

Mr. HOYER. Well, 3 percent of $30 million, the $30 million, of course, though would be first adjusted by 3.1 percent, so you would be netting at $30 million.

Mr. MEGRONIGLE. I think that is essentially what is going to happen, right.

Mr. HOYER. So we are talking about a freeze on administrative costs.

Mr. MEGRONIGLE. Basically.

Mr. HOYER. The President has made it very clear that he wants to effect savings in the operations of government. This Committee wants to cooperate in that objective. Congress certainly wants to comply with the requests before us.

To the extent, Mr. Mosley, as you review these items you can provide us for the record what impact this reduction will have on your operations, we would appreciate your doing that.

Mr. MOSLEY. Indeed we will do that.

Mr. HOYER. So that we will have a feel for what a freeze means in administrative costs.

[The information follows:]

IMPACT OF PRESIDENT'S PROPOSED REDUCTION ON ADMINISTRATIVE EXPENSES FOR THE NATIONAL ARCHIVES

The National Archives and Records Administration's operating expense budget is comprised of approximately 50 percent personnel compensation payments; 35 percent for fixed space payments, including payments to the General Services Administration for rental of space primarily for the Federal records centers, and operation and maintenance of the NARA building and Presidential libraries; 4 percent for necessary expenses such as postage, phones, accounting and payroll services, unemployment and workers compensation; and 3 percent for grants. This leaves only 8 percent for discretionary contracts, services, and other purchases.

A reduction in administrative expenses will impact our ability to purchase supplies and equipment for Archives II. We must fund contracts for services to operate, maintain, and protect our facility, the cost of which continues to increase each year, so there is no other place to reduce expenses.

PERSONNEL REQUEST

Mr. HOYER. Now, your overall budget is how big on personnel? Personnel and rent are how much of a component?

Mr. MILLANE. Personnel is about $75 million and rent is about $40 million.

Mr. MEGRONIGLE. Forty million.

Mr. MILLANE. We also have grants that are excluded.

Mr. HOYER. So your administrative expenses are about 25 percent, thereabouts? Maybe a little less.

PRODUCTIVITY

With respect to productivity, which the President also talks a lot about, have you identified areas where productivity can be enhanced?

Mr. MOSLEY. Yes, Mr. Chairman, that is one of the objectives in our strategic plan which I referred to earlier. We want to improve our measurement systems, and we want to look at the way we are processing our work now and see what we can do to streamline and to improve our efficiency. That is one of our objectives under the strategic plan.

REDUCTION IN FULL-TIME EQUIVALENTS

Mr. HOYER. Now, in terms of the President's reduction in force, which I think he will obtain, by attrition, as I understand it. Although the President talks about 100,000, the figure I saw in the paper the other day was 152,000 spread over the various agencies, the bulk of which obviously are Defense employees.

Do you have a number, do you have a target reduction number?

Mr. MEGRONIGLE. It works out to about 4 percent government-wide, which for us would be about 110 positions.

Mr. HOYER. Okay. Do you have a plan to get to that?

Mr. MEGRONIGLE. Well, as I mentioned earlier, Mr. Chairman, we are essentially already there by virtue——

Mr. HOYER. Your 2,640 onboard employees.

Mr. MEGRONIGLE. Yes.

Mr. HOYER. That is because you are reducing from 2,750 authorized employees. I don't want to criticize anybody, however, the public is not enamored with our shell games. You are not playing a shell game, I don't mean that, don't get me wrong, but the public may view it that way. If you tell the public that you have 2,640 employees and if you reduce it by 4 percent—110, you will still have left 2,640 employees, they get somewhat cynical, and we can all understand why they do that.

If you tell them you are going to reduce 3 percent just after you increase by 3.1 percent, it adds to their cynicism, and we are going to have to deal with that.

As I understand what the Congress has said it was going to do is we are going to reduce 3 percent from our levels of employment in 1992. Now, that is not some authorized figure, that is what we have on board. That means losing real people, and if every agency says, well, we are at the reduced number, I think the President will not be perhaps well served, nor will government generally, as being credible with the American public.

I would like you to submit for the record what, if you reduced 4 percent from the employees that you now have on board, what that would require you to do. Now, I don't want you to spend a lot of time on this. I am not asking you to send a thick report here because this is not worth that time, but I want to have some feel for this.

I am someone who is interested in figuring out the impact of the pay freeze and the locality pay, the latter of which I am more concerned with than the former.

The locality pay is a real problem with retention and recruitment, long term, in light of the fact that San Francisco, New York, and Los Angeles have already received locality pay differentials. I want to look at this as it relates to some of the agencies that come within this subcommittee's jurisdiction, and how we are going to achieve the goals that the President has said he wants to achieve without having the public say it is a word game in Washington. I don't want to criticize—I hope none of you take this as a personal criticism because it is not a personal criticism—but in these three items: the 3.1 percent inflation increase, 3 administrative reduction, and the 4 percent reduction is no less than what you have on board now, it is very interesting. That would even make one more cynical as to how convenient that turned out.

Mr. MEGRONIGLE. I understand your comments very well, Mr. Chairman. I just would like to add.

Mr. HOYER. And I am your friend. I am here to help you, right?

Mr. MEGRONIGLE. I think there are a lot of Federal agencies out there that are not in the same situation we are in. They are going to have a situation of dealing with a cut from their authorized ceiling which they are probably already at. We have just had some difficulty over the years in being able to get up to our ceiling because of other priorities, as you are well aware, so we found ourselves with FTE well below our FTE ceiling. Whether you can call this a blessing or as you say a problem in terms of perception, it depends, but we think it is going to be somewhat of a struggle for us because we have other needs we have to consider in the year ahead with regard to moving into the new building. There are research rooms there that have to have employees. There are buildings personnel that are required to operate that facility that we are going to have to accommodate within the President's program which we think we are able to do working with the numbers as we anticipate them at this point.

Obviously, if the entire reduction had to be taken from the actual on-board personnel, it would have a much greater impact.

Mr. HOYER. Okay. Well, I obviously am very sympathetic to the needs of the new facility, but the public would be more cynical if I told them I didn't care about that facility. However, I think we have to accurately define what we are doing and where we are going. Has OMB indicated that it is from your authorized levels? Is that what they are using, is that what Mr. Panetta is using as the benchmark?

Mr. MEGRONIGLE. Yes, he is.

[The information follows:]

IMPACT OF THE PRESIDENT'S PROPOSED 100,000 FTE REDUCTION ON THE NATIONAL ARCHIVES

The impact will be a reduction of 69 FTE and $2 million in FY 1994, 110 FTE and $3.2 million in FY 1995, 110 FTE and $3.3 million in FY 1996, 110 FTE and $3.4 million in FY 1997 and 110 FTE and $3.5 million in FY 1998. These reductions represent real people and real dollars and will require the National Archives to reduce employment below the current onboard level and not simply eliminate "hollow" FTE. This reduction comes at a time when the National Archives workload will be increasing with the opening of the Archives II facility in College Park, Maryland, establishing the Bush Library project, implementing the JFK assassination collection legislation and opening the new Pittsfield, Massachusetts records center.

MOVE TO ARCHIVES II

Mr. HOYER. Now, in terms of the move itself, are your 1993 resources adequate to affect the move?

Mr. MEGRONIGLE. We are not actually going to begin the move until this November, so we move in fiscal year 1994. It is one of the items we are currently discussing with OMB. There are no funds in the 1993 budget to pay for the move.

Mr. HOYER. Are you at liberty to discuss how much money you will need to effect the move or has OMB asked you to——

Mr. MEGRONIGLE. They have generally asked that we not talk specifically about any of the 1994 request items.

DECLASSIFICATION

Mr. HOYER. When you review materials for declassification, do you consult with the Department of Defense, FBI, State Department or others whose documents you are dealing with?

Mr. MOSLEY. Yes, they are required to provide to us guidelines that we would use then in making declassifications, determinations regarding those materials in our custody.

Mr. HOYER. What impact does their recommendation have? Is that controlling or advisory?

Mr. MOSLEY. Their guidelines are controlling, as I understand it, Mr. Chairman.

Mr. HOYER. Okay. So ultimately they would be deciding which documents to declassify?

Mr. MOSLEY. We would be applying our judgment in the context of using their guidelines to the materials which we hold.

Mr. HOYER. Would it be fair to say that if you are using their guidelines, they are effectively making the determination?

Mr. MOSLEY. Not directly, but certainly their guidelines are critical toward arriving at a final decision regarding the declassification of a given document or materials.

Mr. HOYER. The General Services Administration has an organization called the Information Security Oversight Office (ISOO). Do you deal with this office in the declassification of materials?

Mr. MOSLEY. Yes, we do.

Mr. HOYER. What is their role specifically?

Mr. MOSLEY. Well, they are the government executive branch policy center, in effect, in these areas. We work closely with them in requiring or obtaining assistance in getting guidelines from agencies. We have been working most recently with them during this past year in designing a computerized system that would assist in the controlling of declassification determinations, and we are in the process now of hiring a consultant who would help us design the requirements for this system. We have worked very closely with ISOO along those lines to do that.

It is our opinion, Mr. Chairman, that the declassification system in the government needs attention and that there is much frustration, I think, both on our part and on scholars and other users of materials in their inability to get material that they need, and we support a new executive order that would address some of these problems that are inherent in the current system.

Mr. HOYER. Thank you. Mr. Lightfoot.

Mr. LIGHTFOOT. It seemed like everything got scheduled at 10:00 this morning and has gone downhill since then. I really only have one question, Mr. Chairman. Thank you for yielding. If you have already asked this, tell me, and we will go on.

CHRONOLOGY OF PRESIDENTIAL AGREEMENT AND TEXAS A&M UNIVERSITY DISCUSSIONS

There has been a lot of discussion about situations that pertains to Dr. Wilson getting with the former President's documents and so on and operating the museum. Perhaps it would be instructive if you could provide for the subcommittee, it may be a chronological record of discussions that Dr. Wilson had about his agreement on this position of the former President's papers and also anything discussing about his future employment at the Bush Library. I think that is something that we need to get cleared up one way or another. I would appreciate that if you could.

Mr. MOSLEY. We will provide that.

[The information follows:]

Chronology of the litigation in the Armstrong v. Executive Office of the President (EOP) Suit

January 1989 – Scott Armstrong, represented by Public Citizen, brings suit against President Reagan and wins an injunction prohibiting the disposition of backup tapes of the e-mail of the National Security Council (NSC) and the White House Office of Administration (OA).

January 1991 -- The United States Court of Appeals for the District of Columbia Circuit holds that there is no judicial review of the President's record keeping practices under the Presidential Records Act and remands the case to the district court on the issue of whether the defendant agencies had provided adequate record keeping guidance to their employees. Also before the district court is the issue of the Archivist's compliance with the Federal Records Act.

November 1992 -- Public Citizen is granted a new temporary restraining order (TRO) requiring the maintenance of Bush administration backup tapes for the NSC and OA.

December 10,1992 – TRO expires, but the Government agrees voluntarily to maintain the backup tapes until January 7, 1993, in anticipation of the district court issuing a final ruling on the merits.

December 23-28, 1992 – Plaintiffs and defendants each file a letter at the court's request describing what action would be necessary in their opinion to maintain the status quo. Both parties agree that the National Archives should take custody of materials and preserve original tapes in their original form.

January 6, 1993 – District court issues order finding that the guidance given employees by the NSC and OA is arbitrary and capricious because even though employees have been instructed to print out on paper any communication which meets the statutory definition of record, the paper copy does not contain certain information about the transmission of the message which the court finds fits the definition of federal record.

January 7, 1993 -- Archivist meets with staff to determine how to comply with the court's order. General Counsel meets with the Department of Justice.

January 11, 1993 -- District court issues amended order clarifying previous order.

January 13, 1993 -- Government moves for a stay of the district court's order pending the outcome of an appeal.

January 14, 1993 -- District court denies government's motion for a stay pending appeal.

January 15, 1993 -- Government moves for an emergency stay pending appeal in the Court of Appeals. Motion is granted in part and denied in part. Court of Appeals permits defendants to remove, delete or alter information on their electronic communications systems so long as the information is preserved in identical form pending the disposition of the appeal.

Chronology of the Employment Search of the Archivist
(List of dates compiled from the March 2, 1993, deposition of Don W. Wilson)

Mid- to late-December, 1992 -- Wilson was informed, in a conversation with Jim Cicconi, Vice President of the Bush Foundation, that Perry Atkinson, the Executive Director, was stepping down. Wilson said he was not particularly interested in that position.

A day or two later -- George Bush, Jr. called Wilson to discuss the exhibit responsibility of the future library, and he mentioned that the Executive Director position would be open when Atkinson left. Wilson said he had no interest in a full-time administrative position.

January 4, 1993 -- Wilson received a call from the White House, asking him to come to a meeting with Cicconi and Mr. Stewart, a consultant to the Foundation. The purpose of the meeting was to talk to the President about the exhibit concept and what his role in it would be. In the course of the meeting, Cicconi mentioned that Texas A&M was thinking of offering Wilson a position. The President said they could use someone with presidential library knowledge. Wilson said that he had not spoken with anyone from Texas A&M and did not know what might develop.

January 12, 1993 -- Cicconi called Wilson to say that President Mobley and Dean Gage, the Provost at Texas A&M University, were seriously trying to come up with an offer for Wilson. Wilson said fine. This was the first he knew of Texas A&M's serious interest in offering him a position.

January 12, 1993 -- Wilson had a conversation with Gary Brooks, the National Archives Ethics Officer, saying there was a potential for Wilson to leave government service. Wilson gave Gary a letter of recusal for any activities with financial impact dealing with the University of Tennessee, University of Michigan, and Texas A&M University. Wilson did not mention the Bush Foundation as under his consideration for future employment. His position is full-time with Texas A&M and not with the Foundation.

January 26, 1993 -- Wilson received a phone call from Provost Dean Gage. This was the first time he was directly contacted by Texas A&M and engaged in negotiations for the position. Gage said he would meet again with President Mobley and get back to Wilson.

February 3 or 4, 1993 -- Wilson again spoke to Gary Brooks as the Ethics Officer to inform him that an offer would be forthcoming from Texas A&M. Brooks said he would draft a memo recusing Wilson from possible matters with a financial impact in this area.

February 8, 1993 -- Second recusal, drafted by the Ethics Officer, was filed. It recused Wilson from matters with a possible financial impact on the university of Tennessee and Texas A&M University. It was sent on this date to Ray Mosley as Deputy Archivist, John Fawcett as the head of Presidential Libraries, Assistant Archivist for Presidential Libraries, and to Jerry George as Executive Director of National Historical Publications and Records Commission. The memo instructed these individuals to handle all matters with a direct financial impact on the listed universities.

February 10, 1993 -- Wilson resigned from the Archives.

February 11, 1993 -- Wilson accepted the position with Texas A&M.

Mr. LIGHTFOOT. Mr. Chairman, that is the only question I had. You have already asked my other one. Thank you.

DECLASSIFICATION

Mr. HOYER. One additional question along the lines of the classification. What is the role of the Archives in that discussion? Obviously, it is very controversial as to how many documents a democratic government keeps secret, how long they keep them secret, how those decisions are made. How involved is your agency in that discussion and determination?

Mr. MOSLEY. If you are talking about the policy, I think we would like to be involved more, but I think we do have substantial involvement now. I think that we, as I mentioned earlier, would like to see a better means of opening these materials, declassifying them, and opening them sooner than is now the case. It is important to us to bring in materials to the Archives that the public can use when we bring them in. But when we have to bring them in and keep them inaccessible because they are classified for extended periods, then that, of course, frustrates our intent and our purpose and our mission. We favor full, open access to materials as quickly as national security and other considerations will permit.

PRESERVATION

Mr. HOYER. In the mid 1980s Congress provided an appropriation to the National Archives for the preservation of older documents. What have you been able to do in this area and when do you believe you will finish the program?

Mr. MOSLEY. We spent about $9 million in this past year in the area of preservation. We have been looking the last couple of years at updating our 20-year preservation plan. We developed this plan about 1985, and it is now time to, based on the experience that we have gathered over the past few years, to update our plan. We have been very successful in what we call holdings maintenance; that is, ensuring that our records are in the proper folders and the proper containers and the proper temperature and humidity-controlled environment. We have made substantial progress along those lines in recent years.

Mr. HOYER. What can the Committee do to assist you in preserving these older documents? In other words, are you going to need more money to accomplish this objective?

Mr. MOSLEY. There is always a need for money in this area because——

Mr. HOYER. Have you talked with OMB on this?

Mr. MOSLEY. We do identify in our request funds that we earmark for preservation.

CONCLUSION

Mr. HOYER. I have some other questions, and we will submit them to you. Unfortunately, we are somewhat pressed for time.

Appearing before my other subcommittee, as Mr. Lightfoot points out, are three Secretaries: Secretary of Labor, Secretary of Education, Secretary of Health and Human Services. All are testifying starting at 2:00, so I am trying to move along. I want to

thank you for also having your people help us with a couple of documents up on the wall. I have changed around the hearing room of the subcommittee. I tell people that we have, in terms of productivity increased by 50 percent the seating capacity of this room without any additional space, and we will, of course, expect everybody who comes before the Committee to be able to be equally innovative.

Mr. MOSLEY. That is a good example for the rest of us.

Mr. HOYER. Life should be so easy.

Mr. MOSLEY. We are very pleased to have been able to make those materials available to the Committee.

AGREEMENT ON PRESIDENTIAL MATERIALS

Mr. HOYER. I appreciate that very much. I look forward to working with you. Don Wilson and I have had a very good relationship, and I have a great deal of respect for him, and I am hopeful nothing is askew here, but it did raise some concerns. Frankly, had I been advising Dr. Wilson, I would have advised him to recuse himself and let you or someone else in the agency in effect make the deal and put on the record the reason I was doing it. I just think it is perception which is very important, particularly when we want to establish credibility with the public.

We have a problem in government. The President, I think, is going some ways towards resolving that, but we need to take every effort we can to make sure the public knows we are doing their business hopefully above board.

Mr. MOSLEY. Mr. Chairman, I was just going to add one comment regarding Dr. Wilson. As you know, Senators Glenn, Lieberman, and Pryor have asked the Office of Government Ethics and Office of Public Integrity at Justice to look into these matters. He is eager to have them do that because he thinks there is a lot of information that will have to come out that will then afford you and the American public the full story regarding all of this. I know he is eager to get that under way and to have an opportunity to present his—all the facts that he has in his possession.

Mr. HOYER. I hope we did not inconvenience you too much by accelerating the hearing schedule. Thank you very much.

[Additional questions submitted for the record by the Committee and the answers thereto follow:]

KENNEDY ASSASSINATION RECORDS

Mr. Hoyer. At last year's hearing we had some discussion on the release of Kennedy Assassination records and as I remember, there was a law passed in 1992 which mandates the public disclosure of all records concerning the assassination of President Kennedy. Are you responsible for the release of these documents?

Mr. Mosley. The National Archives is responsible for providing reference service for the released documents that constitute the Kennedy Assassination Records Collection established on December 28, 1992.

The agencies of origin are responsible for determining release. Documents that are determined to be withheld from the public will be referred to a Review Board of five members appointed by the President. The law established this Review Board, which in the three years of its life will decide whether documents still closed to the public can be opened. Upon abolition of the Review Board, the Archivist of the United States will assume responsibility for reviewing periodically those documents left closed by the Review Board and determining if they can be released to the public.

The National Archives is responsible for reviewing assassination-related materials that it holds. This includes the records of the Warren Commission; materials in Presidential Libraries, like the Rockefeller Commission records; and (through a delegation of authority from the House of Representatives) the House Select Committee on Assassination records.

Mr. Hoyer. What is the role of the National Archives in identification of these records?

Mr. Mosley. Identification of records relating to the assassination of President Kennedy has two stages. First, each federal body in all three branches of the government will determine what information in its custody falls under the definition in the law. Questions about these determinations will be referred to the Review Board. In the second stage, each document relating to the assassination must be identified on a records identification form which, NARA has designed. Each agency must complete this form for every document in its possession concerning the Kennedy assassination before the records are transferred to the Archives.

Mr. Hoyer. Where will the records be housed?

Mr. Mosley. One complete set of all released records created by the Federal Government which constitute the JFK Assassination Records Collection will be available to the public in a research room in the National Archives in Washington, DC.

CONGRESSIONAL RECORDS

Mr. Hoyer. What is your role in archiving records of Congress and what is involved with this process?

Mr. Mosley. NARA holds approximately 36,000 cubic feet of House records (1789-1989), 25,000 cubic feet of Senate records (1789-1993), and 1,200 cubic feet of records of Joint Committees of Congress (1789-1989). It also holds records of legislative agencies, such as GPO and GAO, and the record set of U.S. Government publications (more than 20,000 cubic feet), including Congressional publications. The official records of congress are administered by the Center for - Legislative Archives, with assistance from other NARA offices, and their work is overseen by the Advisory Committee on the Records of Congress, established in 1990 by P.L. 101-509, which meets twice each year.

In a recent 2 year period (1991-92), NARA accessioned 2,000 cubic feet of Senate records and 2,200 cubic feet of House records. In 1992, committees and administrative offices of Congress made 229 requests for records in NARA custody. A total of 896 items (boxes, files, volumes) were delivered, often within 24 hours and sometimes the same day.

Since 1982, the records of Congress have received systematic preservation treatment so that virtually all records from 1789 through the early 1920s have been treated. In special cases, the professional conservators at NARA have rebound original Journals in period bindings, constructed special enclosures for documents of the highest intrinsic value, and prepared documents for exhibit. In addition to preserving the records, archivists arrange and describe the records so that proper control can be maintained.

In some instances, usually to preserve records of high intrinsic value or heavily used records, NARA produces microfilm publications. The Center for Legislative Archives has produced several microfilm publications and continues to produce publications of the earliest records of Congress to protect the original documents from use and to make available their contents to the public.

For the public, NARA provides research guidance at no cost. In a typical year, the Center for Legislative Archives receives 3,500 phone calls and researcher visits, over 1,100 written reference requests, pulls over 9,000 items for researchers, copies (for a fee) over 45,000 pages of documents, and screens 1,000,000 pages of records for personnel privacy. Each House has established rules governing public access to its records.

The Center for Legislative Archives also has a growing program of public outreach to promote knowledge of the history of Congress among the general public. This program will include exhibits of original documents, curriculum aids, publications, and educational seminars and teacher workshops. Many of these projects will be done in cooperation with other repositories and Congressional research institutions.

Mr. Hoyer. What is your cost estimate for maintaining these records?

Mr. Mosley. The estimated cost of maintaining the records of the House of Representatives, Senate, and Joint Committees is about $1, 500, 000 in FY93.

(Additional questions submitted for the record by Congressman Bevill and the answers thereto follow:)

RECORDS MANAGEMENT

Mr. Bevill. What is needed for the National Archives to become a more vital player in the development of information policy and to provide more effective guidance on the retention and disposition of records and on the handling of records in multiple format?

Mr. Mosley. The National Archives and Records Administration would be more effective if it had statutory authority to issue binding regulations concerning record status. Currently, agencies must determine how the definition of records in 44 USC 3301 applies to all their documentary materials. If NARA had authority to issue binding regulations it would provide detailed explanations of the definition with practical examples that would be appropriate for the Government as a whole. It would also allow NARA to analyze the recordkeeping requirements and systems of specific agencies, and to develop guidance tailored to each agency that the agency must follow.

NARA also needs to have statutory authority to examine or inspect all records, including the informational content of the records, particularly those that are restricted because of security classification, privacy concerns, tax information, or for any other reason. This inspection authority would strengthen NARA's appraisal function by ensuring access to all Federal records; records would not escape the scheduling process because of their sensitivity. It would also strengthen NARA's records management evaluation program by potentially opening all records to a review of procedures and practices for their creation, maintenance, and disposition.

Finally, NARA needs the authority to establish guidance, regulations, and an inspection program for permanent Federal records that would be more effectively or appropriately maintained in other Federal agencies, such as databases containing observational and experimental data. Such authority is essential if we are to deal effectively with newer types of electronic records.

SHARING OF RESEARCH FINDINGS

Mr. Bevill. The National Archives serves as a research laboratory for the national archives community on many archival issues, such as preservation. How can the National Archives be more effective in involving and sharing its research findings with the broader archival community?

Mr. Mosley. The issue of leadership in the archival profession is fully addressed in the NARA strategic plan. Preservation is the fourth critical success factor in the NARA strategic plan. One of the three goals for this factor is to provide leadership in the preservation of archival materials. We will disseminate information through technical literature and educational activities. We will participate and lead in the formulation of national and international standards. We will support and coordinate mutually beneficial efforts with other archival repositories, especially through the National Historical Publications and Records Commission.

Beyond preservation, the fifth critical success factor in the NARA strategic plan is "Provide leadership in the archival, records, and information fields." The National Archives and Records Administration must reaffirm its preeminence in the fields of archival administration and records and information management. We must begin by focusing our efforts in the area of policy development on adequacy of documentation and access related issues.

We will join with the Information Security Oversight Office to aggressively advocate a new Executive Order on national security information to include an automatic declassification date and mandatory development of declassification guidelines by all Executive agencies with classification authority. We will establish a project in cooperation with the Advisory Committee on the Records of Congress to address the issue of adequacy of documentation of the legislative process.

The National Archives and Records Administration must develop mutually beneficial partnerships with the many Federal agencies with which we share common records and information interests. With these agencies we will strive to establish new partnerships in the areas of information management and Federal government access policy. We must establish mutually beneficial partnerships with other institutions with similar goals and interests. We will support the objectives presented in the National Historical Publications and Records Commission's strategic plan that envision a national documentary program achieved through close associations with other institutions and organizations. We will continue to engage in joint sponsorship of conventions, exhibits, conferences, workshops, and other special events. We will publish and disseminate information to the archival and museum communities on the technologies, procedures, and testing used in the design, planning, and construction of Archives II, our state of the art archival facility.

To publicize our holdings, we will implement the Archival Information System, an online, automated descriptive database containing information about the Federal records in our custody. The Archival Information System will provide researchers with online, dial in access to descriptive information about the records nationwide.

NATIONAL HISTORICAL PUBLICATIONS AND RECORDS COMMISSION

Mr. Bevill. The National Historical Publications and Records Commission adopted last year a long range planning document that holds forth a new vision for the NHPRC that the constituent communities very much support. What do you see as the implications of this expanded role for NHPRC?

Mr. Mosley. The NHPRC is the Archives' grant program, which helps non-Federal archivists and historians preserve and publish records that document American history nationwide. If funded, at the level envisioned, the new NHPRC plan has three major implications:

(1) The NHPRC will be able to make specific, measureable gains in helping Americans in every state save and gain access to valuable historical records. Among the NHPRC plan's highest priority objectives are these:

- To support a specific research agenda on electronic records management;

- To help state archives survey records needs, set priorities for the best use of their dwindling resources, and create strategic plans for saving the most important state and local records;

- To complete the Documents-for-Democracy Program, by supporting publication of nine editions of papers, for study at home and abroad, that for the first time fully document the creation of the nation's basic political institutions (ratification of the Constitution, the First Federal Congress, the beginnings of the Supreme Court, and the development of U.S. foreign policy operations) and the thinking of our democracy's founders (Washington, Adams, Jefferson, Madison, Franklin).

(2) The NHPRC will be in compliance with standards for government efficiency and service in the following ways:

- The NHPRC puts money into projects across the nation.

- As a matter of long-standing policy, the Commission rarely pays even a fraction of the indirect overhead costs of projects.

- Through cost-sharing requirements, matching-grant offers, and direct fundraising assistance, the NHPRC leverages its grants to cover less than half, on the average, of the costs of projects the NHPRC helps support.

(3) The NHPRC will reverse a long financial erosion that has seen appropriations rise for Federal grant-making agencies with missions complimentary to the NHPRC's, while appropriations for the NHPRC have declined below the rate of inflation.

In sum, the NHPRC's strategic plan will begin to restore parity for documentary preservation with other kinds of historic preservation, will restructure the agency to meet guidelines for effective government service, and will produce specific accomplishments in the on-going effort to save valuable historical records and make them accessible to researchers, teachers, students, and citizens nationwide.

(Additional questions submitted for the record by

Congressman Wolf and the answers thereto follow:)

RUTHERFORD B. HAYES PRESIDENTIAL CENTER

Mr. Wolf. The options paper you prepared regarding the Rutherford B. Hayes Presidential Center in Fremont, Ohio lists four options for federal involvement. However, the paper does not mention which option is preferred by the National Archives. Could you explain which option is the preference of the National Archives and why?

Mr. Mosley. Our staff came away from their review of the Hayes Center extremely impressed by the professionalism and dedication of all involved in the program. However, given the fact that any of the suggested options would require a significant outlay of funds by the Federal government, in the present budget environment it is difficult for us to recommend any involvement by the National Archives. Of the options discussed, the grants program would probably be closest to our current legislation.

Mr. Wolf. In your discussion of the pros and cons of including the Hayes Center as part of the Presidential Libraries system, you spend quite a bit of time on points you feel the Hayes Center would find objectionable about being designated a Presidential Library. Assuming the Hayes Center director and trustees support such designation despite these considerations, would the National Archives have any hesitation about the Hayes Center being included in the system?

Mr. Mosley. Again, we are very sympathetic to the needs of the Hayes Center and were impressed by their operation. Our hesitation comes from two areas, funding and authorization. On the funding side, we are concerned about recommending the inclusion of a program which will cost a minimum of $7 million in capital improvements and $1.5 million in annual operations. As to authorization, we see the alteration of the Presidential Libraries Act to include the addition of pre-Hoover presidencies to the system as a major change in the scope of the legislation and the beginning of a series of proposals for the operation of many other small collections which would probably not be in the publics interest.

Mr. Wolf. Your discussion of option 4b, which is a grant program to be administered by the Office of Presidential Libraries, says such a grant program "should include strict requirements for the use of the funds to ensure that they are used exclusively for the preservation and maintenance of Presidential materials." I would like to know whether this could include things like humidity control, a sprinkler system, roof repairs to prevent water damage, and so on. Could such a program address some of the structural deterioration that is hampering the work at the Hayes Center?

Mr. Mosley. Grants which address themselves to structural repairs and restorations of buildings would be a major change to the traditional grants program of the National Historical Publications and Records Commission. The Congress could certainly examine this option, but there may be other Federal agencies better suited to administer such a program (Park Service; National Trust for Historical Preservation).

Mr. Wolf. The proposal that the Hayes Center first suggested to Congressman Gillmor about a year and a half ago was to have a one-time grant to the Hayes Center trust fund for operation and maintenance of the facility. The appeal of this option is that it would likely be far less costly than some form of federal management. Your options paper does not mention this proposal. Do you have any comments on it?

Mr. Mosley. We would agree that it would be less costly than other options and not require a change to the current Presidential Libraries Act.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

ESTIMATES OF CURRENT SERVICES FOR FISCAL YEAR 1993

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
ESTIMATES OF CURRENT SERVICES FOR FISCAL YEAR 1993

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NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
OPERATING EXPENSES (DIRECT)

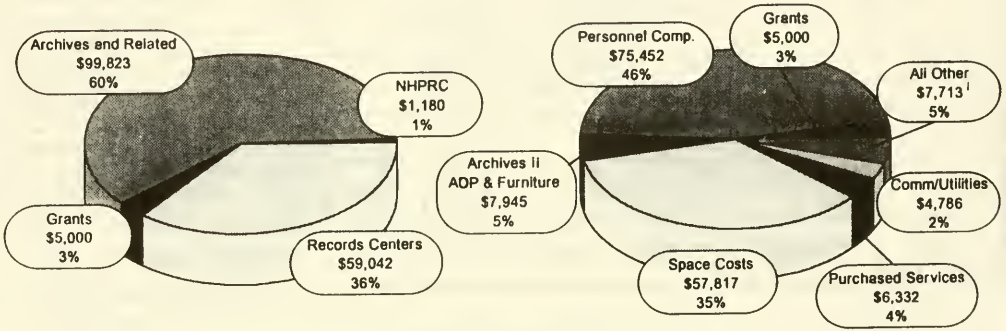
OVERVIEW OF PROGRAM AND FINANCING

(dollars in thousands)

	1992 Actual	1993 Current Services	Less Carryover from 1992	Adjusted 1993 Current Services [1]	1994 Estimate	Changes 1993 to 1994
Records Centers	$ 51,992	$ 59,042	$ -	$ 59,042	-	-
Archives and Related Services	99,412	100,661	-838	99,823	-	-
Nat'l Historical Publications & Records Commission	6,268	6,621	-441	6,180	-	-
Archives II Facility	30,944	25,643	-	25,643	-	-
Total Obligations	$188,616	$191,967	$-1,279	$190,688	-	-
Unobligated Balance Available, Beginning of Year	-7,376	-1,279	1,279	-	-	-
Less: Archives II Facility [2]	-30,944	-25,643	-	-25,643	-	-
Unobligated Balance Available, End of Year	1,279		-		-	-
Unobligated Balance Expiring Adj. in Expired Accounts	575 -7		-		-	-
Appropriation	$152,143	$165,045	-	$165,045	-	-
Total Compensable Workyears	1,925	1,970	-	1,970	-	-

[1] Excludes 1992 carryover funds of $1,279,000, including $441,000 for grants and $838,000 for Kennedy Library alterations.
[2] See explanation of Archives II Facility financing on page 20

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
Highlights Of 1993 Current Services
(dollars in thousands)



1993 Current Services Costs by Program Area

TOTAL: $165,045

1993 Current Services by Major Costs Element

Excludes Archives II Financing Obligations

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
OPERATING EXPENSES (DIRECT)

ANALYSIS OF AUTHORIZED LEVEL FOR 1993

(dollars in thousands)

	FTE	Obligation Amount
Level Authorized by Public Law 102-393	1,970	$165,045
Archives II Facility	-	25,643
Revised 1993	1,970	190,688

DIGEST OF BUDGET ESTIMATES BY ACTIVITIES FOR 1993 CURRENT SERVICES

(dollars in thousands)

Activity	Obligations						Increases or Decreases (-) for 1994					
	1992 Actual		1993 Current Services[1]		1994 Estimate		Total Changes		Program Changes		Other Changes	
	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount
1. **Records Centers**	786	$ 51,992	785	$ 59,042	-	-	-	-	-	-	-	-
2. **Archives and Related Services:**												
a. National Archives	746	61,069	774	65,535	-	-	-	-	-	-	-	-
b. Presidential Libraries	244	30,691	248	26,294	-	-	-	-	-	-	-	-
c. Federal Register	70	5,242	76	5,454	-	-	-	-	-	-	-	-
d. Records Declassification	63	2,410	70	2,540	-	-	-	-	-	-	-	-
Subtotal	1,123	99,412	1,168	99,823	-	-	-	-	-	-	-	-
3. **National Historical Publications and Records Commission:**												
a. Grants	-	5,142	-	5,000	-	-	-	-	-	-	-	-
b. Admin. & Reference Services	16	1,126	17	1,180	-	-	-	-	-	-	-	-
Subtotal	16	6,268	17	6,180	-	-	-	-	-	-	-	-
4. **Archives II Facility [2]**	-	30,944	-	25,643	-	-	-	-	-	-	-	-
Total Obligations	1,925	$188,616	1,970	$190,688	-	-	-	-	-	-	-	-

[1] 1993 excludes carryover of 1992 funds of $1,279.

[2] See explanation of Archives II facility financing on page 20.

Note: See each activity for prorated amount of program direction.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
OPERATING EXPENSES (DIRECT)

SUMMARY OF 1993 CURRENT SERVICES BUDGET

The 1993 appropriation is $165,045,000. Approved program increases include: preparing for the move to the new Archives II facility, including the purchase of office furniture and equipment, acquisition of ADP administrative support system, physical preparation of textual records to be moved, staffing a new research complex, relocating the declassification, machine readable, and archival information systems, and to continue the first phase of the Master Location Register; continuing electronic records research, to conduct a study for the transfer of database structures between agencies; personnel and administrative costs for the new Federal facility at Pittsfield, Massachusetts; and enhancement of government-wide records management programs. Other increases include rent rate changes on existing space, payable to the General Services Administration's (GSA) Federal Buildings Fund (FBF); building operations and maintenance rate changes; the increased cost of goods and services; and personnel compensation including annualization of the 1992 pay raise, a 1993 pay raise of 3.7 percent effective in January 1993, and one less day in 1993. It is currently anticipated that these funds will be utilized as described.

It was necessary to absorb $1,000,000 in the direct program for 1993 due to the Grants appropriation approved for $5,000,000 vs. the requested amount of $4,000,000.

The John F. Kennedy assassination materials project (pursuant to P.L. 102-526) will need 1993 funding. We are planning realignment of current funds for this requirement.

A 1993 Supplemental is currently being considered by OMB for President Bush's Presidential and Vice-Presidential Records. These funds will be used to move, store, and process the papers in preparation for the new Presidential Library in College Station, Texas.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
OPERATING EXPENSES (DIRECT)

DISTRIBUTION OF ESTIMATES BY OBJECT CLASS

(dollars in thousands)

	Object Classification	1992 Actual	1993 [1] Current Services	1994 Estimate
	Personnel Compensation			
11.1	Full-Time Permanent	$54,856	$ 57,562	-
11.3	Other than Full-Time Permanent	4,043	4,243	-
11.5	Other Personnel Compensation	1,157	1,214	-
11.9	Total Personnel Compensation	60,056	63,019	-
12.1	Personnel Benefits	11,700	12,277	-
13.0	Benefits for Former Personnel	138	156	-
21.0	Travel and Transportation of Persons	606	771	-
21.0	Motor Pool Travel	121	113	-
22.0	Transportation of Things	141	284	-
23.1	Rental Payments to GSA	31,536	40,088	-
23.3	Communications, Utilities and Misc. Charges	4,721	4,786	-
24.0	Printing and Reproduction	2,090	2,498	-
25.1	Consulting Services	293	690	-
25.2	Other Services	30,206	22,533	-
26.0	Supplies and Materials	4,199	3,605	-
31.0	Equipment	6,457	9,110	-
32.0	Land and Structures	220	111	-
41.0	Grants	5,142	5,000	-
42.0	Insurance Claims and Indemnities	46	4	-
	Total Obligations Related to Budget Authority	$ 157,672	$ 165,045	-
43.0	Interest and Dividends [2]	30,944	25,643	-
99.0	Total Obligations	$ 188,616	$ 190,688	-

[1] 1993 excludes carryover of 1992 funds of $1,279.

[2] See explanation of Archives II facility financing on page 20.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
OPERATING EXPENSES (DIRECT)

RECORDS CENTERS

(dollars in thousands)

Activity	Obligations						Increases or Decreases (-) for 1994					
	1992 Actual		1993 Current Services		1994 Estimate		Total Changes		Program Changes		Other Changes	
	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount
Records Centers	724	$47,495	723	$54,343	-	-		-	-	-	-	-
Program Direction	62	4,497	62	4,699	-	-	-	-	-	-	-	-
Total	786	$51,992	785	$59,042	-	-	-	-	-	-	-	-

BACKGROUND

The records centers' activity provides for the accessioning, storage, reference service, and disposal of the semi-active and non-current records of Federal agencies through a nationwide system of 14 records centers. Significant savings result from use of low cost records storage and the efficient and timely disposal of non-permanent records.

JUSTIFICATION

The Federal records centers' system reduces Federal record keeping costs by accessioning, storing in low cost space, and efficiently disposing of agencies' records no longer required for legal, administrative, or historical purposes. Reference service is provided for the 18.1 million cubic feet of records in centers' custody to ensure that agencies can meet constituents' requests and conduct their business efficiently. Services on agencies' records include the retrieval, reproduction, authentication of copies, and extraction of information. The National Personnel Records Center provides for the maintenance and reference service on 164.2 million military and civilian personnel folders.

The records center system also offers guidance and assistance in protecting vital records and establishing and maintaining efficient filing systems and records management programs.

Significant savings have been realized through the use of low-cost storage space in records centers instead of storing records in more expensive space in individual agencies. Savings of $30.9 million in agency space and equipment costs were realized in 1992 with anticipated savings of $33.9 million in 1993.

PITTSFIELD, MASSACHUSETTS FACILITY

In the 1992 appropriation for the General Services Administration (GSA) $3,770,000 were provided to GSA to be made available to NARA to pay one-time costs (shelving, ladders, fork lifts, furniture, and microfilm and microfilm cabinets) related to the establishment of the National Long Term Records Center as authorized and directed by Public Law 101-509. The law authorized and directed GSA to provide storage space, together with additional space as necessary for office use, to establish a National Long Term Records Center in Pittsfield for the specialized storage of Federal agency records by NARA as well as public space for a satellite facility of the New England Regional Archives (addressed in Archives and Related). NARA was authorized to assign adequate personnel to operate the facility. During 1992, $176,528 was obligated for the purchase of microfilm and microfilming services. The microfilming has been done on records that are of interest to researchers who will be using the new facility. For 1993, funds were provided for personnel and support (such as supplies, maintenance on computers, and operating equipment) for the storage of Federal agency records. The funding will be used for handling on-going accessioning, appraisal, scheduling, disposal, and reference services on the Federal records at that center as well as for recurring maintenance on center computers, security systems, photocopiers, and other pieces of operating equipment.

During 1993, it is expected that the remainder of no-year funds available through GSA ($3.6 million) will be obligated for equipping, supplying, and moving records and personnel into the new facility. In addition, microfilming of records will be completed.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
OPERATING EXPENSES (DIRECT)

ARCHIVES AND RELATED SERVICES

(dollars in thousands)

Activity	Obligations						Increases or Decreases (-) for 1994					
	1992 Actual		1993 Current Services		1994 Estimate		Total Changes		Program Changes		Other Changes	
	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount
National Archives	660	$49,304	675	$53,295	-	-	-	-	-	-	-	-
Presidential Libraries	213	27,774	217	23,246	-	-	-	-	-	-	-	-
Federal Register	64	4,756	70	4,946	-	-	-	-	-	-	-	-
Records Declassification	63	2,410	70	2,540	-	-	-	-	-	-	-	-
Subtotal	1,000	84,244	1,032	84,027	-	-	-	-	-	-	-	-
Program Direction	123	15,168	136	15,796	-	-	-	-	-	-	-	-
Total	1,123	$99,412	1,168	$99,823	-	-	-	-	-	-	-	-

BACKGROUND

This activity provides for selecting, preserving, describing, and making available to the general public, scholars, and Federal agencies the permanently valuable historical records of the Federal Government, the historical materials and Presidential records in Presidential libraries, related publications and exhibit programs, and the appraisal of all Federal records. It provides for the systematic review of all classified records in the National Archives over 30 years old, except intelligence and cryptological materials dated after 1945 which will be reviewed when 50 years old. It funds the National Archives government-wide audiovisual information and management programs. It also provides for the publication of the Federal Register, the Code of Federal Regulations, the U.S. Statutes at Large, and Presidential documents; and it supports a program to improve the quality of regulations and the public's access to them.

JUSTIFICATION

1. National Archives - On-site facilities provide ready access to Federal agencies and the public to the historical records of the Federal Government. Information regarding these records and their reproductions are also provided through the mail and by telephone. The reference service workload is determined by the volume of requests received from the public and Federal agencies.

Records are arranged and descriptions of their contents are prepared to provide access and facilitate use by staff and researchers. Descriptions of materials are published in guides, inventories, special lists, and other publications. Exhibits provide additional public access to the archival holdings.

This program also appraises all records of the Federal Government for disposition and establishes Government-wide policies, standards, procedures, and regulations to ensure adequate and appropriate documentation of the government's activities. Assistance is provided to Federal agencies to ensure the proper creation, maintenance, use, and disposition of agency records, including the development and implementation of records administration programs, as mandated by law.

The Multimedia and Publications Distribution Division furnishes to the public and Federal agencies information about audiovisual materials produced by or for the Federal Government. The Division also assists Federal agencies to improve management of audiovisual materials and monitors their compliance with OMB Circular A-114.

PRESERVATION

With records ranging from parchment to computer tapes, the scope of the National Archives preservation program is extensive. Highly specialized equipment is used to monitor the condition of the Declaration of Independence, the Constitution, and the Bill of Rights. Systematic programs designed to improve the storage environment of archival records and reduce or eliminate the need for conservation treatment are ongoing. These programs include placing records in acid-free folders and boxes, removing damaging fasteners, and enclosing fragile records in polyester sleeves. Special media records (still pictures, motion pictures, audio and video recordings, aerial photographs, and computer tapes) are copied onto more stable media to ensure the continued preservation of the images and data.

The 1985 National Archives 20-year Preservation Plan, developed after a 3-year study with the assistance of statisticians from the National Institute of Standards and Technology (NIST), continues to be the basic guide to preservation activities in the National Archives. The final draft of a study by the Department of Transportation (DOT) to statistically determine rate of use patterns for textual records was completed in October 1991. The study concluded that the original 20-year plan is basically valid, but that the specific records to be actively preserved will need to be determined by an ongoing condition assessment that will reflect shifting requirements.

The work completed as part of the preparation for the move to a new archives facility in Maryland will significantly reduce the backlog of paper records requiring conservation action. The focus of future preservation will be on records which are used frequently for research

and records which are in jeopardy, primarily special media records which deteriorate over time.

Preservation of records in 1993 is limited to immediate needs related to Archives II.

PREPARATION FOR THE NEW ARCHIVAL FACILITY

Over one million cubic feet of records must be consolidated and transferred from three NARA facilities and the storage areas of other Federal agencies, to the Archives II facility. As a result of this transfer, programs to systematically preserve and conserve the records were expanded; and additional projects to locate, identify, appraise, and accession records that should be part of the National Archives, were undertaken. As a start, NARA began collecting data to build an automated register of locations for all of the records scheduled to be moved. This will ensure that physical control of the records is maintained during the move and that records will be easy to access after their relocation. Also, the move to Archives II will result in additional research rooms, necessitating the hiring and training of additional staff.

These projects are planned, multi-year efforts that must be accomplished prior to the actual move to the new archival facility.

- **Master Location Register**

  Funds were provided in 1993 for the continuation of the master location register (MLR), which will enable NARA to track records during the move and assist in reference after the move. Work by the Office of the National Archives to prepare for the relocation of records began in 1989, and less than twenty percent of the records remain to be surveyed. The survey data is being steadily entered into the computerized tracking system. The increased resources provided in 1992 and 1993 will be used to speed the data entry and review process.

- **Physical Preparation of Non-Textual Records**

  Funds were provided in 1993 to continue the physical preparation of non-textual records scheduled to be moved to Archives II. Non-textual records include reels of motion picture film, sound recordings, video recordings, still pictures, cartographic records, aerial photographs, and electronic records.

- **Staffing the New Research Complex**

  The main Archives building will continue to house records predominately used for family history research, therefore, research rooms will continue to be operated in that facility. All non-textual records, civilian agency records, World War II and later military records, and all security classified executive agency records will be relocated to Archives II. Researchers will have access to records in the new research complex which will have a textual research room, a reference library, a microfilm reading room, a still pictures research room, a cartographic research room, a motion pictures research room, and an electronic records research room. The Archives II research rooms will be open nights and weekends.

- **Relocate Declassification System, Machine Readable System and the Archival Information System**

Preparation for the move to Archives II includes the relocation of the Declassification System, Machine Readable System, and the Archival Information System from the main building to the Archives II facility in 1994. This relocation includes installation, hardware required for shipment, set-up of a secure area to house the Declassification System, and the necessary fiberoptic connections between the computer room and declassification room at Archives II.

- **Enhance and Maintain Declassification Tracking System**

The Declassification Tracking System will be enhanced using database management system (DBMS) software. The system is used to control and track the declassification process of NARA records, as well as FOIA, mandatory review requests, and special processing requests. The systems provide access to declassified records and security to those records which are still classified.

- **Equipment**

The move to Archives II will entail the purchase of special media lab equipment and audio visual equipment. The special media facilities include labs for microfilming, still pictures, motion pictures, video and audio, and cartographic records. The audiovisual equipment is for use in conference and training rooms and theaters.

ELECTRONIC RECORDS

Funding was provided in 1993 to continue the Optical Disk Longevity Study, and to start a second study on databases. Both projects are with the National Institute of Standards and Technology (NIST) and involve state-of-the-art technology in electronic records. Currently, data are stored on the hard drive of a computer or on a floppy disk. Using laser technology, greater amounts of information can be stored on an optical disk. At this time, however, it is not known how fast an optical disk will deteriorate, and therefore, how long information can be retained in the computer. Therefore, the purpose of the Optical Disk Longevity Study is to develop a single, uniform testing methodology that can be used to determine the effective life of an optical disk. Funds are being used to partially underwrite the cost of the last year of the three-year study to allow NIST to buy and test different brands, sizes, and types of optical disks to prove or disprove the theory on the effective life span of an optical disk that has been developed thus far as part of the study. Upon completion of the study, the testing methodology will be published as the Federal standard to use in determining the life span of an optical disk.

For the Database study, funds are being used for the first year of a five-year project. Computer technology has progressed from simple database structures composed of flat files into relational databases driven by programmed information in tables. Groups such as the American National Standards Institute and the International Standards Organization are developing standard formats, the first of which is expected to be issued in 1993. The Database study intends to use these standards to determine if it is

possible to transfer information from one agency's computer system to that of another agency, without the constraint of having the same database structure. In the first year of the study, software would be developed to translate the other agency's database structure into the standard format, and to translate the standard format into NARA's database format. If successful, these conversions would allow transmittal of information between complex database structures.

ARCHIVAL INFORMATION SYSTEM (AIS)

In 1993, the National Archives will continue its major objective to make the information contained in records available to users. All other functions--appraisal, accessioning, description, declassification, preservation--support this objective. Toward that end, the National Archives is developing a new Archival Information System (AIS). AIS is a complete system of integrated modules intended to streamline the descriptive process and facilitate the reference process. The system will contain data about permanently valuable records in the custody of other Federal agencies, the Federal Records Centers, and the National Archives. AIS will allow us to track records through their "life-cycle." A descriptive module will provide online input, editing, and approval of records descriptions and the ability to cross reference finding aids. A reference module will provide varied and powerful online search capabilities. AIS will also serve as the primary information source for researchers not only about what is available now from the National Archives but what will be available in the future.

National Archives Performance Costs
(dollars in thousands)

Activity	1992 Actual	1993 Current Services	1994 Request	Change from 1993
Reference Services	$12,581	$12,912	-	-
Description	5,551	5,973	-	-
Relocation of Records	1,175	898	-	-
Accessions	1,453	1,728	-	-
Appraisal	4,088	4,183	-	-
Preservation 1/	8,899	9,664	-	-
Audiovisual Management 2/	247	-	-	-
Exhibits, Publications and Education	2,491	2,686	-	-
Rent and Recurring Reimbursable Payments to the Federal Buildings Fund	6,761	8,908	-	-
O&M & R&A - NARA Building	4,016	3,981	-	-
Common Distributables	2,042	2,362	-	-
Total Performance Costs	$49,304	$53,295	-	-

1/ Excludes Presidential Libraries.
2/ Beginning in 1993, Audiovisual Management is included in the Exhibits, Publications and Education activity.

2. Presidential Libraries - This program provides for the operation of nine existing Presidential libraries and the retention and processing of Nixon Presidential materials. Presidential records, manuscripts, books, prints, films, and other historical materials received from former Presidents or acquired from their contemporaries are arranged, described, preserved, and processed for opening. Finding aids are published and the materials are made available for scholarly research

and public information. The libraries also undertake solicitation programs to acquire historical materials relating to the President and the Presidency. The Presidential libraries have programs of exhibits, publications, scholarly symposia, conferences and related activities based upon their holdings. Preservation actions include making copies of Presidential films and tapes, conserving museum items, and preserving color photos.

NARA has almost completed the relocation of President Bush's Presidential and Vice-Presidential records out of the White House to temporary storage until a Presidential library is built. A 1993 Supplemental Budget Request is currently being considered by OMB for the Bush Presidential Materials Project. These funds will be used to move, store, and process the records in preparation for the new Presidential library in College Station, Texas.

Pursuant to P.L. 102-526, NARA is currently preparing for the release of the John F. Kennedy assassination materials. Additional funding is required in 1993; however, at this time, we are planning realignment of current funds for this project.

Selected library holdings at the close of 1992 were as follows:

	(thousands)
Pages of manuscripts	264,268
Volumes	257
Other printed items	501
Still pictures	5,043
Museum objects	285
Motion picture film footage	13,659

Exhibits in Presidential libraries were viewed by 1,534,581 visitors in 1992.

Presidential Libraries Performance Costs
(dollars in thousands)

Activity	1992 Actual	1993 Current Services	1994 Request	Change from 1993
Hoover	$ 727	$ 760	-	-
Roosevelt	750	787	-	-
Truman	922	935	-	-
Eisenhower	904	952	-	-
Kennedy	1,221	1,262	-	-
Johnson	1,138	1,208	-	-
Nixon Pres. Materials	841	758	-	-
Ford	916	960	-	-
Carter	820	870	-	-
Reagan	928	1,012	-	-
White House Liaison	153	132	-	-
Planning and Direction	904	931	-	-
Rent and Recurring Reimbursable Payments to the Federal Buildings Fund	546	628	-	-
O&M & R&A - NARA Building	299	327	-	-
O&M & R&A - Libraries	16,288	11,253	-	-
Common Distributables	417	471	-	-
Total Performance Costs	$27,774	$23,246	-	-
Preservation included above	$243	$450	-	-

3. Federal Register - This program provides for the editing, compilation, and publication of Federal regulations in the Federal Register and the Code of Federal Regulations; laws in slip law form and the U.S. Statutes at Large; Presidential documents in the Weekly Compilation of Presidential Documents and Public Papers of the Presidents; a compilation of Privacy Act issuances and statements of Federal agency organization and functions in the United States Government Manual.

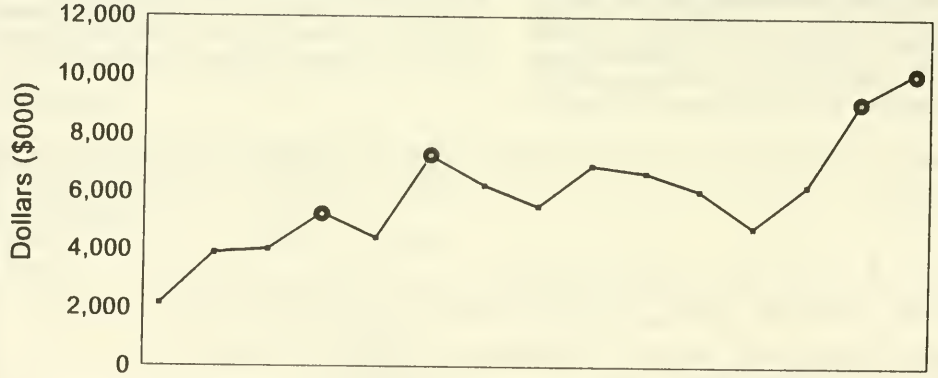
The program also provides leadership and assistance to agencies in regulation drafting; assists the public through its finding aids program for all its publications; and conducts educational programs for the public on how to use the Federal Register.

4. Records Declassification - The declassification program makes available to the public historically valuable information in Federal Government records and donated historical materials by declassifying information without endangering national security. Most of the work is performed in the Washington metropolitan area on records in the National Archives Building and in the Washington National Records Center. A small amount of the total workload is accomplished at the Presidential libraries of recent Presidents. The program provides for the systematic review of security classified records which are or will be 30 years old, except for intelligence and cryptological records which must be 50 years old; the NARA portions of the State Department and the Agency for International Development systematic review projects; and the systematic review of the Office of Strategic Services records. The program also provides mandatory review of records requested by researchers in accordance with procedures established under Executive Order 12356 and the Freedom of Information Act.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Preservation Program Obligations

1979 - 1993 Current Services



Years	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993 Est
Dollars ($000)	2,161	3,894	4,028	5,277	4,426	7,285	6,257	5,535	6,945	6,693	6,074	4,794	6,249	9,142	10,144

o Reflects increases from one time costs.

NATIONAL HISTORICAL PUBLICATIONS AND RECORDS COMMISSION

(dollars in thousands)

Activity	Obligations						Increases or Decreases (-) for 1994					
	1992 Actual		1993 Current Services		1994 Estimate		Total Changes		Program Changes		Other Changes	
	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount
NHPRC:												
Grants	-	$5,142	-	$5,000	-	-	-	-	-	-	-	-
Administration and Reference Services	16	1,126	17	1,180	-	-	-	-	-	-	-	-
Total	16	6,268	17	6,180	-	-	-	-	-	-	-	-

BACKGROUND

The National Historical Publications and Records Commission (NHPRC) provides grants to non-profit institutions and individuals nationwide for the preservation and publication of valuable records that document the nation's history. The Commission's work is essential in promoting efforts to guarantee that our historical documentary record is not lost through deterioration and neglect. The Commission is a 15 member statutory body composed of individuals representing the President, the Congress, the Supreme Court, executive agencies, and national associations of archivists and historians.

The Commission sponsors projects to locate and preserve historical documents which may be lost. It sponsors projects to assess records conditions and needs at the national, regional, and state levels; it helps institutions begin new archival programs where they never before existed; it develops policy for national historical documentary publication and supports projects that are making valuable historical documents available in book and microform editions. From the papers of the Founding Fathers to documents in all areas of history--business, art, the military--Commission supported projects are making available for use important materials to historians, teachers, students, genealogists, and others interested in American history. The Commission also supports educational programs to train archivists and documentary editors and provides research assistance to its sponsored projects.

Commission grants, provided through the appropriation process, are used to supplement funds provided by sponsoring institutions, foundations, and other private donors, and amount to less than 50 percent of the total cost of projects. The Commission has received grants from the Ford, Rockefeller, Hewlett, and Mellon foundations to assist in this work.

JUSTIFICATION

The grants program has been reauthorized through 1993 as a result of Public Law 100-365. The 1993 request for the grants program was $4,000,000. However, the grants portion of our appropriation was approved for $5,000,000. As has been the case in the past, the National Archives is again absorbing funds for this program. This year it is $1,000,000.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
OPERATING EXPENSES (DIRECT)

PROGRAM DIRECTION

(dollars in thousands)

Activity	Obligations						Increases or Decreases (-) for 1994					
	1992 Actual		1993 Current Services		1994 Estimate		Total Changes		Program Changes		Other Changes	
	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount
Records Centers	62	$ 4,497	62	$ 4,699	-	-	-	-	-	-	-	-
Archives & Related*	123	15,168	136	15,796	-	-	-	-	-	-	-	-
Total	185	$19,665	198	$20,495	-	-	-	-	-	-	-	-
*Includes Inspector General	9	510	9	545	-	-	-	-	-	-	-	-

BACKGROUND

This activity provides for general direction and program support for all National Archives and Records Administration (NARA) programs. Direction is provided by the Archivist and an administrative staff. The Archivist's staff ensures coordination among the offices' programs; provides legal advice; promotes the efficient utilization of resources; maintains liaison activities with the Congress; provides policy on budget and personnel matters; conducts audits; manages facilities and the procurement program; evaluates programs; and coordinates ADP systems.

JUSTIFICATION

NARA is committed to streamlining operations, enhancing productivity, and innovation. For example, ADP activities have been consolidated to develop a single agency-wide hardware and software architecture. This will serve data processing requirements for federal records throughout their life cycle and provide a shared reference data base. In an ongoing effort to improve management oversight and administrative efficiency, NARA is conducting management and productivity studies in both archival and administrative activities. In response to the Administration's policy of reducing administrative support costs, the Archives has a cross-servicing agreement with GSA for payroll and accounting services. The Archives continues to contract out Washington, D.C. area mail service and monitoring of the unemployment program.

Personnel management services are provided nationwide through a centralized employment policy branch in Washington, DC, and an operations branch in St. Louis, Missouri.

Program direction staff are responsible for all aspects of facility management for the National Archives Building including security, operation, and maintenance. In addition, staff provide management oversight for major repair and alterations projects at the Archives building.

In 1988, NARA contracted for the design of a new Archives facility in Maryland. This facility will enable NARA to consolidate activities in the Washington Metropolitan area from multiple locations and meet state-of-the-art environmental specifications required for long-term preservation of a variety of historical records. Site clearing and grading began in November 1989. Construction of the parking garage began in May 1990. Building design was completed in September 1990 and the contract to construct the new National Archives Building was let on January 11, 1991. Construction is scheduled to be completed in the summer of 1993 and NARA will begin to move in the fall of 1993.

PLANNING FOR THE NEW ARCHIVAL FACILITY

Funds were provided to acquire workstations, printers, and to contract to operate the data center; and purchase furniture and equipment for Archives II.

- **Workstations, Printers, and Data Center Operation**

  Funds were provided for the acquisition of computer workstations, printers, and related peripheral equipment which will be installed throughout the Archives II facility upon its completion. Also, funds were received for a contractor to prepare for operating the Government Owned Contractor Operated (GOCO) data center. The data center will provide operation and maintenance of data communications and administrative processing to support all organizations in the Archives II facility.

- **Furnishings and Equipment**

  Funds were provided for purchasing some of the office furnishings and equipment for the new Archives II facility. Archives II was designed to make the most efficient use of space through the use of systems furniture in open office environments. Since NARA currently uses traditional furniture in offices, which is in poor condition, new systems furniture is being procured for Archives II. Office furniture is being procured in early FY 1993 to provide enough lead time for delivery and installation prior to the move into Archives II. The request includes funding for such things as workstations, filing and storage equipment, and conference and reception area furnishings.

ARCHIVES II FINANCING

(dollars in thousands)

BACKGROUND

PL 100-440 (102 Stat. 1743-44), the NARA appropriation section, provided authorization for the construction of Archives II as follows:

> "That notwithstanding the provisions of 31 U.S.C. 1341(a)(1) or any other provision of law, the Archivist of the United States is authorized, pursuant to 44 U.S.C. 2903, to enter into a contract for construction and related services for a new National Archives facility in Prince George's County, Maryland, on a site provided, without charge, to the United States by the University of Maryland or the State of Maryland, which site may be transferred to the United States by less than fee simple estate, but shall remain available to the United States so long as it shall be used as a National Archives facility. The contract shall provide, by lease or installment payments payable out of annual appropriations over a period not to exceed thirty years, for the payment of the purchase price and associated costs, which shall not exceed $205,000,000 plus escalation to the midpoint of construction, and reasonable interest thereon. The contract shall further provide that title to the building shall vest in the United States at or before the expiration of the contract term upon fulfillment of the terms and conditions of the contract."

The authorizing language for Archives II permitted the Archivist to enter into a contract for construction and related services either by lease or by installment payments payable out of annual appropriations over a period not to exceed 30 years

Budget authority equal to the debt issue was scored in the year Certificates of Participation were issued (1989). Obligations reflect interest payments made to certificate holders and payments made for accrued interest and premiums when securities are purchased on the secondary market. Outlays reflect payments to certificate holders, payments for accrued interest and premiums paid when securities are purchased, and payments to GSA to repay amounts spent on construction. Outlays are reduced by offsetting collections in the form of interest earned on the funds which are invested until needed to make payments.

1993 BUDGET DISPLAY

	1992	1993	1994
Budget Authority	$ 0	$ 0	$ -
Obligations	30,944	25,643	-
Outlays	81,185	153,840	-

Beginning in 1994, the Archives will seek appropriations for the annual payments to be made under the terms of the Certificates of Participation. In accordance with OMB's guidance, the total annual payment ($29 million) must be separated into a principal and interest component. The portion that represents principal is to be treated as an appropriation for the redemption of debt and excluded from the budget authority and outlay amounts. The portion that represents interest will be reported as budget authority and outlays.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
OPERATING EXPENSES (DIRECT)

WORKLOAD FACTORS

Activity	1992 Actual	1993 Current Services	1994 Estimate	Percentage change from 1993
Records Centers: (000s)				
Records Holdings (cubic feet)	18,056	18,380	-	-
Accessions (cubic feet)	1,003	981	-	-
Disposals (cubic feet)	558	685	-	-
Reference Services	5,228	5,275	-	-
Archives and Related Services: (000s)				
National Archives				
Reference Services	6,940	6,703	-	-
Description	317	331	-	-
Relocation of Records (cubic feet)	21	8	-	-
Accessions (cubic feet)	53	50	-	-
Appraisal	8	8	-	-
Preservation:				
Microfilm (images)	4,893	2,700	-	-
Textual (pages)	141	175	-	-
Non-textual (items)	3,533	3,537	-	-
Holdings Maintenance (cubic feet)	248	252	-	-
Audiovisual Information Services	20	20	-	-

(continued)

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
OPERATING EXPENSES (DIRECT)

WORKLOAD FACTORS

Activity	1992 Actual	1993 Current Services	1994 Estimate	Percentage Change from 1993
Archives and Related Services: (000s) (continued)				
Presidential Libraries				
Reference Services	441	506	-	-
Arrangement	1,033	784	-	-
Units Preserved	824	673	-	-
Acquisitions (cubic feet)	3,043	3,909	-	-
Federal Register				
Manuscript Pages Processed	873	968	-	-
Records Declassification				
Pages Examined	38,610	30,000	-	-
Classified Pages Reviewed	6,136	9,000	-	-
Pages Declassified	5,845	8,500	-	-
National Historical Publications and Records Commission:				
Grants/Projects Reviewed	205	220	-	-
Grants Awarded/Projects Endorsed	145	130	-	-
Fellowship and Institute Applications Reviewed	110	110	-	-
Grant Projects Monitored	250	230	-	-
Records Researched (000s)	650	675	-	-
Inspector General:				
Audits	6	15	-	-
Investigations	7	a/	-	-

a/ Unknown; based on demand

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
OPERATING EXPENSES (DIRECT)

SUMMARY OF EMPLOYMENT

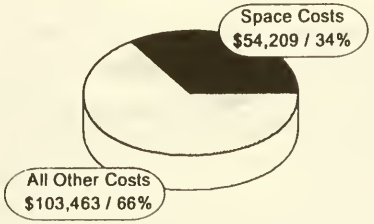
(number of FTE)

Principal Categories	1992 Actual	1993 Current Services	1994 Estimate	Changes from 1993		
				Total	Program	Other
Management and Administrative Direction	239	257	-	-	-	-
Professional	422	454	-	-	-	-
Technical	321	345	-	-	-	-
Clerical/Archival Support [1]	619	666	-	-	-	-
Other	52	56	-	-	-	-
Subtotal	1,653	1,778	-	-	-	-
Part-time and Intermittent FTE	272	192	-	-	-	-
Total	1,925	1,970	-	-	-	-

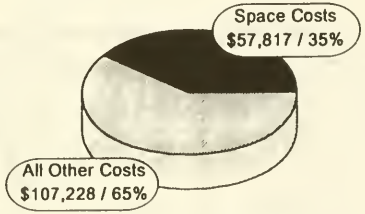
[1] Includes clerk typists, secretaries, stenographers, junior level archives technicians, archives aides and other clerks.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
Space Costs as a Proportion of Direct Current Services Budget
(dollars in thousands)

1992 Actual $157,672



1993 Current Services $165,045



	1992 Actual	1993 Current Services
Rent*	$31,536	$40,088
Operation and Maintenance Costs	13,566	15,506
Recurring and Non-Recurring Reimbursables	1,023	1,023
Repairs and Alterations	8,084	1,200
TOTAL	$54,209	$57,817
Total Square Feet	7.2 million	7.8 million

*Excludes Rent costs paid from OE, NARA Reimbursable account (1992 - $7.5M; 1993 - $7.8M)

Excludes Archives II financing obligations

CONSULTING SERVICES

(dollars in thousands)

Account Title	1992 Actual	1993 Current Services	1994 Estimate	Description
Operating Expenses	$293	$690	-	To develop scientifically engineered work standards for NARA activities. To provide analytical and technical support services for the solicitation, award and administration of the Archives II facility support contract.

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METRIC CONVERSION POLICY

The Omnibus Trade and Competitiveness Act of 1988 (Public Law 100-418), recently implemented by Executive Order 12770, amends the Metric Conversion Act of 1975 by designating the metric system of measurement as the preferred system of weights and measurements for trade and commerce. The 1988 Act requires agencies to include in annual budget submissions a report of the actions taken during the previous fiscal year as well as the actions which it plans for the fiscal year being budgeted to implement the metric system of measurement in contracts and business related activities. [Sec. 5164 (c)] Conversion would not be required if it is impractical or is "likely to cause inefficiencies or loss of markets to United States firms." [Sec. 5164 (b)] NARA accomplishments during 1992 and plans for 1993 are listed below.

ACCOMPLISHMENTS OF 1992

In accordance with the metric conversion provisions of Executive Order 12780, NARA reported to the Secretary of Commerce in November 1991 on NARA's decision not to convert to metric measurements for its procurement-related activities. NARA based its decision on two conditions: the results of an FY 1991 NARA survey of leading vendors in the archival supplies industry and the possible effect of conversion on NARA's move to a facility in College Park, Maryland. Several producers of archival supplies stated that actual product sizes would probably change if archival boxes and folders were measured in the metric system. NARA realized that this change in product size would cause a major inefficiency during the move of over 700,000 cubic feet of records into customized compact shelving in the new building. Since the shelving is designed around archival supplies measured in the English system, any change in product size would impede the most efficient use of these new shelves.

As required by Executive Order 12780, NARA also reiterated its decision against conversion in its June 1992 report to the Secretary of Commerce. NARA also stated in the November 1991 and June 1992 submissions to the Department of Commerce that NARA would follow governmental and industry standards for non-archival products that are purchased primarily through the General Services Administration (GSA).

PLANS FOR 1993

NARA will complete the planning of the move to the College Park, Maryland facility in FY 1993. During this time, NARA will continue its policy of not using metric measurements in solicitations of archival products. For non-archival supplies, especially those purchased through GSA, NARA will continue to follow governmental and industry standards.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
OPERATING EXPENSES (DIRECT)

APPROPRIATION LANGUAGE

For necessary expenses in connection with National Archives and Records Administration and related activities, as provided by law, and for expenses necessary for the review and declassification of documents, and for the hire of passenger motor vehicles, $165,045,000, of which $5,000,000 for allocations and grants for historical publications and records as authorized by 44 U.S.C. 2504, as amended, shall remain available until expended. (1 U.S.C. 106a, 106b, 112, 113, 201; 3 U.S.C. 6, 11-13; 4 U.S.C. 141-146; 5 U.S.C. App. 1; 25 U.S.C. 199a; 44 U.S.C. 710, 711, 729, Chapters 15, 21, 22, 25, 29, 31, 33; Public Law 98-497, Public Law 93-526, Executive Orders 11440, 12356, 10530, 11030, 11490, as amended; Independent Agencies Appropriations Act, 1993.)

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NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
ADVANCES AND REIMBURSEMENTS

DIGEST OF BUDGET ESTIMATES BY ACTIVITIES FOR 1993 CURRENT SERVICES

(dollars in thousands)

Activity	Summary						Increases or Decreases (-) for 1994					
	1992 Actual		1993 Current Services		1994 Estimate		Total Changes		Program Changes		Other Changes	
	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount
Records Centers	507	$22,803	569	$24,901	-	-	-	-	-	-	-	-
Archives and Related Services	80	2,654	82	2,870	-	-	-	-	-	-	-	
Total	587	$25,457	651	$27,771	-	-	-	-	-	-	-	-

OVERVIEW OF NARA REIMBURSABLE PROGRAMS

The Federal records centers provide for the accessioning, storage, reference service, and disposal of the semi-active and non-current records of Federal agencies through a nationwide system of 14 records centers. Services are provided on current records when it can be shown that there is a net savings to the government and when the agency originating the records is willing to reimburse NARA for the expenses incurred.

The records centers store active tax returns, Social Security Administration (SSA) folders, postal money orders, and passport application files. Reference services are performed primarily for the Internal Revenue Service, the SSA, the United States Postal Service and the Defense Finance and Accounting Service. Records centers have also assisted in special projects for the National Research Council and the Department of Veterans Affairs.

Additionally, Federal records centers provide micrographic services for Federal agencies on a reimbursable basis and offer workshops on files improvement and records disposition.

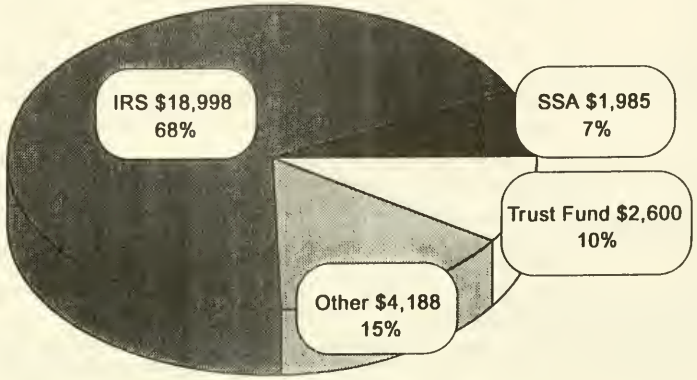
The National Archives and Presidential libraries provide photocopy services on the permanently valuable records for the National Archives Trust Fund Board. The Board reimburses these programs for such services. Other programs include a declassification program, in which records are reviewed prior to their accession into the National Archives, and records management training for other Federal agencies.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
ADVANCES AND REIMBURSEMENTS

DISTRIBUTION OF ESTIMATES BY OBJECT CLASS
(dollars in thousands)

Object Classification		1992 Actual	1993 Current Services	1994 Estimate
11.1	Full-time Permanent	$ 7,875	$ 8,952	-
11.3	Other than Full-time Permanent	4,639	5,214	-
11.5	Other Personnel Compensation	379	291	-
11.9	Total Personnel Compensation	12,893	14,457	-
12.1	Personnel Benefits	2,470	2,546	-
13.0	Benefits for Former Personnel	186	186	-
21.0	Travel/Transportation of Persons (Reimbursable)	219	220	-
21.0	Travel/Transportation of Persons (Motor Pool)	11	15	-
22.0	Transportation of Things	36	112	-
23.1	Rental Payments to GSA	7,494	7,844	-
23.3	Communications, Utilities, and Misc. Charges	204	160	-
24.0	Printing and Reproduction	147	118	-
25.0	Other Services	572	651	-
26.0	Supplies and Materials	725	862	-
31.0	Equipment	204	300	-
32.0	Land and Structures	296	300	-
99.0	Total Obligations	$25,457	$27,771	-

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
Major Reimbursable Customers for 1993 Current Services
(dollars in thousands)



Total: $27,771

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
ADVANCES AND REIMBURSEMENTS

WORKLOAD FACTORS

Activity	1992 Actual	1993 Current Services	1994 Estimate	Percentage Change from 1993
Records Centers: (000s)				
IRS Accessions (cubic feet)	764	802	-	-
IRS Disposals (cubic feet)	470	527	-	-
Reference Services:				
IRS	12,172	12,300	-	-
General	2,003	2,064	-	-
Microfilm (images)	28,172	25,000	-	-
Dropfiles (cubic feet)	2,509	2,400	-	-
Technical Assistance Projects (each)	6	6	-	-
Workshops (each)	208	220	-	-
Photocopies	1,977	2,100	-	-
IRS Photocopy Requests	397	425	-	-
Archives and Related Services: (000s)				
National Archives				
Reproductions	4,837	4,982	-	-
Presidential Libraries				
Reproductions	136	116	-	-
Records Declassification				
Pages Examined	1,575	1,600	-	-
Classified Pages Reviewed	384	385	-	-
Pages Declassified	325	325	-	-

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
ADVANCES AND REIMBURSEMENTS

SUMMARY OF EMPLOYMENT

(number of FTE)

Principal Categories	1992 Actual	1993 Current Services	1994 Estimate	Changes from 1993		
				Total Changes	Program Changes	Other Changes
Management and Administrative Direction	22	25	-	-	-	-
Professional	12	13	-	-	-	-
Technical	96	105	-	-	-	-
Clerical/Archival Support [1]	163	178	-	-	-	-
Other	5	5	-	-	-	-
Subtotal	298	326	-	-	-	-
Part-time and Intermittent FTE	289	325	-	-	-	-
Total	587	651	-	-	-	-

[1] Includes clerk typists, secretaries, stenographers, junior level archives technicians, archives aides and other clerks.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
GIFT FUND

ANALYSIS OF ESTIMATED LEVEL FOR 1993 CURRENT SERVICES

(dollars in thousands)

	1992 Actual	1993 Current Services	1994 Estimate
Financing:			
Prior Year Carry Forward	$2,346	$2,236	-
Permanent Indefinite Budget Authority [1]	422	815	-
Recovery of Prior Year Obligations	16	-	-
Unrealized Discount on Investments	2	-	-
Total Availability	2,786	3,051	-
Obligations	550	555	-
Unobligated Balance	$2,236	$2,496	-

[1] Includes donations and interest earned on investments

DIGEST OF BUDGET ESTIMATES BY ACTIVITIES FOR 1993 CURRENT SERVICES

(dollars in thousands)

Activity	Summary						Increase/Decrease for 1994	
	1992 Actual		1993 Current Services		1994 Estimate			
	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount
Historical Research, Conferences, and Publications	-	$325	-	$346	-	-	-	-
Presidential Libraries	-	225	-	209	-	-	-	-
Total Obligations	-	$550	-	$555	-	-	-	-

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
GIFT FUND

SUMMARY OF 1993 CURRENT SERVICES BUDGET

The National Archives Gift Fund was established to administer incoming grants and donations. Expenditures are made for various programs including historical research, conferences, archival and cultural events, and publications.

Gifts of money and property are made by individuals and organizations for the benefit of archival and records activities and are expended from the Gift Fund in accordance with donor restrictions, if any. Permanent indefinite budget authority is provided from donated funds and interest earned on investments.

AUTHORIZING LANGUAGE

Grants and donations are deposited into this fund to benefit National Archives' collections and services in accordance with terms of the donor (44 U.S.C. 2305).

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NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
GIFT FUND

DISTRIBUTION OF ESTIMATES BY OBJECT CLASS
(dollars in thousands)

Object Classification		1992 Actual	1993 Current Services	1994 Estimate
21.0	Travel/Transportation of Persons	$ 62	$ 24	-
22.0	Transportation of Things	-	13	-
23.3	Communications, Utilities, and Misc. Charges	1	-	-
24.0	Printing and Reproduction	77	13	-
25.2	Other Services	254	235	-
26.0	Supplies and Materials	59	45	-
31.0	Equipment	3	25	-
41.0	Grants, Subsidies and Contributions	94	200	-
99.0	Total Obligations	$550	$555	-

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
TRUST FUND

ANALYSIS OF ESTIMATED LEVEL FOR 1993 CURRENT SERVICES

(dollars in thousands)

	1992 Actual	Change 1992 vs. 1993	1993 Current Services	Change 1993 vs. 1994	1994 Estimate
Income/Cost Comparison - Summary					
Operating Income	$14,372	$ 625	$14,997	-	-
Operating Expense	15,127	-175	14,952	-	-
Net Operating Income or Loss (-)	-755	800	45	-	-
Non-Operating Income or Loss (-)	780	-298	482	-	-
Net Profit or Loss (-)	$ 25	$ 502	$ 527	-	-
Total Outlays	$-3,515	$2,988	$-527	-	-

DIGEST OF BUDGET ESTIMATES BY ACTIVITIES FOR 1993 CURRENT SERVICES

(dollars in thousands)

	Summary						Increase or Decrease (-) for 1994					
	1992 Actual		1993 Current Services		1994 Estimate		Total Changes		Program Changes		Other Changes	
Activity	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount
Reproduction Services	52	$10,813	54	$10,148	-	-	-	-	-	-	-	-
Presidential Libraries	72	3,627	75	3,607	-	-	-	-	-	-	-	-
Total Obligations	124	$14,440	129	$13,755	-	-	-	-	-	-	-	-

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
TRUST FUND

SUMMARY OF 1993 CURRENT SERVICES BUDGET

The Trust Fund receives, holds, and disburses monies collected from: sales of reproductions of records in the National Archives, Presidential libraries, and the Federal records centers; sales of reproductions of audiovisual materials produced by or for the Federal government by the Multimedia and Publications Distribution Division; sales of publications and historical mementos in the National Archives Building and the Presidential libraries; admission fees to the Presidential libraries; and fees for archival training and conferences.

Reproduction of Records. Reproductions of all varieties of records including documents, photographs, maps, motion pictures, and ADP tapes in the National Archives, the Presidential libraries, and the Federal records centers are made upon request and sold to the public, to scholars and to Federal agencies. These reproductions are used for scholarly research, genealogy and family history, to illustrate books and articles, and to make new motion pictures and video productions.

Publications and Historical Mementos. The fund publishes or purchases for resale books and other printed materials based upon the records in the National Archives and the Presidential libraries. These publications include facsimiles of the Declaration of Independence and Constitution, genealogical guides, and memoirs of former Presidents. The fund also manufactures or purchases for resale items for visitors to the National Archives Exhibit Hall and the Presidential libraries. Such items include post cards, color slides, posters, and souvenirs.

Admission Fees. Fees are charged for admission to the exhibits at most of the Presidential libraries and for educational workshops at other NARA locations.

Multimedia and Publications Distribution Division. The division sells and rents to the public audiovisual materials (such as motion pictures, video tapes, photographic slides and audio tapes) produced by or for agencies of the Federal government. These materials cover the wide range of programs in which the Federal government is involved and include materials on health and safety, science and technology, business and economics, agriculture, and industrial arts.

AUTHORIZING LANGUAGE

The Archivist of the United States furnishes, for a fee, copies of unrestricted records in the custody of the National Archives (44 U.S.C. 2116).

Proceeds from sale of copies of microfilm publications, reproductions, and other publications, and admission fees to Presidential Library museum rooms are deposited to this fund.

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NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
TRUST FUND

WORKLOAD FACTORS

Activity	1992 Actual	1993 Current Services	1994 Estimate	Percentage Change from 1993
Reproduction of Records (000s):				
National Archives [1]	8,376	6,652	-	-
Presidential Libraries	444	544	-	-
Federal Records Centers	1,977	2,100	-	-
Publications and Historical Momentos (000s units sold):				
National Archives	335	349	-	-
Presidential Libraries	634	631	-	-
Presidential Library Paid Admissions (000s):	778	719	-	-
Multimedia and Publications Distribution Division (000s):				
Audiovisual Materials, number of sales and rentals	23	27	-	-

[1] National Archives reproductions will decrease in 1993 due to the completion of the Supreme Commander of the Allied Powers project.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
TRUST FUND

DISTRIBUTION OF ESTIMATES BY OBJECT CLASS

(dollars in thousands)

Object Classification		1992 Actual	1993 Current Services	1994 Estimate
11.1	Full-time Permanent	$ 2,515	$ 2,900	-
11.3	Other than Full-time Permanent	384	459	-
11.5	Other Personnel Compensation	37	41	-
11.9	Total Personnel Compensation	2,936	3,400	-
12.1	Personnel Benefits	684	643	-
13.0	Benefits for Former Personnel	12	16	-
21.0	Travel/Transportation of Persons	60	59	-
22.0	Transportation of Things	23	30	-
23.1	Rental Payments to GSA	291	295	-
23.3	Communications, Utilities and Misc. Charges	907	1,826	-
24.0	Printing and Reproduction	1,438	1,405	-
25.2	Other Services	4,946	3,589	-
26.0	Supplies and Materials	2,831	1,720	-
31.0	Equipment	312	772	-
41.0	Grants, Subsidies and Contributions	-	-	-
99.0	Total Obligations	$14,440	$13,755	-

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
TRUST FUND

SUMMARY OF EMPLOYMENT
(number of FTE)

Principal Categories	1992 Actual	1993 Current Services	1994 Estimate	Changes from 1993		
				Total	Program	Other
Management and Administrative Direction	17	20	-	-	-	-
Professional	3	3	-	-	-	-
Technical	25	30	-	-	-	-
Clerical/Archival Support [1]	40	49	-	-	-	-
Other	6	7	-	-	-	-
Subtotal	91	109	-	-	-	-
Part-time and Intermittent FTE	33	20	-	-	-	-
Total	124	129	-	-	-	-

[1] Includes clerk typists, secretaries, stenographers, junior level archives technicians, archives aides and other clerks.

THURSDAY, FEBRUARY 25, 1993.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

WITNESSES

BRIAN C. GRIFFIN, CHAIRMAN
WILLIAM J. OLMSTEAD, EXECUTIVE DIRECTOR
JEFFREY LUBBERS, RESEARCH DIRECTOR
GARY J. EDLES, GENERAL COUNSEL

INTRODUCTION

Mr. HOYER. The hearing will convene.

We are going to hear this morning from the Administrative Conference, represented by Mr. Griffin. We welcome you Mr. Griffin. If you will introduce those who are with you at the table, we will include your entire statement at the appropriate place in the record. You may proceed to summarize that as you wish.

SUMMARY STATEMENT OF MR. GRIFFIN

Mr. GRIFFIN. Thank you, Mr. Chairman.

With me this morning are Bill Olmstead and Jeff Lubbers. Bill Olmstead is our Executive Director and Jeff Lubbers is our Research Director. And I might point out, we have three Marylanders here for you.

Mr. HOYER. Excellent. That is excellent. We are always glad to see good Marylanders come to the committee, even more so nowadays.

Mr. GRIFFIN. As you know, Mr. Chairman, better than I, these are extraordinary times in which to be participating in the appropriations process. The President has issued a call to arms to improve government efficiency, enhance our Nation's competitive position in the world and reduce the Federal deficit.

I want to briefly highlight this morning how the Administrative Conference plans to participate actively in that effort.

To begin with, the President's budget request to operate the Administrative Conference in fiscal year 1994 is $2,314,000, the same as our budget for 1993. There has been no increased budget request, although we know full well that there will be increases in a number of expense categories that are beyond the Conference's control, like rent and statutorily mandated or authorized employee benefits.

Given the Nation's fiscal circumstances, however, the Conference, like the rest of government, must simply find creative ways to do more with less.

As the committee knows, for the past 25 years, the Administrative Conference has been the Government's principal advisory body on improving the administrative process. We are the executive

branch overseer, if you will, of the Administrative Procedure Act and numerous other crosscutting government procedural statutes.

Next year we will focus our programmatic efforts on finding new ways to improve the efficiency of the administrative process. After all, the administrative process is the way in which the average citizen or small business interacts with the Federal government. For example, it is the way in which an individual receives promptly, or does not receive promptly, his or her disability benefits or a license or a decision on an EEO claim.

The administrative process also establishes the ground rules for obtaining information from the government or, conversely, for preventing the release of information that one believes would violate his or her personal privacy rights. It is the mechanism by which a small business can obtain attorneys' fees if it successfully prevails in litigation against the government.

If the process works effectively, the public can go about its business in a confident and efficient fashion, but if the process takes too much time or costs too much money or is fundamentally unfair in some respect, our citizens are, at a minimum, inconvenienced or, more seriously, abused. And the public becomes disaffected with government.

We have several major initiatives under way to make the process more efficient. First, we shall continue our efforts to encourage Federal agencies to use what is known as alternative means of dispute resolution or ADR. By "ADR", I mean those various techniques, like mediation, that are alternatives to the more traditional but costly and highly resource intensive procedures such as litigation or administrative adjudication.

We take our direction in this regard from two important statutes passed by Congress in 1990 that were designed to encourage the government's use of ADR, namely the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act. These two statutes affected the basic structure of government decision making by encouraging agencies to work cooperatively rather than confrontationally with the affected public where such cooperation is appropriate.

Perhaps most important for the long term, these statutes are designed to change the culture of government decision making so that agencies will prefer to avoid or settle disputes rather than resolve so many of them through costly administrative or judicial trials. If we can change this climate of government decision making to even a modest degree, we can reduce the cost of government significantly.

Both statutes give the Administrative Conference a leading role in coordinating the government's efforts to increase the use of these less costly and more flexible procedures.

As you will see from our prepared statement, the Conference has put together an extensive series of training programs for government officials on the use of ADR. Moreover, we have issued guidance documents for use by government agencies and have worked closely with dozens of agencies, including the EEOC, Department of the Air Force, and the Federal Regulatory Commission, to help them comply with the legislation.

Obviously, it is more efficient for the Conference to coordinate the government's activities under these new statutes than it is to have each separate agency or department devote its own resources to doing essentially the same work.

Second, we will continue to serve as a clearinghouse of general information on administrative law and the government process for Federal agencies. Publications like our Federal Administrative Procedure sourcebook are, we think, extremely cost-effective because they are used by virtually all of the various agencies of government. We shall also continue to respond to requests from Members of Congress and their staffs and from congressional committees for assistance with administrative process issues involved in legislation.

Third, we will continue to study key elements of the administrative process and make recommendations on how that process can be made more effective without compromising its basic fairness. The tight budget makes it unlikely that we will be able to use our own funds to commission any new studies in fiscal year 1994. But it is possible that various agencies will ask us to undertake studies for them in 1994 as they have done in the past and transfer funds to the Administrative Conference so we can undertake those projects. And we shall continue to work on projects that we have begun in the current fiscal year and strive to implement other recent Conference recommendations.

I appreciate the opportunity to be here this morning, and my colleagues and I would be happy to answer any questions that you may have, Mr. Chairman.

Mr. HOYER. Thank you very much.

[The statement follows:]

EXECUTIVE SUMMARY OF TESTIMONY OF

Brian C. Griffin

Chairman

Administrative Conference of the United States

before the Subcommittee on Treasury, Postal Service, and General Government

House Committee on Appropriations

February 24, 1993

Background

The Administrative Conference of the United States is a permanent agency of the federal government, established by Congress in 1964. The Conference has 101 members who are senior officials of the federal government, lawyers in private practice, law professors, and other experts in administrative law and government. It has a full-time Chairman, appointed by the President with the advice and consent of the Senate, and a 10-member Presidentially-appointed Council. Apart from the Chairman, all Conference members serve part-time and donate their time and expertise. The Conference has a permanent full-time, career staff of 24 full time equivalents (FTEs). About half of the staff are lawyers.

The Conference has two principal missions. First, it develops recommendations for improvement in the procedures by which federal agencies administer a wide range of regulatory, benefit and other government programs. Through its small career staff, the use of contract consultants (ordinarily law professors), and dialogue among its members in committee meetings or semi-annual plenary sessions, the Conference conducts studies of selected problems involving the administrative process. It then combines its experience and judgment in a cooperative effort toward improving the fairness and efficiency of governmental procedures. It provides recommendations to agencies, the President, Congress or the courts as appropriate. Its recommendations can be found in 1 C.F.R. Part 305 and 310.

Second, it facilitates the exchange of information and discussion on issues of common concern to government agencies, advocates legislative changes where appropriate, and provides formal and informal advice and assistance to government agencies and their staffs, Congress and congressional staffs, and members of the public.

Assistance to Congress

The Conference continued its efforts to respond to congressional requests and make its views known on individual matters pending before Congress. The Conference staff reviews bills introduced into Congress to determine whether they deal with areas on which the Conference had adopted a recommendation. If they do, we advise Congress of our views, typically by letters to the appropriate congressional committees or subcommittees.

The Conference also responds to specific congressional requests. Last year, the Conference transmitted to Congress Recommendation 91-8, *Adjudication of Civil Penalties Under the Federal Aviation Act*. This recommendation was the outgrowth of a direct congressional request that the Conference study the nettlesome issues affecting the FAA's demonstration civil penalty program and recommend a solution. Congress incorporated the Conference's recommendation, with some rather modest adjustments, into Public Law 102-345, the FAA civil penalty legislation, signed by the President on August 26, 1992, that makes permanent the Federal Aviation Administration's civil penalty program and transfers authority over adjudication of civil penalty matters affecting pilots and flight engineers from the FAA to the National Transportation Safety Board.

The Conference presented testimony before four Congressional subcommittees in 1992. In addition to the presentation of its annual appropriations testimony, it presented its views in support of its recommendation regarding the FAA's civil penalty program to the House Subcommittee on Aviation. At the invitation of the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee, the Conference offered comments on the application of alternative means of dispute resolution to medical malpractice

litigation involving the federal government. And, at the request of the Subcommittee on Oversight of Government Management of the Senate Governmental Affairs Committee, the Conference presented testimony on ways to address allegations of possible bias by administrative law judges within the Social Security Administration.

Summary of 1992 Conference Initiatives

Recent Conference recommendations touch a broad range of governmental procedure and process issues. The enactment in 1990 of the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act represents the implementation of nearly a decade's worth of Conference initiatives and reflects the priority status accorded to the Conference's dispute resolution program. These new statutes affect the fundamental structure of adjudication and rulemaking by potentially placing increased decisional responsibility in the hands of those likely to be affected by the government's action. In that sense, they can be seen as the most important amendments to the Administrative Procedure Act since the Freedom of Information Act amendments of 1974.

The Administrative Conference continues to give priority attention to working with federal agencies to implement the statutes. Conference activity prevents needless duplication of effort by federal agencies and helps ensure a reasonable degree of uniformity among agencies. The Conference consulted extensively with dozens of agencies in 1992 in an effort to help them comply with the legislation. In particular, the Conference published a 75 page guidance document for agency officials responsible for implementing the ADR Act. The document contained extensive explanatory material on the Act and offered advice on ways to set up ADR programs successfully.

In May 1992 the Conference presented, in cooperation with the Society of Professionals in Dispute Resolution and the Federal Mediation and Conciliation Service, a day-long program for over 300 federal employees on implementation of the Act. In October 1992, the Conference sponsored a full day roundtable discussion to assist agency personnel in finding and hiring ADR neutrals. A half-day Conference-sponsored seminar, for congressional staff members in January 1992, sought to familiarize them with ADR concepts, their uses, and relevant legislation.

In 1992, Conference staff participated in agency ADR implementation programs sponsored by the FDIC, the Department of Labor, the Department of Justice, and the Office of Personnel Management, as well as the Small Agency Council. In addition to the programs just noted, Conference staff participated in and helped develop numerous other agency ADR training programs, including programs for the EEOC, IRS, NSA, and U.S. Army. It has recently received funding through an interagency agreement to assist the Air Force in developing experiments, training programs, and written materials that will help the Air Force implement mediation and other ADR processes in contracting, environmental, and personnel matters.

It is useful to mention that the Conference's 1992 ADR activities were encouraged in part by a unique set of private grants from the Hewlett and Culpeper Foundations. These grants represent an unusual private commitment of funds in recognition of the value of the Conference's efforts to promote less costly and time consuming consensual decision making.

The Conference plans to continue into the coming fiscal year its extensive implementation efforts under the ADR Act and the Negotiated Rulemaking Act. The Conference recently established a coordinating committee and four interagency working groups to help agencies implement the ADR Act. The groups will focus on ADR training and education, clearinghouse and outreach, implementation efforts, and system design. They are intended to enable agencies to undertake ambitious, coordinated efforts to set up new dispute resolution programs and make them work.

The Conference will continue to maintain its Roster of Dispute Resolution Neutrals, which commenced in 1990. The Roster is a computerized database of dispute resolution specialists available to help resolve conflicts that arise in agency programs. To date, nearly 400 individuals and organizations have asked to be included on the Roster and the Conference has fielded scores of requests from agencies for names of specialists.

Apart from its ADR activities, the Conference last year studied and made recommendations aimed at improving administrative processes in a wide array of areas. Several recommendations addressed core areas of administrative law, namely, rulemaking, adjudication, and judicial review. One recommendation considered

agency use of policy statements, which include guidances, guidelines, manuals, staff instructions, opinion letters, press releases or other informal captions. It seeks to ensure that before an agency promulgates substantive policies that bind affected persons, it provides appropriate notice and opportunity for comment on such policies, and makes sure that policy statements are not treated as binding. In particular, this recommendation urges agencies not to issue statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using "legislative" rulemaking procedures (normally including notice-and-comment). This recommendation has been distributed among the agencies. Another recommendation seeks to provide guidance to the agencies on applying the exemption to notice-and-comment rulemaking for rules of agency practice and procedure. Although courts have used a number of different tests to determine whether a rule was one of procedure or practice, none has been particularly satisfactory. The Conference also adopted a recommendation on streamlining attorney's fee litigation under the Equal Access to Justice Act.

In one of its largest projects in recent years, the Conference, at the behest of the Office of Personnel Management, undertook a broad study of the federal administrative judiciary. We were charged by OPM with providing "a clear delineation of the current `landscape' of administrative adjudication," including an "analysis of the evolving role of [administrative law judges, or ALJs] and other agency adjudicators from 1946 to the present." The study considered the evolution of the use of ALJs, differences among agencies in their use of adjudicators, the ALJ selection process, issues relating to the scope of ALJ independence, surveys of adjudicator attitudes, and the need for changes. The Conference recommended significant reform of the process by which administrative law judges are appointed and supervised. It called for the creation of a larger pool of eligible candidates, the elimination of the veteran's preference for ALJ positions, and enhanced recruitment of women and minorities. It also proposed that the current statutory ban on performance appraisals for administrative law judges be eliminated and that a system be established to permit appropriate review of ALJ performance. The Conference also proposed creation of a first-of-its-kind mechanism to allow the public to file complaints about ALJ conduct or performance.

In 1992, the Conference also adopted recommendations pertinent to particular agency programs. As part of its ongoing interest in administrative civil money penalty programs, the Conference undertook a study of the enforcement program at the Department of Housing and Urban Development under the 1988 amendments to the Fair Housing Act. In those amendments, Congress for the first time had authorized an administrative remedy for housing discrimination, although a judicial remedy had existed since the law's inception. The Conference also examined the numerous service programs in place to help meet the needs of migrant farmworkers. The programs to meet health, education, housing, job training, and other needs of migrant and seasonal farmworkers (MSFWs) have developed separately. In addition, migrant and seasonal farmworkers draw on the assistance of numerous other general programs separately administered by the Department of Labor, the Department of Health and Human Services, and the Department of Education. This division of responsibility results in a lack of coordination and causes overlap as well as gaps in service. The Conference also completed a study, undertaken at the request of EPA, of the procedural implications of the termination of EPA's implementation of the Noise Control Act of 1972. During this period, there has been no procedure to reexamine EPA's existing preemptive standards to take into account developments in science and technology. In addition, in response to a request from the Office of Juvenile Justice and Delinquency Prevention, the Conference studied the administration of the formula grant program, including OJJDP's efforts to monitor and assist state compliance with statutory mandates and requirements. Lastly, the Conference considered the procedures used by EPA for achieving settlements with de minimis parties in the Superfund program

Interagency Projects

In 1992, the Conference worked on several projects at the request of other agencies and funded through interagency transfers under the Economy in Government Act. Interagency projects included the study of the juvenile justice grant compliance and monitoring system used by the Department of Justice, Office of Juvenile Justice and Delinquency Programs; the study of administrative adjudication funded by the Office of Personnel Management; new approaches to noise control regulation by the Environmental Protection Agency; and, at the express request of the National Commission on Migrant Education, regulatory and coordination barriers to federal migrant programs. Each of these projects culminated in a recommendation in 1992. The Conference also studied judicial review of immigration cases, supported by funds from the Immigration and Naturalization Service. While this project did not culminate in a recommendation, it did serve as the foundation for a Conference colloquy that brought greater public attention to the issue.

Plans for the Future

The Conference expects to move in three principal directions in fiscal year 1994. First, to satisfy its statutory mandate "to arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure," the Conference shall maintain its current level of general clearinghouse and informational activity--including our program of seminars, colloquia, and publications. Second, it shall continue efforts to implement the ADR and Negotiated Rulemaking statutes. In this respect, as required by statute, we are beginning to gather data on agency implementation that we will present to Congress during anticipated oversight hearings. Finally, we shall attempt to maintain current levels of research but we expect to do so largely with funds obtained from other agencies through inter-agency transfers.

In the past few years, the Conference workload has increased substantially. Passage of the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act in 1990 has increased the demands on Conference staff and brought about a considerable shift in the use of Conference resources as agencies seek assistance in implementation. One-third to one-half of the Conference's resources are currently devoted to ADR activities and implementation of the Negotiated Rulemaking and Administrative Dispute Resolution Acts. At the same time, the number of requests from Congress, the Administration, and the agencies for Conference assistance in other areas of administrative law and process remains high. There remains a need to address those issues that affect numerous programs and agencies throughout the federal government to avoid severe cost implications in later years due to lost efficiency, significant increases in litigation, and a hodgepodge of procedural entanglements.

In recent years much of the Conference's new research has been funded from inter-agency money. Although we shall continue some current projects with funds under our general appropriation, new projects are likely to be funded solely with inter-agency transfer funds in fiscal year 1994. While studies of particular agency programs funded by inter-agency transfers are obviously of importance to these agencies, such studies may not address the many cross-cutting administrative and procedural issues affecting a number of agencies, but which may not be a priority to any one agency. If the Conference is to continue to address such matters, it is vital that a quality independent research program be maintained in the long term.

Future Conference research to be initiated in FY-93, but which is most likely to be considered in FY-94-95, will continue to be organized into two broad categories: research related to an in-depth study of the procedures of a single agency and research addressed to broader issues common to many agencies. We plan to initiate work on five or six of these new projects with FY-93 funds and carry those projects over into FY-94. These project ideas include areas as diverse as implementation of the Americans with Disabilities Act, employer sanctions and anti-discrimination adjudications under the 1986 Immigration Reform and Control Act, an examination of multi-member agencies and the need for improved collegiality and other operational improvements, and the intersection of FOIA requirements with court settlement documents. The Conference has also begun a major initiative, which will likely continue into fiscal year 1994, to study impediments to agency rulemaking and hopes to adopt recommendations on how to expedite and otherwise improve agency rulemaking processes.

As in the past, the Conference stands ready to tailor its research agenda to the express direction of Congress or the Administration.

During this period of fiscal restraint, the Conference will concentrate on those activities that result in streamlining the administrative process and producing savings to the government and to the citizens who seek to use the administrative processes in their dealings with government. Our clearinghouse activities in general, and our implementation of recently passed statutes in particular, save the other agencies of government countless hours and considerable expense because they can rely on the Conference's work. Conference initiatives can also make the manner in which the federal government deals with its citizens more fair and equitable--even recognizing that enhanced fairness and equity carry a pricetag.

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OFFICE OF
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TESTIMONY OF
BRIAN C. GRIFFIN

Chairman
Administrative Conference of the United States

before the
Subcommittee on Treasury, Postal Service, and General Government
Committee on Appropriations

United States House of Representatives

February 24, 1993

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
APPROPRIATIONS TESTIMONY
FEBRUARY 24, 1993

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STATEMENT OF BRIAN C. GRIFFIN

Introduction

My name is Brian C. Griffin and I serve as the Chairman of the Administrative Conference of the United States. I am pleased to discuss with you the mission of the Administrative Conference for fiscal year 1994. I should note at the outset that the Administration's position on funding for specific programs or activities is currently under development and, consequently, its policy determinations are not reflected in our testimony at this time.

Background

It is helpful, Mr. Chairman, to evaluate the role of the Conference in some context. The idea of having an institution to recommend improvements in agency procedures goes back 40 years and has received support from all three branches of government on a bipartisan basis. Before there was a permanent Administrative Conference, the courts and Presidents Eisenhower and Kennedy appointed temporary organizations to study pressing shortcomings of the administrative process. Congress created the Administrative Conference in 1964 as a permanent, independent agency pursuant to recommendations by both temporary conferences that such an agency be established and modeled on the Judicial Conference of the United States.

The need for a permanent body to advise the government on improving its processes and procedures, I might note, is well recognized in other common law countries. Great Britain has its Council of Tribunals, Australia has the Administrative Review Council, and Canada has the Council of Canadian Administrative Tribunals.

Since its creation, the Administrative Conference has provided objective and practical advice, in the form of formal recommendations and informal consultations with Congress and agencies, on ways to improve agency procedures used to administer innumerable programs that affect the basic needs of millions of Americans.

Statutory Mission

The Administrative Conference of the United States advises the Congress, the President, and federal agencies on ways to improve the fairness and efficiency of federal agencies' administrative procedures, including those used to conduct adjudications, rulemakings, and other agency activities. The Conference directs studies of the structure of government agencies and their administrative processes. In addition, the Conference advises the Judicial Conference of the United States on matters of administrative law relating to judicial review of agency decisions.

The Conference also serves as a clearinghouse of information on topics of current concern in administrative law and governmental process that save agencies from expending resources independently--or, indeed, duplicating efforts--to accomplish similar tasks. It devises model rules such as those for agency implementation of the Government in the Sunshine Act and the Equal Access to Justice Act, synthesizes and publishes administrative law materials, and regularly conducts seminars and working groups. These activities also provide a mechanism for ensuring a degree of consistency from agency to agency in procedural matters affecting the public, and help to improve the administration and effectiveness of programs that are vitally important to the American people.

Conference Membership

The Conference is, in effect, an advisory committee and, indeed, is actually chartered under the Federal Advisory Committee Act. It has an authorized membership of 101 members, who include the government's top legal officers, leading academic authorities in the field of administrative law, and experts from the private sector who are knowledgeable about governmental processes. A list of Conference members is attached as Appendix A. Except for the Chairman, all of our members serve part-time and without compensation. Because of the prestige of serving on the Administrative Conference, the government receives, free of charge (except for travel expenses for out-of-town members) the services of its participants. Last year alone, we estimate that the government received hundreds of hours and tens of thousands of dollars of free service from Conference members from the private sector.

The Administrative Conference is headed by a Chairman who is an advice-and-consent Executive Level II appointee with a term of 5 years. The Chairman acts as the chief executive officer of the Conference, presiding over its meetings. He also heads the Office of the Chairman, which consists of a small career staff of 24 full time equivalents (FTEs), which includes 23 full-time permanent and two part-time permanent employees. The Administrative Conference's overall direction is reviewed by a 10-member presidentially-appointed Council, half of whose members have traditionally been from the Executive branch, and the other half from outside the government.

The remainder of the membership of the Administrative Conference is divided into two categories: government, and nongovernment or "public." There are 50 government members appointed by the heads of their agencies. They are, typically, the general counsels of the Cabinet departments, commissioners of the multi-member independent agencies, or other senior level department and agency officials. Members do not have to be lawyers, however, and some are not.

The Conference also has among its government members a cadre of career civil servants who lend important continuity to its activities. Among the career government officials are three who hold so-called "floating" government seats that are used to provide the Conference with perspectives that might otherwise go unrepresented. Those seats are filled by a member of a board of contract appeals, an administrative law judge, and an inspector general.

Our statute requires that public, i.e., non-government, members be chosen by the Chairman from among "members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to federal administrative procedure" so as to provide "broad representation of the views of private citizens and utilize diverse experience." 5 USC § 593(b)(6). As a result, our public members come from both political parties, various regions of the country, and all points on the philosophical spectrum.

Conference bylaws also establish a category of nonvoting, emeritus membership for former Chairmen and those individuals who have served at least 8 years as Conference members. By this

means, the Conference retains the expertise of these distinguished administrative law authorities while permitting new members to contribute their ideas.

The Conference also maintains a permanent liaison relationship with the federal judiciary, which is represented by Chief Judge Stephen G. Breyer of the United States Court of Appeals for the First Circuit and Circuit Judge Stephen F. Williams of the United States Court of Appeals for the District of Columbia Circuit. We also have liaison arrangements with federal agencies that are not regular Conference members and with various groups which are interested in the administrative process, such as the Section on Administrative Law and Regulatory Practice of the American Bar Association, the Federal Bar Association, and the National Conference of Administrative Law Judges.

The Conference Process

The Conference's formal advice is given in the form of recommendations that are debated and adopted by vote of its full membership. The Chairman, in consultation with the professional staff, initially decides to pursue a particular topic on the basis of instructions from Congress, or suggestions from Congressional committees, Conference members, agency officials, members of the academic community, or others. The topics are typically narrow and precise--as can be seen from the list of recommendations set out in the Code of Federal Regulations, and attached as Appendix B. The full text of recommendations from 1991 through 1992 can be found in Appendix C.

When a topic is defined, the project proposal is submitted to the Council for approval and a consultant is selected--usually a law professor who is already a noted national expert in that particular field. The consultant reviews available literature and case law, interviews agency officials, and submits a comprehensive report on the topic. Although the scope of the report is worked out in advance, and monitored throughout the project, the consultant retains the latitude to make his or her own findings and conclusions.

When a consultant's draft report is submitted, it is reviewed by the members of one of our committees. (All Conference members serve on one or more of the committees.) Quite often the consultant refines his or her product in light of committee discussion. After the consultant submits a

final report, the committee considers whether to develop a set of recommendations. Committee deliberations--which typically include representatives of affected parties even if they are not members of the Conference--produce practical solutions to diverse, difficult, and often seemingly intractable, procedure or process problems that affect thousands, or even millions, of citizens in a range of governmental areas as diverse as health care, international trade, farm lending, transportation, and the processes of agency decisionmaking.

Recommendations that emerge from the various committees are transmitted to the Council, which reviews them for placement on the agenda of the next semi-annual general meeting, or plenary session. Occasionally, the Council has placed alternative proposals before the membership to sharpen debate on the key issues. At a plenary session, the proposed recommendations are thoroughly debated and often amended. On occasion, they are referred to committee for further work, or simply voted down. This extensive process of deliberation and review ensures that recommendations emerge that reflect the maximum possible consensus among knowledgeable persons of many perspectives and makes them much more likely to achieve implementation than single-source proposals.

Recommendations that are adopted by the full Conference are published in the Federal Register and transmitted by the Chairman to the Congress, the President, the judiciary or the relevant agencies. By arrangement with the Office of the Federal Register, they are codified in the Code of Federal Regulations at 1 CFR Part 305.

Implementation of Conference Recommendations

Among the things that give the Conference its unique character are its efforts to implement its recommendations. Conference proposals do not simply languish on a shelf. Rather, the Chairman and the professional staff actively promote implementation of Conference proposals.

Because the Conference has advisory powers only, the staff monitors Congressional and agency activities to discover if one or more agencies, or a Congressional committee, is interested in a problem that relates to a past recommendation. The staff, or the Chairman personally, will then ensure that the

interested body is aware of the Conference recommendation and is offered Conference assistance. This includes the preparation of testimony, the submission of written comments on agency rule proposals, or the development of training for applicable audiences interested in implementation. Of course, the staff also encourages agencies, Congress, or the courts to become interested in problem areas the Conference has uncovered. A copy of our implementation digest is included as Appendix D.

Assistance to Congress

We are particularly proud, Mr. Chairman, of our efforts to assist in the development of legislation and otherwise make Congress aware of our recommendations. Since 1987, our General Counsel has supervised a systematic program to review bills introduced into Congress to determine whether they deal with areas on which the Conference has adopted a recommendation. If they do, we advise Congress of our views, typically by letters to the majority and minority members or staff of appropriate committees but, on occasion, by direct contact with the author of the legislation. In 1992, Conference personnel continued efforts to seek implementation of standing recommendations and accepted congressional invitations to testify on numerous bills containing provisions on which Conference expertise was considered relevant.

A. FAA Civil Penalty Demonstration Project.

Passage of Public Law 102-345, the FAA civil penalty legislation, signed by the President on August 26, 1992, illustrates the useful assistance that the Conference can provide to the Congress. That legislation makes permanent the Federal Aviation Administration's civil penalty demonstration program and transfers authority over adjudication of civil penalty matters affecting pilots and flight engineers from the FAA to the National Transportation Safety Board. To this extent, it implements Conference Recommendation 91-8, *Adjudication of Civil Penalties Under the Federal Aviation Act*.

The legislation and the Conference recommendation are the direct outgrowth of a congressional request that the Conference study the nettlesome issues affecting the FAA's civil penalty program. Congress believed that it was desirable to arm the FAA with the power to impose civil penalties as an

element of its enforcement authority. So it authorized a demonstration program. But it was unsure of the proper contours of that authority. The problem became complicated because the implementation of the demonstration program became highly controversial. So Congress extended the program temporarily and asked the Conference to study it and offer recommendations. It asked us to respond within a year.

Although we operated under a statutorily-imposed deadline, the Conference process leading to the recommendation was comprehensive. Professor Henry Perritt of the Villanova Law School prepared an extensive analysis of the issues, the Conference's Adjudication Committee held a public hearing at which a dozen people testified, and representatives of the various interested agencies and private parties met under Professor Perritt's guidance to discuss whether they could achieve a consensus on a proper solution. When that effort was unsuccessful, the Conference's Adjudication Committee debated the issues, received written comments, and developed a set of proposals. The Council disagreed with the Committee's approach and recommended an alternative approach. Given the volatile nature of the issues, that was not too surprising. Following exhaustive debate at its December, 1991 plenary session, the full membership approved Recommendation 91-8, which was transmitted to the appropriate congressional committees several weeks ahead of the statutory deadline. Congress incorporated that recommendation, with some rather modest adjustments, into Public Law 102-345.

Mr. Chairman, it is my view that this type of activity is an excellent illustration of the Conference's ability to lend its nonpartisan governmental, academic, and private sector expertise and experience to the resolution of difficult issues pending before Congress. The issues presented were extremely controversial and no solution cried out as obviously and inevitably preferable. Consensus among affected parties was not possible. Nonetheless, the Conference's extensive study of the problem--on a relatively tight schedule--and its involvement of all affected interests, provided an unbiased solution around which consensus could develop. It also helped ensure, I believe, that Congress' resolution of the issue was well informed and could be completed before the expiration date of the program.

B. Other Assistance to Congress.

Conference recommendations were significant in other legislative activity as well during the past year.

♦ The Court of Federal Claims Technical and Procedural Improvements Act of 1992, which is Title IX of Public Law 102-572, modified the certification provision of the Contract Disputes Act so that it is no longer a jurisdictional requirement to appealing a denial of a contract claim. In this respect, the statute incorporates a central element of Conference Recommendation 83-1, *The Certification Requirement in the Contract Disputes Act*. Our staff actively consulted with committee staff during the course of committee consideration of the legislation.

♦ Title XIII of Public Law 102-550, the Housing and Community Development Act of 1992, created within the Department of Housing and Urban Development a new Office of Federal Housing Enterprise Oversight with responsibility for supervising the safety and soundness of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). Insofar as these two government-sponsored enterprises are concerned, the legislation implements Conference Recommendation 91-6, *Improving the Supervision of the Safety and Soundness of Government-Sponsored Enterprises*. The Conference reviewed the legislation at the express request of committee staff. See Appendix H.

♦ The Conference presented testimony before four Congressional subcommittees in 1992. In addition to the presentation of its annual appropriations testimony, former Acting Chairman Ross presented the Conference's views in support of its recommendation regarding the FAA's civil penalty program to the House Subcommittee on Aviation. At the invitation of the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee, he offered comments on the application of alternative means of dispute resolution to medical malpractice litigation involving the federal government. And, at the request of the Subcommittee on Oversight of Government Management of the Senate Governmental Affairs Committee, he presented testimony on

ways to address allegations of possible bias by administrative law judges within the Social Security Administration.

As required by statute, the Conference transmitted the tenth annual report on agency activities under the Equal Access to Justice Act, covering agency action during fiscal year 1991. The Office of the Chairman also presented its fifth annual seminar on the administrative process for Congressional staff.

Conference Areas of Activity

Because our mission is so encompassing, and our resources are limited, it is essential that we channel our research and implementation efforts into a limited number of areas, attempting to predict which subjects are the most likely candidates for significant improvement. In the Administrative Dispute Resolution Act[1] and the Negotiated Rulemaking Act,[2] both enacted at the end of 1990, Congress directed us to play a coordinating role in the fostering of less costly and less time consuming consensual approaches to agency decision making. We did so in 1992. In addition, we divided our research attention between those procedural issues that cut across the government and those that affect individual agencies.

A. Dispute Resolution

In 1990, Congress enacted the Administrative Dispute Resolution (ADR) Act and the Negotiated Rulemaking Act and gave the Conference responsibility as lead agency to coordinate the federal government's effort to lower the cost and reduce the time for public participation in agency activity. Both statutes affect the structure of adjudication and rulemaking, respectively, by placing increased decisional responsibility in the hands of the affected public. Passage of these laws represents the implementation of two significant Conference initiatives and reflects a congressional endorsement of the priority that the Conference accords to its dispute resolution program.

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[1] 5 U.S.C. §571-83 (1990), as amended by Pub. L. 102-354.

[2] 5 U.S.C. §561-70 (1990), as amended by Pub. L. 102-354.

The ADR Act amends the Administrative Procedure Act to authorize parties, including the government, specifically to agree to use mediation, arbitration, simplified or expedited procedures, or other mutually agreeable processes to resolve disputes arising under federal administrative programs. The new law amends several other statutes to afford parties the flexibility to use these alternative means of dispute resolution, or ADR, where routine processes would inhibit dispatch or consensual resolution.

In addition, the ADR Act requires each federal department and agency to designate a senior official as its dispute resolution specialist, to review systematically, in consultation with the Administrative Conference, all programs for ADR potential, to provide ADR training for selected personnel, and to review grants and contracts for inclusion of clauses encouraging ADR use. The Conference is also directed to report to Congress on agencies' implementation of the Act and to offer advice, assistance, and other support.

Similarly, the Negotiated Rulemaking Act formally establishes the Administrative Conference as a clearinghouse of information and experience with negotiated rulemaking and utilizes its expertise to keep the Congress informed as to how these structured negotiations are working.

The Administrative Conference gave priority attention to ADR in 1992. The Conference published a 75 page guidance document for agency officials responsible for implementing the ADR Act. The document contained extensive explanatory material on the Act and offered advice on ways to set up ADR programs successfully. The Conference also consulted extensively with dozens of agencies in 1992 in an effort to help them comply with the legislation.

In May 1992 the Conference presented, in cooperation with the Society of Professionals in Dispute Resolution and the Federal Mediation and Conciliation Service, a day-long program for over 300 federal employees on implementation of the Act. In October 1992, the Conference sponsored a full day roundtable discussion to assist agency personnel in finding and hiring ADR neutrals. A half-day Conference-sponsored seminar, for congressional staff members in January 1992, sought to familiarize them with ADR concepts, their uses, and relevant legislation.

The Conference plans to continue into the coming fiscal year its extensive implementation efforts under the ADR Act and the Negotiated Rulemaking Act. The Conference recently established a coordinating committee and four interagency working groups to help agencies implement the ADR Act. The groups will focus on ADR training and education, clearinghouse and outreach, implementation efforts, and system design. They are intended to enable agencies to undertake ambitious, coordinated efforts to set up new dispute resolution programs and make them work.

The Conference will continue to maintain its Roster of Dispute Resolution Neutrals, which commenced in 1990. The Roster is a computerized database of dispute resolution specialists available to help resolve conflicts that arise in agency programs. To date, nearly 400 individuals and organizations have asked to be included on the Roster and the Conference has fielded scores of requests from agencies for names of specialists.

In 1992, Conference staff participated in agency ADR implementation programs sponsored by the FDIC, the Department of Labor, the Department of Justice, and the Office of Personnel Management, as well as the Small Agency Council. In addition to the programs just noted, Conference staff participated in and helped develop numerous other agency ADR training programs, including programs for the EEOC, IRS, NSA, and U.S. Army. It has recently received funding through an interagency agreement to assist the Air Force in developing experiments, training programs, and written materials that will help the Air Force implement mediation and other ADR processes in contracting, environmental, and personnel matters.

It is useful to mention that the Conference's 1992 ADR activities were encouraged in part by a unique set of private grants from the Hewlett and Culpeper Foundations. These grants represent, I believe, an unusual private commitment of funds in recognition of the value of governmental promotion of consensual decision making.

B. Core Issues of Administrative Procedure.

In 1992, the Conference adopted many recommendations aimed at improving administrative processes in government-wide areas as diverse as attorneys fee litigation, more effective use of the federal administrative judiciary, and the use of agency policy statements.

1. Rulemaking

Section 553(b)(A) of the Administrative Procedure Act, which governs the rulemaking procedures of all federal agencies, provides that the requirements of notice and the opportunity for public comment on proposed agency regulations do not apply to "general statements of policy, or rules of agency organization, procedure, or practice . . . ." The Conference this past year crafted recommendations designed to provide guidance for agencies on when they may or may not reasonably dispense with notice-and-comment procedures.

Agency Policy Statements

This recommendation concerns agency use of policy statements, which include all substantive nonlegislative rules that are not limited to interpreting existing law. They come with a variety of labels and include guidances, guidelines, manuals, staff instructions, opinion letters, press releases or other informal captions.

The recommendation recognizes that policy statements that inform agency staff and the public about agency policy are beneficial to both. While they do not have the force of law (as do agency rules issued after notice-and-comment procedures pursuant to legislative delegation), they nonetheless are important tools for guiding administration and enforcement of agency statutes and for advising the public of agency policy.

The recommendation addresses a concern, however, about situations where agencies issue policy statements which they treat, or which are reasonably regarded by the public, as binding and dispositive of the issues they address. The issuance of such binding pronouncements as policy statements does not

offer the opportunity for public comment which is normally afforded during the notice-and-comment rulemaking process for rules which have the force of law.

Recommendation 92-2 seeks to ensure that before an agency promulgates substantive policies that bind affected persons, it provides appropriate notice and opportunity for comment on such policies, and makes sure that policy statements are not treated as binding. In particular, this recommendation urges agencies not to issue statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using "legislative" rulemaking procedures (normally including notice-and-comment). This recommendation has been distributed among the agencies.

Rules of Procedure and Practice

Although courts have used a number of different tests to determine whether a rule was one of procedure or practice, none has been particularly satisfactory. This recommendation therefore seeks to provide guidance to the agencies on applying the exemption.

Recommendation 92-1 encourages agencies to use notice-and-comment procedures voluntarily in promulgating rules of procedure and practice except in situations in which the costs of such procedures will outweigh the benefits of having public input. The recommendation also proposes that a rule should be found to fall within the statutory exception for rules of procedure and practice, and therefore exempt from the §553 notice-and-comment requirement, only when it both (a) relates solely to agency methods of internal operations or of interacting with regulated parties or the public, and (b) does not (i) significantly affect conduct, activity, or a substantive interest that is the subject of agency jurisdiction, or (ii) affect the standards for eligibility for a government program. To assist agencies in implementing this recommendation, the Conference urges OMB to refrain from invoking its review procedure under Executive Order 12,291 with respect to rules relating to procedure and practice that an agency voluntarily publishes for comment. This recommendation has been distributed among the agencies.

2. Adjudication

Streamlining Attorney's Fee Litigation Under the Equal Access to Justice Act

Recommendation 92-5 urges Congress to amend the Equal Access to Justice Act to reduce litigation over the dollar value of fee awards, to encourage settlements, to eliminate litigation on the question of when prevailing parties must file for fees, and to encourage judicial economy. It further suggests that Congress amend the law to provide fee awards in individual social security benefit claims cases without regard to whether the position of the United States was substantially justified and consider whether to extend the Act's coverage to categories of agency or Article I court adjudications that are similar to those types of cases now covered by the Act. This recommendation has been forwarded to the appropriate congressional committees.

The Federal Administrative Judiciary

In one of its largest projects in recent years, the Conference, at the behest of the Office of Personnel Management, undertook a broad study of the federal administrative judiciary. We were charged by OPM with providing "a clear delineation of the current 'landscape' of administrative adjudication," including an "analysis of the evolving role of [administrative law judges, or ALJs] and other agency adjudicators from 1946 to the present."

The study was done by a team of consultants, headed by Paul Verkuil, former President of the College of William and Mary and former Dean of the Tulane University Law School. It considered the evolution of the use of ALJs, differences among agencies in their use of adjudicators, the ALJ selection process, issues relating to the scope of ALJ independence, surveys of adjudicator attitudes, and the need for changes. The consultants found that the number of ALJs had leveled off as agencies sought to use non-ALJ adjudicators rather than ALJs in their adjudicatory hearings. It concluded that agency reluctance to use ALJs stemmed from perceived problems arising from the current ALJ selection process, including agencies' inability to hire women and minorities, and from the agencies' difficulties in managing their ALJs.

The Conference's recommendations reflect the Conference's basic view that the uniformity that derives from using ALJs in adjudicatory hearings should be encouraged. In order to foster such uniformity, the Conference recommended significant changes in the way that ALJs are selected, in order to provide agencies a better opportunity to select ALJs with the qualifications they require. Among the changes recommended are substantial expansion of the register of eligible candidates from which an agency can select an ALJ, and elimination of the veterans' preference in ALJ selection. The Conference also recommended that processes be developed to allow chief ALJs to review the performance of ALJs, to provide a mechanism for addressing complaints about ALJ performance, and to provide a forum for complaints by ALJs about improper interference with their decisionmaking. If such recommended changes are made, the Conference recommends that Congress be more amenable to requiring the use of ALJs in agency formal adjudications.

C. Agency-Specific Projects.

The Conference also adopted recommendations pertinent to particular agency programs, including coordination of programs for migrant and seasonal farmworkers, administration of the Office of Juvenile Justice and Delinquency Prevention's formula grant program, and administration of enforcement procedures under the Fair Housing Act.

Enforcement Procedures Under the Fair Housing Act

As part of its ongoing interest in administrative civil money penalty programs, the Conference undertook a study of the enforcement program at the Department of Housing and Urban Development under the 1988 amendments to the Fair Housing Act. In those amendments, Congress for the first time had authorized an administrative remedy for housing discrimination, although a judicial remedy had existed since the law's inception. The study noted that, despite an attractive administrative remedy, the majority of housing discrimination cases continued to be litigated in the courts. The reasons for this trend remain unclear.

In Recommendation 92-3, "Enforcement Procedures Under the Fair Housing Act," the Conference recommends that HUD increase its efforts to process complaints within the 100-day statutory period and encourage the use of alternative dispute resolution in all stages of Fair Housing Act cases. It suggests that the Department of Housing and Urban Development (HUD) notify each complainant of his or her option to select private counsel when a reasonable cause finding is made and study why parties in cases under the Fair Housing Act use the judicial process rather than the administrative adjudication process. It also urges Congress to amend the Fair Housing Act so each aggrieved person on whose behalf a complaint has been filed is automatically deemed a party to a lawsuit or administrative proceeding.

Coordination of Migrant and Seasonal Farmworker Service Programs

Since the 1960s, the federal government has established numerous service programs to help meet the needs of migrant farmworkers. The programs to meet health, education, housing, job training, and other needs of migrant and seasonal farmworkers (MSFWs) have developed separately. There are approximately ten MSFW-specific service programs, and farmworkers also draw on the assistance of numerous other general programs such as food stamps or Medicaid. The four largest federal programs are separately administered by the Department of Labor, the Department of Health and Human Services, and the Department of Education. This division of responsibility results in a lack of coordination and causes overlap as well as gaps in service.

Recommendation 92-4 urges that the President establish by executive order a policy-level Interagency Coordinating Council on MSFW programs. This Council is not intended to replace, and indeed should promote, existing coordination at the program staff, state, and service delivery level. The Conference suggests that the Council be specifically charged to coordinate and review MSFW service programs, giving particular attention to gaps in services and unjustified overlap. It should encourage public participation through public meetings, creation of an advisory committee, or other means.

Implementation of the Noise Control Act

In 1992, the committee completed its examination of EPA's implementation of the Noise Control Act of 1972. Since funding of this program was terminated a decade ago, EPA has retained regulatory responsibilities under the Act. During this period, there has been no procedure to reexamine EPA's existing preemptive standards to take into account developments in science and technology. The Conference's study of the procedural implications of this situation, undertaken at the request of EPA and conducted by consultants Professor Sidney A. Shapiro and Dr. Alice H. Suter, led to adoption of Recommendation 92-6, "Implementation of the Noise Control Act."

Recommendation 92-6 urges the Environmental Protection Agency (EPA) to analyze the preemptive effects of its existing and pending noise standards to eliminate, where possible, any unintended effects. It suggests Congress review issues raised by the analysis, including whether the continuation of substantive regulatory requirements without funding, or EPA's inability to reexamine, modify, or rescind those requirements, creates undue procedural burdens upon industry, the states, and the public.

Administration of the Office of Juvenile Justice and Delinquency Prevention's Formula Grant Program

In 1974, Congress created the Office of Juvenile Justice and Delinquency Prevention within the Department of Justice. OJJDP is responsible for administering a program of formula grants to local and state governments. The Conference, in response to a request from OJJDP, studied the administration of the formula grant program, including its efforts to monitor and assist state compliance with statutory mandates and requirements. As part of this study, the Conference adopted Recommendation 92-8 which addresses issues of: staffing, training, communication and consultation with states, coordination and collaboration at various levels of government, and consistency and clarity of policy elaboration.

De Minimis Settlements Under Superfund

The Conference's consideration of procedures for achieving settlements with de minimis parties in EPA's Superfund program resulted in Conference Recommendation 92-9, "De Minimis Settlements Under Superfund." Recommendation 92-9 urges the EPA to expand its efforts to negotiate settlements with "potentially responsible parties" that have contributed relatively small amounts of hazardous waste at sites covered by the Superfund program. A more active agency role is recommended and suggestions are made for additional guidance from EPA headquarters to regional offices. The recommendation also calls for establishing a central, publicly accessible repository of *de minimis* settlement documents.

Interagency Projects

The Conference worked on several projects at the request of other agencies and funded through interagency transfers under the Economy in Government Act. In 1992, interagency projects included the study of the juvenile justice grant compliance and monitoring system used by the Department of Justice, Office of Juvenile Justice and Delinquency Programs; the study of administrative adjudication funded by the Office of Personnel Management; new approaches to noise control regulation by the Environmental Protection Agency; and, at the express request of the National Commission on Migrant Education, regulatory and coordination barriers to federal migrant programs. Each of these projects culminated in a recommendation in 1992. The Conference also studied judicial review of immigration cases, supported by funds from the Immigration and Naturalization Service. While this project did not culminate in a recommendation, it did serve as the foundation for a Conference colloquy that brought greater public attention to the issue.

Clearinghouse, Training, and Advisory Activities

By statute the Conference is directed to "arrange for interchange among administrative agencies of information potentially useful in improving procedure" (5 U.S.C. §594(2)). Each year the Conference serves as a central clearinghouse for information on administrative practice and procedure so that agencies can receive the benefit of each other's and the Conference's experience.

Annual Seminar for Independent Agency Members

A seminar series for the Presidential appointees who serve as members of independent regulatory agencies, begun in 1988, continues to permit the appointees to step away from their everyday work and address common problems of the regulatory process. The program, offered each spring, is the only effort at government-wide training for political appointees regarding the administrative process. In connection with the seminar, the Conference has produced a pamphlet entitled *Multi-Member Independent Regulatory Agencies: A Preliminary Survey of their Organization*. The pamphlet provides an introduction to issues of organization common to multi-member agencies, such as the powers of the Chairman, quorum requirements, litigation authority, the requirement of Office of Management and Budget (OMB) clearance or the authority to bypass OMB review of legislative or budget matters.

About 50 members from more than 20 independent boards and commissions attended the Conference's fifth annual seminar for members of independent regulatory agencies. The topic of international regulatory cooperation was addressed by Richard C. Wright, Commercial Counselor of the Delegation of the Commission of the European Communities to the United States; Janet Steiger, Chairman of the Federal Trade Commission; and Claude E. Barfield, Director of Science and Technology Policy for the American Enterprise Institute. The program also included a presentation by Jane S. Ley, Deputy General Counsel, Office of Government Ethics, on new ethics laws, including post-government employment restrictions and rules on receipt of honoraria, gifts or reimbursements.

Council of Independent Regulatory Agencies

The Chairman of the Conference chairs the Council of Independent Regulatory Agencies (CIRA). CIRA is an informal organization composed of the chairs of the 13 major independent regulatory boards and commissions. It enables agency chairs to exchange ideas concerning governmental and regulatory issues with select members of the executive branch, academics, and members of Congress. CIRA met several times in 1992 to address issues such as the regulatory moratorium, communication between independent agencies and the White House, regulatory relief for small businesses, the

Administrative Conference's recommendation regarding the federal administrative judiciary and past recommendations as they apply to the independent regulatory agencies, and other regulatory issues.

Seminar for Agency General Counsels

During FY-92, the Conference initiated a new seminar series for agency chief legal officers. More than 40 department and agency chief counsels and general counsels or their representatives participated in the first in a series of quarterly meetings. The June 1 opening session featured Solicitor General Kenneth Starr as the guest speaker. At a second seminar Research Director Jeffrey S. Lubbers and Conference Member Paul Verkuil addressed issues pertaining to the study of the federal administrative judiciary.

Model Rules

Hearings are currently held before presiding officers at scores of federal departments and agencies. Each agency has its own set of procedure and practice rules that cover many of the same procedural areas. To the extent that the conduct of hearings at these agencies presents similar problems, it appeared useful to agency litigators and presiding officers, as well as private practitioners who litigate before several agencies, to formulate model procedure and practice rules that address common procedural problems. Such model rules and related commentary could also be used by those agencies that are either required to establish formal procedures for new adjudicatory programs or interested in amending their existing rules in selected areas. A Working Group within the Office of the Chairman has completed work on a set of model procedure and practice rules suitable for use in formal agency adjudications. They are intended for those proceedings that offer an opportunity for an oral, fact-finding hearing before an agency adjudicator, whether conducted pursuant to the Administrative Procedure Act, other statutes, or agency regulations or practice. Public comment on the model rules and accompanying commentary has been solicited through a notice in the Federal Register and are due shortly.

Additional Assistance to Agencies

In 1992, the Conference organized a seminar on rulemaking procedures for agencies subject to Executive Order 12,699, *Seismic Safety of Federal and Federally Assisted or Regulated New Building Construction*; commented on aspects of a Department of Health and Human Services' proposed rule under the Orphan Drug Act; commented on Department of Justice rules under the Radiation Exposure Compensation Act; commented on aspects of a proposed rule by the Department of Housing & Urban Development changing elements of their informal rulemaking process; and advised the Office of the Secretary of Education on procedural issues raised in appeals from a state loan guaranty agency's decision to disqualify a vocational school from participation in student loan programs.

Colloquia in 1992

The Conference offers an ongoing colloquy series that allows for the presentation and discussion of issues in administrative law and regulatory procedures that affect administrative agencies. A list of the colloquia is set out as Appendix E.

Advice and Assistance to Foreign Governments and Scholars

Public Law 102-403 amended the Administrative Conference Act to clarify the Conference's authority to respond to requests from foreign governments for administrative law and process advice and assistance. Under the new law, Conference international advisory activity must be conducted on a reimbursable basis and be approved by the Department of State, the Agency for International Development, or the U.S. Information Agency. The legislation was sponsored in the House by Representative Barney Frank, then Chairman of the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee. In the Senate it was sponsored by Senator Charles Grassley and co-sponsored by Senator Howell Heflin, the Ranking Minority Member and Chairman, respectively, of the Subcommittee on Courts and Administrative Practice of the Senate Judiciary Committee.

The Conference will conduct its first overseas initiative pursuant to this new authority next month when a team of experts will present a week-long seminar on the American administrative process in Kiev, Ukraine. Overseas programs are designed to achieve two objectives. First, we hope that they will foster the growth of democrative processes in the countries of Eastern Europe and the former Soviet Union. Second, they should familiarize foreign goverment officials and leaders of the legal community with the American administrative process as a means of fostering inter-governmental cooperation. We are told by the Department of Justice, for example, that European countries are prepared to assist in the enforcement of American court decrees but are less willing, because of lack of familiarity, to cooperate with federal administrative agencies in the conduct of their missions.

The Administrative Conference's role as a central source of expertise on administrative process issues has resulted in recent years in visits to the Conference's offices by foreign government officials who wish to discuss the American administrative system. A list of recent visits is included in Appendix G.

Publications

Conference publications are an important part of its clearinghouse function. The Conference issues several types of publications that benefit government agencies. *The Federal Administrative Procedure Sourcebook: Statutes and Related Materials*, one of the most requested publications, was published in the fall of 1992 in an updated and revised version. The *Sourcebook* collects statutory and regulatory material frequently used by agency attorneys and provides brief analyses of each. Agency "rider" requests on the printing requisition doubled the Conference's order. The Conference *Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution* (1987) continues to be available from the Government Printing Office. The Conference also published the *Negotiated Rulemaking Sourcebook* in 1990 and an updated version of *A Guide to Federal Agency Rulemaking* in 1991. Publication of a pamphlet on agency use of ombudsmen was completed in 1992.

The Conference also publishes each year several newsletters containing information useful to agency personnel concerning ongoing research activities and other Conference initiatives. These

newsletters, which are provided to all members of the Senior Executive Service as well as agency personnel directly involved in administrative law issues, prompted numerous requests for Conference publications and research reports relevant to current agency activity.

In 1991, the Office of the Chairman updated its extensive bibliography of administrative law materials. Almost 300 documents, including Conference recommendations, sourcebooks, and law review articles, were catalogued and indexed for use by federal agencies and the interested public. The Conference maintains a Federal Depository Library that contains many administrative law materials unavailable in less specialized collections, and continuously responds to requests for assistance.

Workload and Budgetary Issues

The Conference expects to move in three principal directions in fiscal 1994. First, we shall continue our efforts to implement the ADR and Negotiated Rulemaking statutes. In this respect, as required by statute, we are beginning to gather data on agency implementation that we will present to Congress during anticipated oversight hearings. Second, to satisfy our statutory mandate "to arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure," we will maintain our current level of general clearinghouse and informational activity--including our program of seminars, colloquia, and publications. Finally, we shall attempt to maintain current levels of research but, as I shall explain, we expect to do so largely with funds obtained from other agencies through inter-agency transfers.

In the past few years, the Conference workload has increased substantially. Passage of the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act in 1990 has increased the demands on Conference staff and brought about a considerable shift in the use of agency resources as agencies seek assistance in implementation. One-third to one-half of the Conference's resources are currently devoted to ADR activities and implementation of the Negotiated Rulemaking and Administrative Dispute Resolution Acts. At the same time, the number of requests from Congress, the Administration, and the agencies for Conference assistance in other areas of administrative law and process remains high. There remains a need to address those issues that affect numerous programs and

agencies throughout the federal government to avoid severe cost implications in later years due to lost efficiency, significant increases in litigation, and a hodgepodge of procedural entanglements.

Historically, the direct research budget for new contracts has been approximately 20 percent of the total Conference appropriation, allowing 10-12 new projects per year. In some recent years, however, most new research has been funded from inter-agency money. Although we shall continue some current projects with funds under our general appropriation, new projects are likely to be funded essentially with inter-agency transfer funds in fiscal year 1994. While studies of particular agency programs funded by inter-agency transfers are obviously of importance to these agencies, such studies may not address the many cross-cutting administrative and procedural issues affecting a number of agencies, but which may not be a priority to any one agency. And, as I have noted earlier, the Conference traditionally devotes a significant portion of its annual research budget to these important cross-cutting issues. If the Conference is to continue to address such matters, it is vital that a quality independent research program be maintained in the long term.

Future Conference research to be initiated in FY-93, but which is most likely to be considered by committees in FY-94-95, will continue to be organized into two broad categories: research related to an in-depth study of an issue in a single agency and research addressed to broader issues common to many agencies. In furtherance of this approach, the Council has approved a number of additional topics that will occupy the Conference for several years. (See Appendix F) We plan to initiate work on five or six of these new projects with FY-93 funds and carry those projects over into FY-94. These project ideas include areas as diverse as implementation of the Americans with Disabilities Act, employer sanctions and anti-discrimination adjudications under the 1986 Immigration Reform and Control Act, an examination of multi-member agencies and the need for improved collegiality and other operational improvements, and the intersection of FOIA requirements with court settlement documents. The Conference has also begun a major initiative, which will likely continue into fiscal year 1994, to study impediments to agency rulemaking and hopes to adopt recommendations on how to expedite and otherwise improve agency rulemaking processes.

Several additional projects from the Council's approved list may also be possible if the affected agencies are willing to support Conference studies under the Economy in Government Act. These include an examination of adjudication procedures in industrial security clearance review cases and a study of ALJ subpoena power.

As in the past, the Conference stands ready to tailor its research agenda to the express direction of Congress or the Administration.

Clearinghouse Activities in the Coming Year

In the coming year, the Administrative Conference will continue its full range of clearinghouse activites, according priority attention to working with federal agencies to improve use of ADR processes. Several roundtables for issues in alternative dispute resolution will be held in 1994 and the computerized database containing the agency's roster of dispute resolution neutrals will be maintained. The Conference will also continue its annual seminars for legislative staff and regulatory commissioners, the CIRA breakfast program, and quarterly meetings of agency chief legal officers. It is expected that the Conference will present at least three colloquies on timely topics in the coming year.

In the late 1970s, the Conference gathered and published statistical reports on administrative hearings under the Uniform Caseload Accounting System. This was discontinued for budgetary reasons. The recent report of the Special Committee on the Future of the Conference strongly urges the gathering of this data because of its substantial value to those attempting to study results of reform efforts. Recently, the government has suffered from a lack of definitive statistical data, hindering its efforts to thoroughly analyze positions taken on the ALJ Corps bill, the Fair Housing Act, legislation affecting Social Security and Veterans Department benefit claims procedures, or on myriad legislation debating the pros and cons of new independent commissions. This statistical research effort would cost between $100,000 and $150,000 annually to resume. To better define the scope of this problem the Conference will explore ways to revive the statistics-gathering function through multi-agency

activities and will continue to ask for agency support through SES details to explore the feasibility of a more limited effort in this area.

General Administration

Health unit costs are projected to increase 11 percent each year for the next few years. In addition, the Conference has been advised by the General Services Administration that it will have a $4,500 increase in facility rent in FY-94; the Conference had a $7,300 rent increase in FY-92.

The Conference is required by the Metric Conversion Act of 1975[3] and by Executive Order 12770[4] to use the metric system for procurement contracts, grants, and other business-related activities by the end of fiscal year 1992. It is also required to submit an annual report to the Secretary of Commerce and to Congress on the Conference's efforts to comply with metric conversion. This report is included as Appendix I. The Conference will continue to implement metric conversion in FY-94 and anticipates no notable expenses connected with this endeavor.

Personnel Compensation and Benefits

The Conference has been experiencing a substantial increase in benefits charges associated with personnel payroll. When the Conference's reauthorization bill passed Congress in 1990, projected budget costs assumed civilian personnel benefits would approximate historical levels at 13 percent of personnel compensation. Based on those projections, the Conference's share of FY-94 benefits would have been under $200,000. Benefits payments are now projected to be $291,206, or nearly $100,000 more than anticipated 4 years ago. This increase is primarily associated with the higher costs to the Conference attributable to FERS and the associated thrift savings matching program. Employee benefits for the Civil Service Retirement System require from 8-15 percent of salary from our appropriation while benefits for the FERS plan employees range from 21-34 percent of salary. Thus,

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[3] 5 U.S.C. §205 et. seq., as amended by section 5164 of the Omnibus Trade and Competitiveness Act of 1988, Pub. Law. 100-418 (1988).

[4] 56 Fed. Reg. 35801, July 25, 1991.

the entire increase authorized for FY-94 will be insufficient to cover projected increases in mandatory employee salary and benefit costs.

Research and Recommendations

Work on Conference formal recommendations includes three primary costs: 1) the payment of the researcher, 2) travel costs for researchers during the project's development and consideration, and 3) support costs at the researcher's institution which cannot be performed by Conference staff. Some new research may be initiated in FY-94 if the Conference continues to receive interagency transfers as in the past. Because of a change in the Conference's enabling legislation enacted by Congress in 1990, the Conference may now retain interagency funds not expended in a given year until they are expended on the designated projects. This has permitted us to utilize these funds more efficiently.

Conclusion

I am aware that we continue to live in a period of fiscal restraint and there is a need to devote additional attention to a reduction of the budget deficit. Fiscal restraint and the need for efficiency make this the precise time to strengthen the Conference's efforts to streamline the administrative process. For a very modest cost, the United States receives tremendous value in the form of volunteered expertise from Conference members. The Conference's work often results in considerable savings to the government and to the citizens who seek to use the administrative processes in their dealings with government. Our clearinghouse activities in general, and our implementation of recently passed statutes in particular, save the other agencies of government countless hours and considerable expense because they can rely on the Conference's work. Such efficiencies can be obtained without abandoning the federal government's historic, 45 year effort to make the manner in which it deals with its citizens more equitable.

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

OFFICE OF
THE CHAIRMAN

Biographies of Witnesses

Brian C. Griffin. Chairman of the Administrative Conference of the United States. Before being appointed Chairman of the Administrative Conference, Mr. Griffin was Deputy Assistant Attorney General of the Tax Division, United States Department of Justice. Mr. Griffin was previously in private practice in Oklahoma City, where he also served as adjunct professor of law at the University of Oklahoma. Mr. Griffin received a British law degree from Oxford University as a Rhodes Scholar, and American law degrees from the University of Oklahoma (J.D.) and Southern Methodist University (LL.M. in Taxation).

William J. Olmstead. Executive Director of the Administrative Conference of the United States for six years. He is a member of the senior staff of the Office of the Chairman and is in the Senior Executive Service. Before joining the Administrative Conference, Mr. Olmstead served as the Assistant General Counsel for Hearings at the Nuclear Regulatory Commission. Mr. Olmstead previously served as the Director of Regulations at the Nuclear Regulatory Commission. Mr. Olmstead received a law degree from Washburn University.

Jeffrey Lubbers. Research Director of the Administrative Conference of the United States since 1982. He joined the Conference in 1975 as a staff attorney. He is a member of the senior staff of the Office of the Chairman and is in the Senior Executive Service. He was also an instructor at the University of Miami Law School in 1974-5 where he taught administrative law and legal research. Mr. Lubbers received his J.D. from the University of Chicago in 1974.

Administrative Conference of the United States

Fiscal Year 1994
Budget Justification Materials
In Support of the Conference's
Appropriations Testimony

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TAB A - Membership of the Assembly of the Administrative Conference

TAB B - List of past recommendations of the Administrative Conference of the United States

TAB C - Recommendations of June 1992 Plenary Session

TAB D - Recommendations of December 1991 Plenary Session

TAB E - Draft Supporting Expense Report Schedules

I. SUMMARY FIGURES

Dollar Amounts

1992 appropriation	$2,227,000*
1993 appropriation	$2,314,000
1994 request	$2,314,000

Appropriation Language

For necessary expenses of the Administrative Conference of the United States, established by the Administrative Conference Act, as amended (5 U.S.C. 571 et seq.) and not to exceed $1,500 for official reception and representation expenses; [$2,314,000] $2,314,000.

Estimates of Programmatic Application of Funds

(in thousands of dollars)

	Actual 1992	Est'd 1993	Est'd 1994
General Administration	479	459	434
Personnel Compensation and Benefits	1,501	1,722	1,756
Formal Recommendations (Research; reports)	158	73	69
Implementation and Advisory (Agency assistance)	40	40	35
Clearinghouse (Information interchange)	44	20	20
Direct Program	2,222	2,314	2,314
Reimbursable Program	109	150	50
Budget Authority (gross)	2,331	2,464	2,364
Appropriation	**2,222**	**2,314**	**2,314**
Spending authority from Offsetting Collections	**109**	**150**	**50**
Total obligations	2,331	2,464	2,364
Obligated balance, start of year	732	709	714
Obligated balance, end of year	-709	-714	-714
Outlays (gross)	2,354	2,459	2,364
Budget Authority (net)	2,222	2,314	2,314
Deduction for offsetting collections:	-109	-150	-50
Outlays (net)	2,245	2,309	2,314

Personnel Resources--FTEs

1992 Actual	1993 Estimate	1994 Estimate
24	24	24

*Original appropriation of $2,227,000 was reduced $5,000 pursuant to P.L. 104-141 §523A.

II. DESCRIPTION OF THE AGENCY

A. STATUTORY MISSION

The Administrative Conference of the United States is a permanent agency consisting of 101 members who are federal agency heads, the government's top legal officers, leading academics in the field of administrative law, and experts from private life who are knowledgeable about governmental processes. The agency advises and makes recommendations to cabinet departments and administrative agencies, the President, the Congress and Judicial Conference of the United States on ways to improve the fairness and efficiency of administrative procedures used by federal agencies. These procedures include those used to conduct adjudications, rulemakings and other agency activities. In addition, the Conference advises on matters of administrative law relating to judicial review of agency decisions. The Conference also works informally with agencies to improve their administrative procedures. It fields hundreds of questions from agency personnel concerning administrative process each year and devises model rules such as those for agency implementation of the Equal Access to Justice Act. It collects and synthesizes materials like the *Agency Guide to Rulemaking* (Published in FY-91), the *Sourcebook on Federal Administrative Procedure* (currently being printed), the *Sourcebook on Federal Agency Use of Alternative Dispute Resolution* (last issued in 1987, being considered for revision in FY-95), the *Sourcebook on Negotiated Rulemaking* (1989), *Multi-Member Independent Regulatory Agencies: A Preliminary Survey of Their Organization* (revised in 1991) and other administrative law reference materials. Workshops and seminars on key topics of current concern in administrative law and governmental processes are regularly conducted. This saves agencies from expending resources independently to accomplish similar tasks and provides a mechanism for ensuring consistency from agency to agency in procedural matters affecting the public.

B. MEMBERS AND STAFF

The Administrative Conference of the United States is headed by a Chairman who is an advice-and-consent Level II appointee with a term of five years. On December 23, 1992, the President nominated Brian C. Griffin of Oklahoma to a five year term as Chairman. Mr. Griffin formerly was Deputy Assistant Attorney General with the Tax Division at the Department of Justice. The Chairman acts as the chief executive of the Conference, presiding over its meetings. He also heads the Office of the Chairman which consists of 22 full-time permanent, and two part-time permanent, and one full-time temporary positions.

The Administrative Conference's overall direction is reviewed by a ten-member Presidentially appointed Council, half of whose members have traditionally been from the Executive branch, and the other half from outside the government. Current members of the Council are: Susan Au Allen, Paul Shearman Allen & Associates; Richard Breeden, Chairman of the Securities and Exchange Commission; Constance Horner, Director of White House Personnel; Walter Gellhorn, Professor Emeritus, Columbia University; C. Boyden Gray, former Counsel to the President; William R. Neale, Krieg DeVault Alexander & Capehart, Indianapolis, Indiana; and Paul Vander Myde, Vice President for Corporate Affairs, VSE Corporation. There are four vacancies.

Other than the Council, the membership of the Administrative Conference is divided into two categories: government and "public" or non-governmental. There are 50 government members, all

from the Executive Branch. These members are either the head of the department or agency or an individual designated by the head. Typically, the member designated is the General Counsel or a legally trained Commissioner. Members do not have to be lawyers, however, and some are not. The 40 public members are appointed by the Chairman, with the approval of the Council, for terms of two years. The listing of both government and public members, current as of February 13, 1992, is attached to this budget submission (Tab A).

Because of the prestige of serving on the Administrative Conference, the government receives, free of charge (except for travel expenses for out-of-town members) the services of both its government and public participants -- individuals with an impressive array of accomplishments and experiences who donate hundreds of hours of service.

C. FORMAL RECOMMENDATIONS

The Administrative Conference has three principal statutory duties, the first of which is to "study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies ... and make recommendations to administrative agencies ... the President, Congress, or the Judicial Conference of the United States ... ." [5 U.S.C. § 574(1)] Formal Recommendations of the Administrative Conference are the result of a relatively unique deliberative process that begins with the decision by the Chairman, with the approval of the Council, to pursue a particular research topic. The Chairman's decision is frequently based on informal expressions of interest in a problem by a member of the Conference, a Congressional committee or a member of Congress, an Executive Branch official or an interested citizen. The topics are usually narrow and precise--as can be seen from the list of past Recommendations. [1 C.F.R. Part 305 *see* Tab B.]

When a topic has been defined, the staff of the Office of the Chairman finds a consultant--typically a law professor who already has specialized knowledge about the particular subject. The consultant will interview agency officials, review the literature, and write a 100 to 200 page report on the problem. The consultant works closely with the Office of the Chairman and the members of the appropriate Conference committee throughout this process. The Office normally obtains the services of highly qualified consultants at below-market rates due to the prestige of working with the Conference.

The draft report is reviewed by a Conference committee (all members serve on one of the six committees). If the committee believes it is warranted, it develops one or more proposed Recommendations assisted by public participation and comment. The Council reviews Recommendations proposed by committees and, if it believes the proposals have received sufficient attention, places them on the agenda of the next general meeting of the whole Conference -- or Plenary Session.

At the Plenary Session, proposed Recommendations submitted by the Council are thoroughly debated by the members. Often Recommendations are amended and occasionally they are referred back to committee or voted down. If a Recommendation is adopted, it is published in the Federal Register and is sent to the agencies or to the Congress, as appropriate. The Recommendations of the Conference are codified in the Code of Federal Regulations. [1 C.F.R. Part 305]

This extensive deliberation and review ensures that the resulting Recommendation reflects the maximum possible consensus among knowledgeable persons of varied perspectives. The Recommendations resulting from this consensual process provide departments and agencies with a

procedural approach to complex and controversial problems which is much more likely to succeed by gaining public acceptance and withstanding judicial challenge than single-source proposals.

The Chairman on occasion receives official requests from agencies, the President's Domestic Policy Council or committees or members of Congress to develop a Recommendation in a particular area. Recent examples were a Congressionally directed study of the Federal Aviation Administration's civil money penalty program, a request from the Domestic Policy Council on federal personnel appeal procedures, and a request from the Office of Personnel Management on the federal administrative law judge program. Several federal agencies transferred funds to the Conference in FY-91-92 in order to obtain Conference expertise and assistance for specific projects involving administrative processes.

D. IMPLEMENTATION AND ADVISORY ACTIVITIES

The Administrative Conference's second statutory duty is to "arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure." [5 U.S.C. § 574(2)] The Conference accomplishes this task in two basic ways: 1) initiating exchanges with agencies to seek their cooperation in implementing Conference Recommendations and 2) responding to agency requests for advice and assistance.

Implementing Conference Recommendations is an important part of the activities of the staff of the Office of the Chairman. The Office maintains a separate file on each past Recommendation. Information received from all agencies and other sources concerned with implementing a particular Recommendation is documented in that file. Because the Conference has no regulatory authority to implement its Recommendations, it tries to stay abreast of current developments in one or more departments or agencies, or Congressional committees, that may relate to a problem addressed by a Conference Recommendation. The relevant body will be informed of the Conference Recommendation and Conference assistance will be offered. This includes the preparation of testimony, the submission of written comments on agency rule proposals, or the development of training for applicable audiences interested in implementation.

The Office of the Chairman also receives requests from departments, Office of Management and Budget (OMB), agencies, members of the judiciary and Congressional committees for its views on procedural matters or administrative matters in areas in which the Conference has not adopted a formal Recommendation. In such situations, the Chairman or staff of the Office of the Chairman will provide information based on their own expertise and/or on research reports contained in the Conference library. In some cases studies may be initiated to address the area if it appears to have broad application throughout the government or if the requesting body wishes to have Conference assistance under the Economy in Government Act.

Another means for providing advice and assistance to agencies is the Council of Independent Regulatory Agencies, created in April of 1982 at a meeting with the President. This informal group of agency heads is convened by the Chairman of the Conference to discuss matters of interest to over a dozen chairmen of the principal regulatory agencies who are its members. The Conference provides a means by which communication can be shared between the White House and the agencies while respecting their independence. During FY-92 the Conference established a companion group of department and agency chief legal officers which meets quarterly.

The Conference organizes and conducts colloquies to help carry out its mandate "to provide suitable arrangements through which federal agencies, assisted by outside experts, may cooperatively

study mutual problems...." (5 U.S.C. §571) In FY-92 the Conference was able to conduct six of these popular and successful colloquies and symposiums. The Conference also annually holds an all-day seminar on current issues in the administrative process for members of independent regulatory agencies and a program for legislative staff who draft legislation dealing with administrative procedure and process.

The Office of the Chairman also hosts various individuals and groups from foreign governments who are interested in questions of governmental process and in the work of the Conference. During the past twelve months, Conference personnel have worked with officials from numerous countries including Australia, Bulgaria, Canada, China, Great Britain, Israel, Russia, South Africa, and Ukraine. Active assistance continues to be given to the State Department, the Justice Department, and the Agency for International Development (AID) concerning administrative reform in eastern European countries.

E. CLEARINGHOUSE ACTIVITIES

The third duty assigned to the Administrative Conference is to "collect information and statistics from administrative agencies and publish such reports as it considers useful for evaluating and improving administrative procedure." [5 U.S.C. § 574(3)] The Conference collects and maintains statistics on agency formal adjudications, awards under the Equal Access to Justice Act, and other administrative issues of broad concern within administrative agencies. It also publishes books on a regular schedule that contain materials useful to the administrative community at large. In addition the Office of the Chairman maintains a library that not only includes Conference publications and the archived records of past Conference research projects but also an excellent collection of materials on administrative law subjects. The collection is frequently used by personnel from other federal agencies who need information on the Administrative Procedure Act, the Freedom of Information Act, the Privacy Act, or other legal material relating to administrative law. The library is a Federal Depository Library and is open to the public.

III. FY-94 BUDGET CHANGES REQUESTED BY FUNCTION

1994 Request (Description of Changes)

The Administrative Conference requests $2,314,000 for its Fiscal Year 1994 budget. This request is the same as the FY-93 Conference budget. This is within the ceiling authorized for FY-94 in the last year of the Conference's four year authorization cycle. Unfortunately, the increase is insufficient to continue Conference programs at the FY-93 level and will not allow the Conference to pursue its five-year strategic planning objectives to: 1) return the research budget to historical levels; 2) regularize Conference publications on a multi-year schedule; and 3) develop a methodology for systematically collecting adjudication data from the agencies to form a basis for sound government-wide analysis and planning. In fact, the requested amount will be insufficient to allow the initiation of new research funded by the appropriation or to schedule revision of a Conference publication. Nor will it permit the Conference to systematically collect adjudication data which has not been done for nearly a decade.

In the past few years, the Conference workload has substantially increased. The number of requests from Congress, the Administration, and the agencies for Conference assistance has continued to increase. There is a growing backlog of issues on which research and committee consideration is required. In addition, the recent passage of two major bills, the Administrative Dispute Resolution Act [Pub. L. 101-552 (November 15, 1990)] and the Negotiated Rulemaking Act [Pub. L. 101-648 (November 29, 1990)], has increased the demands on Conference staff as more agencies seek assistance in implementation. Failure to address these issues which affect numerous programs and agencies throughout the federal government will have severe cost implications in later years due to lost efficiency, significant increases in litigation, and a hodgepodge of procedural entanglements.

A. GENERAL ADMINISTRATION

The Conference has been notified of increases in rent and support contracts that would require $494,000 to maintain same services. The FY-94 request is for $434,000, $25,000 less than FY-93. This area includes facility rent, staff travel, communications, equipment purchase and maintenance, interagency agreements to provide support services, some small purchase and service contracts, office supplies, and library acquisitions. The Conference has been notified of increases associated with interagency agreements to provide services to the Conference and increased postage costs that have been clearly identified. The Conference has been advised by the General Services Administration that it projects a $4,500 increase in facility rent in FY-94. Telecommunications efficiencies realized in FY-93 will be stabilized in FY-94.

Due to the increases projected in personnel compensation, however, a number of services important to the Conference's mission are being cut in order to reduce the expense in this category. Computerized legal research will be eliminated during the year, saving $15,000. Funds set aside for space for colloquies have been eliminated saving $2,000. Staff training funds are deleted saving $6,000. Office supplies and library acquisitions are cut $10,000. Equipment replacement costs have been cut $15,000. Contracts for accounting support and miscellaneous purchase orders are cut $2,000. Scheduled equipment replacement will be deferred, saving $7,000.

B. PERSONNEL COMPENSATION AND BENEFITS -$1,756,389

A two per cent increase is requested for Personnel Compensation and Benefits for FY-94. In recent years the Conference has had 24 FTE and no attrition. For FY-94, the projected increases in personnel and benefits will be over $34,000 above the costs for the same services in FY-93 assuming no pay increase is awarded federal employees. The amount reflects scheduled increases in grade or within grade but does not include cost of living increases. This amount does not include changes in benefits that may result from changes in employee thrift savings plans or changes in the retirement plans in which particular employees may be enrolled. Nor does it include sufficient funds to cover increases that may be necessary if the Washington metropolitan area were designated by the Office of Personnel Management (OPM) for differential pay. Cost increases beyond the request that are actually experienced in FY-94 will be absorbed by shifting funds from the discretionary program areas.

The Conference has been experiencing a substantial increase in benefits charges associated with personnel payroll. When the Conference's reauthorization bill passed Congress in 1990, projected budget costs assumed civilian personnel benefits would approximate historical levels at 13 per cent of personnel compensation. Based on those projections the Conference's share of FY-94 benefits would have been under $200,000. Benefits payments are now projected to be $278,515, or nearly $79,000 more than anticipated 4 years ago. This increase is primarily associated with the higher costs to the Conference attributable to FERS and the associated thrift savings matching program. Employee benefits for the Civil Service Retirement System require from 8-15 per cent of salary from our appropriation while benefits for the FERS plan employees range from 21-34 per cent of salary.

C. RESEARCH AND RECOMMENDATIONS

Work on Conference formal Recommendations includes three primary costs: 1) the payment of the researcher, 2) travel costs for researchers and out-of-town committee members during the project's development and consideration, and 3) support costs not performed by Conference staff including clerical, reproduction, and distribution directly associated with the consultant's work. The Conference's request includes $69,200 for these latter two activities in FY-94. The request does not include any funds to award new research contracts during the year. The amount requested is that necessary to support the associated travel expenses and support costs for ongoing research funded in prior years. Some new research may be initiated in FY-94 if the Conference continues to receive interagency transfers as in the past. Historically, the direct research budget for new contracts has been approximately 20 per cent of the total Conference appropriation allowing 10-12 new projects per year. There have been a few past years, however, where all new research was funded from interagency money. While interagency funded studies can be of importance to other agencies, frequently they are of significance primarily to the agency funding the study. As a consequence, the number of administrative and procedural issues affecting numerous agencies but not of critical importance to any one agency has been growing. If the Conference is to address such matters, it is vital that a quality independent research program be maintained.

D. IMPLEMENTATION AND ADVISORY ACTIVITIES

The Conference's Implementation and Advisory program provides assistance requested by agencies during the year particularly for smaller agencies who do not have funds to provide under the

Economy in Government Act to reimburse Conference expense. Included in this area are costs for printing (not including postage and mailing) the annual report, publication in the Federal Register, the Code of Federal Regulations, newsletter printing, and seminars and colloquies. The FY-94 request reduces funds requested for these activities approximately $5,000 for a request of $34,900. Federal Register costs will be reduced due to the fewer number of projects projected for work during the year and some expected savings associated with using electronic text. While increased demands for Conference assistance with Alternative Dispute Resolution initiatives continue to be experienced, no funds are requested beyond basic personnel and agencies will be asked to support such requests with funding. CFR publication costs will be slightly higher because each year's Recommendations increase the number of pages required in the Code of Federal Regulations. The Conference's newsletter (18,000 copies) has been distributed to senior government officials three times a year. The printing costs for three issues are approximately $5,300. One issue will be cut to save printing and postage costs.

E. CLEARINGHOUSE ACTIVITIES

The Conference's Clearinghouse activities include printing and photography for the Conference's routine activities such as announcements, notebooks and curriculum materials, graphics, fliers, or video supplies for committee meetings, plenary sessions, seminars or training programs. In addition the costs of the Conference's major publications are provided in this area. Funding for these activities needs to be improved. Starting in FY-91 the budget has enabled the Conference to plan for a regularized publication schedule for some of the materials agencies find most useful. Consequently, a major revision of the SOURCEBOOK ON ADMINISTRATIVE PROCEDURE was completed in FY-92 and THE MANUAL FOR ADMINISTRATIVE LAW JUDGES is scheduled for issuance in FY-93. Several other publications are still in demand and the Conference needs funds to substantially revise them. The FY-94 request does not include funds to revise and reprint the *Guide to the Government in the Sunshine Act* which was scheduled for revision in FY-94. This program area request includes $8,000 to publish the annual volume of Recommendations and Reports, $3,000 for photographic services, and $7,000 for some other Conference publications including pamphlets, fliers, study materials, stationary and photocopy supplies. Although budgeted in the General Administration program area, an important Conference Clearinghouse activity is its library which holds a substantial collection focusing on administrative law. The FY-94 request is $19,500 reduced from $44,500 two years ago.

The Conference's request does not allow for major publications revision nor new research funding except for projects agencies may be willing to fund. The newsletter will be reduced to two issues and the Depository Library collection will not maintain its current acquisitions. New equipment purchases will be deferred.

TABLE SHOWING DISTRIBUTION OF BUDGET CATEGORIES

Category	FY-92 APPROVED	FY-93 CURRENT	FY-94 REQUEST
1. General Administration	479	459	434
2. Personnel Comp.	1,501	1,722	1,756
3. Research/Recs	158	73	69
4. Imp./Advisory	40	40	35
5. Clearinghouse	44	20	20
TOTAL	2,222	2,314	2,314

IV. FY-94 BUDGET REQUEST BY FUNCTION

1994 Request (Description of Program by Request Category)

A. GENERAL ADMINISTRATION - $434,011.13

The Conference is located at 2120 L St. NW. in a suite of offices occupying a portion of the fifth floor. The General Services Administration (GSA) will charge the Conference $228,203 rent for its office facilities in FY-94 compared with $222,752 in FY-93. Other rental payments will be lowered by using a more limited storage facility and obtaining less parking space. These other rents are estimated to be $10,477. Interagency agreements with GSA and the Department of Health and Human Services (HHS) to handle payroll, personnel administration, some procurement, health clinic and other small agency matters where it is not prudent to maintain a separate Conference capability are estimated at $26,278. Communications, utilities, and postage are projected to be $51,708. Significant postage increases have been somewhat offset by savings on phone charges including an increase in fax traffic which reduced a substantial volume of express mail deliveries. Support contracts for miscellaneous administrative needs include: court reporting services for plenary sessions, temporary service contracts, and imprest fund charges. These costs are projected to require $12,000. Staff training and rentals for meeting facitlities have been eliminated. Repair and maintenance contracts for office equipment will total $13,754. Some equipment maintenance contracts have been renegotiated lower and some have been dropped entirely meaning that broken typewriters will not be repaired. A lease to purchase agreement for a large copy machine substantially reduced equipment lease costs and deferral of replacement equipment purchases will reduce equipment costs to $25,590. The costs of library acquisitions, computerized legal research, and office supplies are reduced $10,500. The increased supply costs associated with research funded through interagency transfers are included in the outlays shown for reimbursable programs. Travel costs for the Office of the Chairman are projected at $8,000.

The total cost for the General Administration category in FY-94 totals $24,735 less than the amount appropriated for FY-93. While costs for particular items in this category will increase between three and four per cent over the year, a number of traditional activities will be curtailed or eliminated.

B. PERSONNEL COMPENSATION AND BENEFITS - $1,756,388.87

The Conference employs 24 full-time equivalents (FTEs). The Chairman and his personal staff (one secretary and two professional assistants) constitute four FTEs. One and one-half FTEs are needed to perform receptionist and phone answering services for the Conference. One-half FTE is used to maintain the library which serves as a Federal Depository Library open to the public in addition to its function as the Conference's principal legal research facility. One and one-half FTEs are assigned to handle Conference publications including writing, layout, graphic design, contracting with the Government Printing Office (GPO), and public affairs functions. Three FTEs are assigned agency administrative functions including procurement, budget, personnel, payroll, time and attendance, recruitment, publications and facilities management, and accounting. Three FTEs are assigned management and general counsel functions associated with planning and executing Conference activities including research, recommendations, legislative initiatives, and implementation strategies. Six and one-half FTEs are professional attorneys assigned to standing Conference committees to

provide staff research support and management of committee schedules and initiatives. Four FTEs provide secretarial and clerical support to the professional staff, maintain Conference files and records, handle correspondence and mail, and respond to public and Conference member inquiries.

C. RESEARCH AND RECOMMENDATIONS - $69,200

Proposed future research projects are selected by the Chairman and approved in advance by the Council. Under Council procedures, the Chairman may decide, based on available funds, to initiate new research from items on the approved list. As indicated under 1993 activities in the next section, current plans are to initiate research in FY-93 on five or six projects on the Council's approved list of 14. For FY-94, $63,000 of the Conference's request is needed to support travel associated with ongoing research projects funded in prior years. In addition, $3,200 in communications, research assistance, and support services for ongoing work is required. No funds are requested to initiate new projects selected from the pending projects list although the Conference will seek agency support for some of the projects currently on the list or others that the Council may subsequently approve during FY-93. To fund an additional six to ten projects from the list would require at least $150,000 beyond the Conference's request.

D. IMPLEMENTATION AND ADVISORY ACTIVITIES - $34,900

The Administrative Conference will continue to place major emphasis in FY-94 on assistance to agencies conducting activities under the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act. Federal Register publication costs related to Conference Recommendations, meeting notices, and other required publication notices will be approximately $9,000. In addition, a number of related activities including necessary revisions to the CFR will cost $19,000. The Annual Report will require $3,600 and printing costs for two newsletters (three newsletters have been possible in the past) during the year are projected to be $3,300. While there will continue to be a need to conduct programs related to alternative dispute resolution (ADR) and negotiated rulemaking (Reg Neg) for agency personnel, no funds have been included to support these activities nor other colloquies and seminars. The Council of Independent Regulatory Agencies (CIRA) is an informal organization composed of the chairs of the 13 major independent regulatory boards and commissions and the Chairman of the Administrative Conference, who also serves as Chairman of CIRA. At CIRA meetings, agency chairs exchange ideas concerning governmental and regulatory issues and problems, and discuss these issues with select members of the Executive Branch, academics, and members of Congress.

The Administrative Conference will continue its annual seminars for legislative staff and regulatory commissioners. The CIRA breakfast program will be continued as well as the new quarterly program for chief legal officers. It is hoped that at least three colloquies will be held on timely topics. Roundtables for issues in alternative dispute resolution will be continued.

E. CLEARINGHOUSE ACTIVITIES - $19,500

The computerized database containing the agency's roster of dispute resolution neutrals will be maintained and a publication informing agencies how to use the roster will be kept current. Work will

commence in FY-94 on a major revision to the Conference's *Guide to the Government in the Sunshine Act*, although publication will not be funded. This publication is out of print and dated but requests for guidance continue to be received. It has not been revised for over ten years. Work commenced in FY-92 on a revision to the *Manual for Administrative Law Judges* and it is scheduled for publication in FY-93. Printing of the annual publication *Recommendations and Reports of the Administrative Conference* will cost $8,000. Photography services for the year will be curtailed and only $2,500 is planned. Miscellaneous printing orders for pamphlets, study books, letterhead, envelopes, forms and other office materials will be reduced to $9,000.

Due to the budget limitations, no actions will be taken with regard to the following list of items which have been identified as useful and having a potential cost-benefit to the government:

- -- Compilation and collection of prior agency procedural reviews
- -- Continuation of the Conference's five-year plan to resume statistics-gathering on administrative proceedings
- -- Revision and update of the Directory of Administrative Hearing Facilities.

V. FY-92 - 93 ACTIVITIES AND ACCOMPLISHMENTS

A. RESEARCH AND RECOMMENDATIONS

1992 Accomplishments

During FY-92 the Administrative Conference held three Plenary Sessions: December 12-13, 1991, June 18-19, 1992, and September 9, 1992. Eleven Recommendations were considered and nine were adopted at these sessions involving issues in Alternative dispute resolution, civil penalties, specialized courts, rulemaking, agency policy statements, enforcement procedures, interagency coordination, equal access to justice, and use of Administrative Law Judges in formal adjudication.

RECOMMENDATION 91-7, *Implementation of Farmer-Lender Mediation by the Farmers Home Administration*, suggests steps for improving the Farmers Home Administration's (FmHa) implementation of farmer-lender mediation programs under the Agricultural Credit Act. The Recommendation calls on FmHA to amend its regulations to give its representatives greater flexibility in engaging in debt restructuring through mediation. It also calls for training of FmHA personnel and other steps to enable them to take full advantage of mediation, and it encourages other federal agencies involved in debt restructuring to be mindful of overall advantages of participation in mediation processes.

RECOMMENDATION 91-8, *Adjudication of Civil Penalties Under the Federal Aviation Act*, proposes to Congress that changes be made in adjudication of the administrative civil penalty program for violations of aviation safety. The Conference recommends that the program become permanent but that adjudication responsibility for cases involving pilots and flight engineers be transferred from the Federal Aviation Administration (FAA) to the National Transportation Safety Board (NTSB).

RECOMMENDATION 91-9, *Specialized Review of Administrative Action*, identifies guidelines for Congress to consider in determining whether and how to create specialized courts for review of administrative action. The Recommendation opposes creation of a single specialized court for review of all administrative cases and further advises that specialized courts are appropriate for particular administrative programs only if they involve a large volume of cases, the predominance of case-specific factual issues or technical issues requiring special expertise, and a need for uniformity in agency program administration. If Congress should create such a specialized court, the Recommendation proposes structural approaches to increase the court's effectiveness and minimize duplication of review functions.

RECOMMENDATION 91-10, *Administrative Procedures Used in Antidumping and Countervailing Duty Cases*, suggests changes to reduce the time and expense associated with these proceedings while improving the development of the administrative record.

RECOMMENDATION 92-1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements*, encourages agencies to voluntarily use notice-and-comment procedures in promulgating rules of procedure and practice except in situations in which the costs of such procedures will outweigh the benefits of having public input. The Recommendation also proposes that a rule should be found to fall within the statutory exception only when it both (a) relates solely to agency methods of internal operations or of interacting with regulated parties or the public, and (b) does not (i) significantly affect conduct, activity, or a substantive interest that is the subject of agency

jurisdiction, or (ii) affect the standards for eligibility for a government program. The Conference urges OMB to refrain from exercising jurisdiction under Executive Order 12,291 with respect to rules relating to procedure and practice that an agency voluntarily publishes for comment.

RECOMMENDATION 92-2, *Agency Policy Statements*, advises agencies not to issue statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using legislative rulemaking procedures (normally including notice-and-comment). Agencies should not attempt to bind affected persons through policy statements.

RECOMMENDATION 92-3, *Enforcement Procedures Under the Fair Housing Act*, deals with the Department of Housing and Urban Development's (HUD) implementation of the 1988 amendments to the Fair Housing Act. The Conference recommends that changes be made to ensure that complainants' litigation interests are protected, that HUD continue to study the reasons why parties are choosing to go to court rather than taking advantage of the administrative remedy, and that it take a number of actions to ensure that the enforcement program remains effective.

RECOMMENDATION 92-4, *Coordination of Migrant and Seasonal Farmworker Service Programs*, urges establishment by executive order of an Interagency Coordinating Council on migrant and seasonal farmworker programs. The Recommendation suggests that the Council be charged with identifying specific coordination tasks, giving particular attention to gaps in services and unjustified overlap. In most instances, primary responsibility should be given to an appropriately chosen lead agency. The Recommendation also calls for development of a reliable and comprehensive migrant and seasonal farmworker population census system, independent of any existing specific programs.

RECOMMENDATION 92-5, *Streamlining Attorney's Fee Litigation Under the Equal Access to Justice Act*, suggests ways in which Congress should amend the Equal Access to Justice Act, a statute providing for the award of attorney's fees to certain individuals and entities who prevail over the United States in court and administrative litigation. The Conference recommends that the Act be amended to reduce collateral litigation over the amount of awardable fees and encourage settlement of fee petitions. In addition, the Recommendation proposes that the standard for award of attorney's fees in cases involving individual benefit claims (such as Social Security disability claims) be changed by eliminating the proviso that the United States need not pay fees if its position was substantially justified. The Conference also urges Congress to resolve difficulties concerning the timeliness of fee applications when cases are remanded to agencies and to consider whether certain administrative and Article I court proceedings not now covered by the Equal Access to Justice Act should be included within its coverage.

RECOMMENDATION 92-6, *Implementation of the Noise Control Act*, responds to a request by the Environmental Protection Agency (EPA) to assist it in addressing procedural concerns arising in connection with the absence of funding for EPA's responsibilities under the Noise Control Act. The Recommendation advises EPA to analyze the preemptive impact of its existing regulations under the Act, taking into account a number of related issues. The Recommendation suggests that the analysis be followed by appropriate Congressional action, either to repeal the Noise Control Act or to fund whatever responsibilities may be delegated by Congress to EPA under the Act.

RECOMMENDATION 92-7, *The Federal Administrative Judiciary*, will be formulated as a result of a report that considers the role of the federal administrative judiciary including administrative law judges and other presiding officers in conducting formal adjudications under the Administrative Procedure Act. A Recommendation from the Conference is expected to be adopted at the forthcoming Plenary Session on September 9.

1993 Activities

Ongoing Research activities included projects funded from interagency transfers under the Economy in Government Act and initiated at the request of the funding agency, projects being completed as a result of obligations incurred in prior years, and projects identified by the Council for new funding in FY-92. Research is currently being undertaken in the following areas:

1. Adjudication.

(1) Rule-11 type sanctions in administrative proceedings. Under the recent addition to the Federal Rules of Civil Procedure, sanctions can be assessed against attorneys involved in frivolous lawsuits. This provision, while still somewhat controversial among the bar, has certainly resulted in some of the intended benefits. The Conference will consider whether there should there be an analog in federal agency proceedings.

(2) Organization of adjudicative offices in executive departments. Many Executive Departments have struggled with the placement and organization of their adjudicative offices. The Department of Health and Human Services (HHS) has three different loci of ALJs (Social Security Administration (SSA), Food and Drug Administration (FDA), Departmental Appeals Board). The Departments of Education and Interior have centralized Offices of Hearings and Appeals with subordinate Chief ALJs. The Department of Transportation (DOT) placed some of its ALJs in the Office of the Secretary, with others in the Coast Guard (each with its own Chief ALJ). Similar issues occur with respect to appellate officers, (e.g., judicial officers vs. appeal boards). Various problems concerning delegation of authority, separation of functions, supervision, appeal routes, etc., have developed, some of which bear on independence (fairness) and efficiency issues.

2. Administration.

(1) The juvenile justice grant compliance and monitoring system. The Office of Juvenile Justice and Delinquency Programs (DOJ) requested the Conference's assistance in evaluating the Office's regulatory and administrative procedures in determining and monitoring compliance with the deinstitutionalization, separation, and jail removal requirements of their state formula grant programs. Use of waivers, de minimis criteria, and settlement issues will be examined.

(2) The Fish and Wildlife Service's approach to conflict management under the Endangered Species Act. Recent litigation in the Pacific Northwest over the impact of timber harvesting on the habitat of the rare spotted owl have focused attention on the need for better conflict management under the Endangered Species Act. This project will seek to propose improvements in the Service's ability to deal with conflicts.

(3) Agency procedures for reviewing discretionary grant applications. There is no government-wide statute covering the procedures that agencies with grant authority must use in reviewing applications. This study is reviewing agency discretionary grant programs, such as HUD's, as well as programs of agencies, including the National Science Foundation, which have a peer review procedure. The Conference will consider whether changes in agency grant programs are needed.

(4) HUD administrative grievance procedures for public housing tenants. The Department of Housing and Urban Development has had regulations providing for administrative grievance procedures for public housing tenants since 1975. Several attempts to revise these rules have failed. In addition, HUD has begun invoking a 1983 statute authorizing the Secretary to waive administrative

grievance procedures in eviction cases and to seek state-court ordered evictions. The Conference will consider recommendations to HUD on its grievance rules and its waiver practices.

3. Governmental Processes

(1) Right-to-counsel issues in agency proceedings. The Administrative Procedure Act provides little guidance on procedural limitations applicable to agency investigations. Issues include: how far does the right to counsel in Section 555 extend? Does it extend to persons queried by agency inspectors? Can agencies regulate the presence of attorneys during testimony given by persons subpoenaed as part of an agency civil investigation (see 10 CFR Part 2). What about agency's right to demand unescorted inspections?

(2) Inspectors general. With the support of the Governance Institute, this Conference will consider a study of the role and operations of Offices of Inspector General in carrying out responsibilities of internal oversight of agency programs and in preventing waste, fraud and abuse. IGs' independence, accountability, investigative authority and relationships with Congress, the President, and agency program managers will be studied.

(3) Agency procedures for the distribution and sale of government assets This survey and evaluation of the various agency techniques for auctioning, selling or distributing government assets, including oil leases, airport landing rights and "resolved" savings and loans will be ready for Conference consideration in early 1993.

(4) The interplay between civil and criminal enforcement of regulatory statutes. There are many variations among agency behavior in choosing between civil and criminal sanctions. The decisionmaking is diffuse, with agency headquarters, field offices and U.S. Attorneys all participating. Moreover, the recent Supreme Court case, *U.S. v. Halper* [109 S. Ct. 1892 (1989)], applied the Double Jeopardy Clause to certain types of civil penalties sought against persons previously convicted criminally for the same offense. The Conference will examine both horizontal and vertical coordination among enforcement entities.

4. Judicial Review.

(1) Choice of forum in government contract litigation. Under current law challengers to government action in contract cases have a multiplicity of forums. In pre-award (bid protest) cases, challenges may be filed in district court or with the GAO (or in the GSA Board of Contract Appeals in computer-related contracts). In post-award disputes the choice is between the Claims Court or the appropriate agency board of contract appeals. The Conference will consider the impact of this forum choice and the proposals for change.

(2) Judicial review of early intervention decisions of federal banking regulators. The new bank regulatory laws give the FDIC and other banking agencies strong authority to take prompt corrective action ("early intervention") against ailing institutions. Although the statutes specifically provide for judicial review of seizure (conservatorship or receivership) actions, the laws are silent on judicial review of early interventions. Some courts have found such actions (e.g., removal of officers or directors) to be unreviewable. Other courts have entertained suits for injunctive relief.

5. Regulation.

(1) Settlement of Superfund cases. The mounting backlog of Superfund enforcement cases has led EPA to develop new strategies for settling these cases, including expedited settlements with "de minimis" parties (allowed under a 1986 amendment to the Act). This research involves an empirical

study to comprehensively analyze all de minimis settlements as well as a sampling of non-de minimis settlements.

(2) Division of roles in joint federal/state regulatory programs. How "regulatory federalism" works--federal oversight of state implementation of federal programs. Programs under study include the Clean Air Act and the Surface Mining and Reclamation Act.

(3) Pesticides registration and cancellation. The process for cancelling or suspending approved pesticides has been strongly attacked as too cumbersome and the Administration and Congress are sparring over proposed legislation to reform the process. Such actions are obviously similar to other licensing programs in the health and safety area. The Conference will consider means to achieve consensus in this area.

(4) Use of audited self-certification. Industry self-regulation has been used and/or proposed as an alternative to regulation in a variety of regulatory contexts, ranging from meat and poultry inspection, EEO contract compliance, environmental controls and, perhaps most often in the securities and commodities arena. An evaluation of this technique will try to determine when it is most and least effective and would contribute greatly to what has been up to now, mostly a rhetorical debate. The funded study is using both a survey and case study approach.

6. Rulemaking.

(1) Non-APA procedures for assessing civil money penalties. The use of Administrative Procedure Act (APA) adjudication procedures for assessing civil money penalties in administrative proceedings is well-accepted. However, in various environmental laws, Congress has created bifurcated statutes allowing the EPA to use non-APA procedures (including non-ALJ hearing officers) to assess small-amount civil penalties. EPA is attempting to develop implementing regulations for these laws, and the D.C. Circuit has ruled favorably (though not squarely) in an analogous enforcement case.

(2) Agency use of interim-final rules. The Conference is examining, empirically, agencies' behavior when they use interim-final rules. Issues being considered include whether agencies eventually issue a final rule and how long it takes. The effect of public comment in making significant changes in the final rule is being examined.

(3) The rulemaking process--has it become overburdened and underused? Agencies have increasingly turned to less satisfactory alternatives to notice-and-comment rulemaking (e.g., adjudication, "non-rule" rulemaking) to make policy. Both external requirements and internal organizational constraints have changed the nature of rulemaking from its simple APA procedure to a long and uncertain process. The Conference is examining legislative, judicial and executive branch constraints on rulemaking and will evaluate agency responses and propose solutions, if necessary.

(4) Use of no-action letters and letter rulings by federal agencies. One of the Conference's earliest and most influential studies was of the SEC's no-action letter procedure. Recommendation 70-2 led to public availability of these letters. In addition to evaluating the practice 20 years later, this new review will encompass the CFTC's use of no-action letters as well the use of similar letter rulings by the IRS, Customs Service, Antitrust Division and other agencies.

Not all of these projects will be considered at the December 1992 Plenary Session, of course, but those not completed at that time will be among the prime candidates for the June 1993 Session.

Due to funding from private sources, the Conference will be able to continue to conduct systematic activities in support of its alternative dispute resolution initiatives. In addition, the Council

has approved implementation of recommendations made by the Special Committee on the Future of the Conference. These recommendations will form the basis of the Conference's development of information for its reauthorization legislation in FY-94.

Future Conference research to be initiated in FY-93 but which is most likely to be considered by committees in FY-94-95 will be organized into two broad types: that related to an in-depth study of an issue in a single agency and that addressed to broader issues common to many agencies. The Conference will plan and group its research effort to achieve a balance of single agency studies and broader generic studies. The single agency studies will be assigned to the standing committees to insure a balance of work for each committee while the broader studies will be assigned to the committee with the most logical jurisdiction. To ensure that all studies and associated committee work achieve maximum benefit to the Conference and its member agencies, studies will continue to be grouped in logical thematic topics. There are two goals resulting from this approach: (1) Conference research and committee work is focused to realize effective use of scarce funds; and (2) research is organized to allow the Conference to determine whether, and if so, what revisions to Administrative Procedure Act (APA) provisions should be formulated and recommended. The logical organizing themes identified for future research during the next five years are: Alternative Dispute Resolution, Adjudication, Financial Services, Health and Welfare, Trade Regulation, Judicial Review, Regulation and Rulemaking. In FY93-94 specific focus will be placed on review of APA adjudication and alternative dispute resolution. Committees considering thematic projects are asked to focus specifically on the processes for resolving disputes in the area in light of current APA requirements and to indicate whether better approaches could be envisioned. In addition, committees will review past Recommendations relevant to committee work and make recommendations to the Chairman concerning whether further research is needed or whether past Recommendations should be revised or revoked.

In addition to projects identified above on which work will continue in FY-93, the Council has approved a number of additional topics. Work can be initiated on five or six new projects from FY-93 funds from the following list:

1. ***Agency implementation of the Program Fraud Civil Remedies Act*** Enacted in 1986, the Act calls upon most large departments and agencies to set up procedures for investigating and administratively adjudicating program fraud allegations. Model rules of practice were promulgated by HHS. How well have they been implemented? Have the Act's procedures been fair and effective?

2. ***Employee sanction and/anti-discrimination adjudications under IRCA*** Under the 1986 Immigration Reform and Control Act, the DOJ was required to set up new adjudication programs to enforce key provisions of the Act. The program requires administrative law judges or decision-makers, but there are numerous special provisions raising procedural issues. For example, in anti-discrimination cases, ALJ decisions are directly reviewable in the courts of appeals. The role of the special counsel (and the EEOC) in such case also raises interesting procedural issues. The GAO is charged with review of the implementation of these provisions, but the Conference should contribute its review of the procedures.

3. ***FTC/DOJ premerger review process under the Hart-Scott-Rodino Act*** Under the Act, both agencies must approve mergers over a certain size threshold and therefore each requests information on the effects of the proposed mergers. These informational requests have involved voluminous paperwork and lengthy review time. Moreover few mergers have been disapproved in recent years. A study would assess the effectiveness of the Act and the agency's practices and procedures.

4. ***Foreign Trade Zone Procedures*** The 1934 Foreign Trade Zones Act was designed to create duty-free areas in the U.S. within which foreign goods may be assembled, repackaged, joined with domestic goods, etc. In recent years applications have zoomed upwards for various reasons, and so have objections from domestic industries and unions. The Act gives little guidance concerning procedures to be used by the Board, (located within the Department of Commerce) but the Board has issued regulations for its informal hearing procedures. The Conference should examine the procedure of this little-known but increasingly important Board.

5. ***Clarification of Jurisdiction over Money Claims Against the U.S.: Claims Court vs. District Court.*** The former (Thomas S. Susman) and current (Peter L. Strauss) chairmen of our Committee on Judicial Review have agreed that the jurisdictional confusion in the area needs to be fixed. The problem is caused by the overlapping of the Tucker Act's assigning claims over $10,000 to the Claims Court, the Little Tucker Act's assigning claims under $10,000 to either district courts or the Claims Court, and district courts allowing monetary relief in varying amounts, pursuant to the APA.

6. ***Implementation of the Americans with Disabilities Act.*** This 1990 law is one of the most far-reaching regulatory statutes ever enacted. It seeks to protect over 43 million people and covers most employers and public accommodations. A half dozen federal agencies are charged with issuing regulations concerning terms like "undue burden" and "reasonable accommodations." Anticipating the development of enforcement disputes under the Act, there is a section encouraging use of ADR, (Section 513). The Conference ought to begin developing expertise in this area.

7. ***Review of FOIA's Exemption 8 – Relating to Regulation of Financial Institutions.*** Exemption (b)(8) of FOIA exempts from disclosure, records "contained in or relating to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." Its viability has come into question, given the new openness and importance of bank and thrift regulation. A study of the operation and impact of this exemption (and perhaps the even littler known exemption 9, relating to oil wells) would be timely.

8. ***FOIA and Settlement Documents.*** A persistent difficulty in the crafting and passage of the 1990 Administrative Dispute Resolution Act was caused by the uncertainty concerning the need for confidentiality of some documents generated by ADR proceedings (e.g., mediator's notes) and their availability under FOIA. Legislators indicated that this issue deserved more study. The Conference should describe the state of the law, review the implications for the success of ADR as well as for openness goals and evaluate the need for changes in either FOIA or the ADR Act.

9. ***Multi-member agencies -- Need for Improved Collegiality or Other Operational Improvements.*** The Office of the Chairman's recent descriptive monograph on the organization of such agencies showed a wide variety among them concerning their membership structure, powers of the chair, requirements for agency action, OMB bypass provisions, and litigating authority. Moreover, reviewed questions about the lack of collegiality (and the effect of the Sunshine Act) make a comprehensive look at this organizational model timely.

10. ***Regulatory Takings.*** Under the 1988 Executive Order, executive agencies must perform a "takings implications assessment" when writing new regulations. Legislation has been introduced to broaden this requirement so as to require agencies to determine whether their activities deprive property owners of the reasonable use of land, to explore less intrusive alternatives, and if unavoidable, to compensate owners. Moreover, the federal courts have become more hospitable to regulatory takings claims. The study would describe developments and suggest appropriate ways of dealing with these concerns.

11. ***Use of a Negotiated Model State Act Approach to Federal Regulation of Medigap Insurers, and Judicial Review of the Early Intervention and Seizure Decisions of Federal Banking Regulators.*** The 1990 Medigap Improvements Act uses a novel approach to regulation of medigap insurance providers (i.e., private health insurance companies providing coverage supplemental to Medicare). The Act requires private insurance companies to meet state laws that meet federal standards. It mandates that the National Association of Insurance Commissioners (NAIC) develop a model statute though a participatory, negotiating process. States must then adopt the NAIC model statute or else HHS regulations would apply to the companies. This model has been suggested for other aspects of health care regulation and deserve study.

Several additional projects from the Council's approved list may also be possible if the affected agencies are willing to support the Conference under the Economy in Government Act.

1. ***Adjudication Procedures in Industrial Security Clearance Review Cases.*** The Directorates for Industrial Security Clearance Review (DISCR) in the Department of Defense has expressed some interest in having ACUS review its non-APA adjudication procedures and those of other similar boards in the government.

2. ***Resolving Disputes over Scientific Fraud.*** Controversies have developed over the federal government's procedure for investigating and adjudicating allegations of fraud or misconduct in federally funded research. The NIH is currently in the middle of a dispute concerning the procedures of its Office of Scientific Integrity and has expressed some interest in a Conference study of the matter.

3. ***ALJ Subpoena Power.*** The Department of Labor's Office of ALJs is interested in supporting a Conference examination of the limitations on the ability of administrative law judges to issue and seek enforcement of subpoenas. Even within the Department there are variations among the many statutes giving rise to ALJ hearings.

B. IMPLEMENTATION AND ADVISORY ACTIVITIES

1992 Accomplishments

The Conference has adopted several Recommendations that encourage federal agencies to make greater use of mediation, minitrials, negotiation, arbitration, and related methods to improve their decision-making and offer advice on how to begin doing so. In addition, the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act mandate specific implementation responsibilities for the Conference. The Office of the Chairman continued a number of initiatives during the year and with the assistance of two private grants from the Hewlitt and Culpeper Foundations has conducted a number of roundtables and training sessions for federal agencies and departments. Those grants were also used to publish and distribute various pamphlet publications and to provide a video-tape training program to agencies. Agencies have increasingly asked the Conference for assistance in developing policies mandating alternative dispute resolution (ADR) uses in their programs. The Conference has worked with agencies to provide training and support for their new ADR specialists and others who must identify disputes where ADR techniques may prove cost-effective or may provide better, more satisfactory outcomes. The staff cooperated with the D.C. Circuit Court Administrator to provide training in ADR techniques for judges and mediators participating in that circuit's dispute resolution program and is now undertaking an evaluation of the program. The Conference rules establishing a roster of potential "neutrals" for various kinds of ADR led to a computerized database of persons available to serve as mediators, trainers, and consultants in agency ADR programs and agencies have

requested specific information about neutrals to meet particular needs during the year. Several ADR roundtables have been organized and facilitated by trained dispute resolution specialists. In addition to imparting useful information, the roundtables provide agency personnel an opportunity to share ADR experiences with one another.

The Conference has continued efforts to identify appropriate opportunities to encourage negotiated rulemaking. The Conference used money provided in the FY-92 budget for assistance to agency negotiated rulemakings to help finance participation in the Coast Guard's first effort. The Office of the Chairman is holding a specific roundtable on negotiated rulemaking during FY-93. A number of agencies are now actively engaged in various stages of negotiated rulemaking proceedings in accordance with the Conference's Recommendations and the Negotiated Rulemaking Act. The Conference staff is providing active assistance.

Conference personnel continued efforts to seek implementation of standing Recommendations. It accepted Congressional invitations to testify on numerous bills containing provisions on which Conference Recommendations were relevant. The more significant activity during FY-92 involved the passage of Public Law 102-354, the FAA civil penalty legislation, signed by the President on August 26, 1992. The statute makes permanent the FAA's civil penalty demonstration program and transfers authority over adjudication of civil penalty matters affecting pilots and flight engineers from the FAA to the NTSB. To this extent, it implements Conference Recommendation 91-8, *Adjudication of Civil Penalties Under the Federal Aviation Act*. Acting Chairman Ross had testified in the House on March 26 in support of the Conference's Recommendations.

Conference Recommendations were significant in other legislative activity as well. S. 2521 is a bill that would, among other things, modify the certification provision of the Contract Disputes Act so that it would no longer be a jurisdictional requirement to appealing a denial of a contract claim. In introducing the measure, Senator Howell T. Heflin noted that "[t]he treatment of this topic parallels a 1983 Recommendation of the Administrative Conference of the United States." In Recommendation 83-1, *The Certification Requirement in the Contract Disputes Act*, the Conference proposed a modification -- but not abolition -- of the certification requirement. On June 5, 1992 the Office of the Chairman sent the subcommittee comments on the legislation reflecting Recommendation 83-1. Subcommittee counsel has indicated that the bill may be revised around a compromise premised on the ACUS Recommendation. The House Judiciary Committee reported H.R. 3910, a bill to establish a specialized corps of administrative law judges (ALJs). The Senate Judiciary Committee reported out similar legislation. Both the House and Senate versions require that the new Chief ALJ of the Corps conduct a follow-up study of agency review of ALJ decisions under the new legislation. Such study must be conducted in consultation with the Administrative Conference, among others. In addition, the Conference expects to begin work implementing its major study of the administrative judiciary which in turn will serve as a valuable resource to Congressional committees considering ALJ legislation.

H.R. 2900 and S. 2733, if enacted, would establish a new office in HUD to oversee Fannie Mae and Freddie Mac. If enacted, the legislation would implement ACUS Recommendation 91-6 insofar as the two government sponsored enterprises (GSEs) are concerned.

Federal agencies continued to carefully consider Conference Recommendations and follow their guidance. The most significant activity, as noted above, was the government-wide initiatives to implement the Negotiated Rulemaking Act and the Administrative Dispute Resolution Act.

1993 Activities

As a part of its responsibilities for implementation of the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act, Conference staff have been provided specialized training and instruction in ADR techniques. Staff has been systematically providing training support to numerous federal agencies including OPM's executive development centers where ADR seminars have been developed for agency personnel. The Conference also provides some training to government employees on Conference Recommendations. This is an effective implementation methodology which needs to be expanded so that it reaches many more government employees charged with responsibilities in areas of Conference initiatives. Conference personnel are certified to provide continuing legal education credits for its programs. To adequately staff a regularized training effort would require additional staff and associated funding. In contrast to the Federal Judicial Center which trains new judges in basic procedure, there is no training for new Commissioners or new federal appointees in administrative law and procedure. The consequences of failures resulting from lack of training can be quite costly. The Conference will continue to explore alternatives for providing introductory training in federal procedure to new political appointees with the Federal Executive Institute during FY-93-94. In addition the Conference has started new initiatives to provide for exchange of information between the legal staffs of government agencies by sponsoring a series of meetings with agency general counsels. During the next five years additional efforts will be undertaken to better integrate the expertise of Conference members into these programs.

The Conference continues to seek ways to obtain systematic consideration and implementation of Conference Recommendations concerning the administrative process in pending legislation. To advise the Chairman and to help achieve this objective, a legislative liaison committee drawn from the membership is being considered. This committee's initial focus would be to assist the Chairman and the General Counsel in preparing for the Conference's next reauthorization cycle in FY-94. Congressional consideration of the Conference's efforts to upgrade the statistics-gathering function and the training function should be sought.

C. CLEARINGHOUSE ACTIVITIES

1992 Accomplishments

The Council of Independent Regulatory Agencies (CIRA) is an informal organization composed of the chairs of the thirteen major independent regulatory boards and commissions and the Chairman of the Administrative Conference, who also serves as Chairman of CIRA. At CIRA meetings, agency chairs exchange ideas concerning governmental and regulatory issues and problems, and discuss these issues with select members of the Executive Branch, academics, and members of Congress.

This group meets on a regular basis, the typical format being a breakfast meeting at the White House with a key member of the Administration as the group's guest. The agencies whose chairmen participate in CIRA are the Commodity Futures Trading Commission, Consumer Product Safety Commission, Equal Employment Opportunity Commission, Federal Communications Commission, Federal Energy Regulatory Commission, Federal Maritime Commission, Federal Reserve System, Federal Trade Commission, International Trade Commission, Interstate Commerce Commission, National Labor Relations Board, Nuclear Regulatory Commission, and the Securities and Exchange Commission. Speakers at CIRA breakfasts have included senior members of Congress and Senior White House staff.

During FY-92 the Conference initiated a regularized seminar series for agency chief legal officers. More than 40 department and agency chief counsels and general counsels or their representatives from government participated in the first in a series of quarterly meetings of agency chief legal officers sponsored by the Conference. The June 1 opening session featured Solicitor General Kenneth Starr as the guest speaker.

The Conference held a number of other colloquies and seminars during the year. These programs are designed to allow for the presentation and discussion of issues in administrative law and regulatory procedures that affect administrative agencies. Special events during the year included:

ALJ Hearing - A study of the federal administrative judiciary was the subject of a public hearing sponsored by the Committee on Adjudication on June 17, 1992. Fifteen speakers, including representatives from a number of administrative law judge organizations, individual ALJs, administrative judges from several agencies, and representatives from other organizations interested in the federal administrative judiciary, shared their views of the consultants' report and its recommendations with members of the Committee.

ADR Conference - On May 5, 1992 the Conference co-sponsored, with the Society of Professionals in Dispute Resolution and the Federal Mediation and Conciliation Service, a full-day conference on implementing the Administrative Dispute Resolution Act. The conference addressed practical opportunities the Act presents in a variety of settings including contracting, developing regulations and policies, enforcement, personnel and EEO cases, and licensing and ratemaking.

Regulatory Takings - At the Conference's April 21 colloquy, Acting Chairman Robert S. Ross, Jr., moderated a panel, consisting of Barry Hartman, Acting Assistant Attorney General for Environment and Natural Resources; John Echeverria, Counsel to the National Audubon Society; and Paul Kamenar, Executive Legal Director of the Washington Legal Foundation and senior fellow of the Administrative Conference; discussing cases before the U.S. Supreme Court which involved the question of when a "regulatory taking" occurs.

The final colloquy of the year concerned "The Supreme Court's Administrative Law Docket" on Thursday, September 24, 1992. Judge Patricia M. Wald, of the D.C. Circuit Court of Appeals was the highlighted speaker.

In addition, the Conference held its annual seminar for regulatory agency commissioners and its legislative forum for Congressional staff on administrative law issues. The Conference, with the support of grants from the Hewlitt and Culpeper Foundations held four roundtables on alternative dispute resolution during the year.

Conference publications are an equally important part of the clearinghouse function. During the year, the Conference published three newsletters which contained information useful to agency personnel concerning ongoing research activities and other Conference initiatives. These newsletters, which are provided to agency heads and all members of the senior executive service as well as agency personnel directly involved in administrative law issues, prompted numerous requests for Conference publications and research reports relevant to current agency activity. Publication of a major resource, the second edition of *Sourcebook on Administrative Procedure* was completed. The *Sourcebook* collects statutory and regulatory material frequently used by agency attorneys and provides brief analysis of each. Agency "rider" requests on the printing requisition are expected to double the Conference's order. Publication of a pamphlet on agency use of Ombudsman was completed. Work is underway and publication is expected in FY-93 for a new edition of the Conference's *Manual for*

Administrative Law Judges. Agency interest in this collection of legislative and judicial materials on administrative procedure is high and demand is expected to be heavy.

The Conference library, a Federal Depository Library, contains many administrative law materials unavailable in less specialized collections. It responds to continuous requests for assistance.

1993 Activities

The Administrative Conference will continue its annual seminars for legislative staff and regulatory commissioners. The CIRA breakfast program and the quarterly meetings of agency chief legal officers will be continued. It is hoped that at least three colloquies will be held on timely topics. Roundtables for issues in alternative dispute resolution will be continued. The computerized database containing the agency's roster of dispute resolution neutrals will be maintained. Work will be completed on a major revision to the Conference's *Guide to the Government in the Sunshine Act*. This publication was last revised over ten years ago. It needs substantial revision. As noted, professional editing work will also be done on a revision to the *Manual for Administrative Law Judges*.

The Conference has a study series of topics which have current interest in the agencies which is supplemented on a regular basis. The completion of the study of the federal administrative judiciary will lead to a possible collection of related materials that could be published in the Conference's study series if sufficient funding is available. Funds are not available for publication of this volume during FY-93 without either agency support or university press support.

In the late 1970s the Conference gathered and published statistical reports on administrative hearings under the Uniform Caseload Accounting System. This was discontinued for budgetary reasons. The recent report of the Special Committee on the Future of the Conference strongly urges the gathering of this data because of its substantial value to those attempting to study results and reform. The government lacked definitive statistical data to analyze positions taken on the ALJ Corps bill, the Fair Housing Act, legislation affecting Social Security and Veterans Department benefit claims procedures, or myriad legislation debating the pros and cons of new independent commissions. This would cost between $100,000 and $150,000 annually to resume. To better define the scope of this problem the Conference will explore ways to revive the statistics-gathering function through multi-agency activities and will continue to ask for agency support through SES details to explore feasibility of more limited effort in this area.

Administrative Conference of the United States

Fiscal Year 1994 Budget Submission

TAB A

Membership of the Assembly of the Administrative Conference

February 11, 1993

Brian C. Griffin, Chairman

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of the

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Administrative Conference of the United States

Fiscal Year 1994
Budget Submission

TAB B

List of Past Recommendations of the Conference

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305.68-2 U.S. Government Organization Manual (Recommendation No. 68-2).

305.68-3 Parallel Table of Statutory Authorities and Rules (2 CFR Ch. I)[1] (Recommendation No. 68-3).

305.68-4 Consumer Bulletin (Recommendation No. 68-4).

305.68-5 Representation of the Poor in Agency Rulemaking of Direct Consequence to Them (Recommendation No. 68-5).

305.68-8 Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency (Recommendation No. 68-6).

305.68-7 Elimination of Jurisdictional Amount Requirement in Judicial Review (Recommendation No. 68-7).

305.68-8 Judicial Review of Interstate Commerce Commission Orders (Recommendation No. 68-8).

305.69-1 Statutory Reform of the Sovereign Immunity Doctrine (Recommendation No. 69-1).

305.69-2 Judicial Enforcement of Orders of the National Labor Relations Board (Recommendation No. 69-2).

305.69-3 Publication of a "Guide to Federal Reporting Requirements" (Recommendation No. 69-3).

305.69-4 Analytical Subject-Indexes to Selected Volumes of the Code of Federal Regulations (Recommendation No. 69-4).

305.69-5 Elimination of Duplicative Hearings in FAA Safety De-certification Cases (Recommendation No. 69-5).

305.69-8 Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies (Recommendation No. 69-6).

305.69-7 Consideration of Alternatives in Licensing Procedures (Recommendation No. 69-7).

305.69-8 Elimination of Certain Exemptions from the APA Rulemaking Requirements (Recommendation No. 69-8).

305.69-9 Recruitment and Selection of Hearing Examiners; Continuing Training for Government Attorneys and Hearing Examiners; Creation of a Center for Continuing Legal Education in Government (Recommendation No. 69-9).

305.70-1 Parties Defendant (Recommendation No. 70-1).

305.70-2 SEC No-Action Letters Under Section 4 of the Securities Act of 1933 (Recommendation No. 70-2).

305.70-3 Summary Decision in Agency Adjudication (Recommendation No. 70-3).

305.70-4 Discovery in Agency Adjudication (Recommendation No. 70-4).

305.70-5 Practices and Procedures Under the Renegotiation Act of 1951 (Recommendation No. 70-5).

305.71-1 Interlocutory Appeal Procedures (Recommendation No. 71-1).

305.71-2 Principles and Guidelines for Implementation of the Freedom of Information Act (Recommendation No. 71-2).

305.71-3 Articulation of Agency Policies (Recommendation No. 71-3).

305.71-4 Minimum Procedures for Agencies Administering Discretionary Grant Programs (Recommendation 71-4).

305.71-5 Procedure of the Immigration and Naturalization Service in Respect to Change-of-Status Applications (Recommendation No. 71-5).

305.71-6 Public Participation in Administrative Hearings (Recommendation No. 71-6).

305.71-7 Rulemaking on a Record by the Food and Drug Administration (Recommendation No. 71-7).

305.71-8 Modification and Dissolution of Orders and Injunctions (Recommendation No. 71-8).

305.71-9 Enforcement of Standards in Federal Grant-in-Aid Programs (Recommendation No. 71-9).

305.72-1 Broadcast of Agency Proceedings (Recommendation No. 72-1).

305.72-2 Conflict-of-Interest Problems in Dealing with Natural Resources of Indian Tribes (Recommendation No. 72-2).

305.72-3 Procedures of the United States Board of Parole (Recommendation No. 72-3).

305.72-4 Suspension and Negotiation of Rate Proposals by Federal Regulatory Agencies (Recommendation No. 72-4).

305.72-5 Procedures for the Adoption of Rules of General Applicability (Recommendation No. 72-5).

305.72-6 Civil Money Penalties as a Sanction (Recommendation No. 72-6).

305.72-7 Pre-induction Review of Selective Service Classification Orders and Related Procedural Matters (Recommendation No. 72-7).

305.72-8 Adverse Actions Against Federal Employees (Recommendation No. 72-8).

305.73-1 Adverse Agency Publicity (Recommendation No. 73-1).

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305.73-5 Elimination of the "Military or Foreign Affairs Function" Exemption From APA Rulemaking Requirements (Recommendation No. 73-5).

305.73-6 Procedures for Resolution of Environmental Issues in Licensing Proceedings (Recommendation No. 73-6).

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305.89-5 Achieving Judicial Acceptance of Agency Statutory Interpretations (Recommendation No. 89-5).

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305.89-7 Federal Regulation of Biotechnology (Recommendation No. 89-7).

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305.91-4 The National Vaccine Injury Compensation Program (Recommendation No. 91-4).

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305.91-6 Improving the Supervision of the Safety and Soundness of Government-Sponsored Enterprises (Recommendation No. 91-6).

305.91-7 Implementation of Farmer-Lender Mediation by the Farmers Home Administration (Recommendation No. 91-7).

305.91-8 Adjudication of Civil Penalties under the Federal Aviation Act (Recommendation No. 91-8).

305.91-9 Specialized Review of Administrative Action (Recommendation No. 91-9).

305.91-10 Administrative Procedures Used in Antidumping and Countervailing Duty Cases (Recommendation No. 91-10).

AUTHORITY: 5 U.S.C. 571-578.

SOURCE: 38 FR 19782, July 23, 1973, unless otherwise noted.

Administrative Conference of the United States

Fiscal Year 1994 Budget Submission

TAB C

Recommendations of the June 1992 Plenary Session

Rules and Regulations

Federal Register
Vol. 57, No. 131
Wednesday, July 8, 1992

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.
The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

1 CFR Part 305

Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure

AGENCY: Administrative Conference of the United States.

ACTION: Recommendations.

SUMMARY: The Administrative Conference of the United States adopted six recommendations at its Forty-Fifth Plenary Session addressing: (1) The procedural and practice rule exemption from the APA notice-and-comment rulemaking requirements; (2) agency policy statements; (3) enforcement procedures under the Fair Housing Act; (4) coordination of migrant and seasonal farmworker service programs; (5) streamlining attorney's fee litigation under the Equal Access to Justice Act; and (6) implementation of the Noise Control Act.

The Administrative Conference of the United States is a federal agency established to study the efficiency, adequacy, and fairness of the administrative procedures used by federal agencies in carrying out administrative programs, and to make recommendations for improvements.

Recommendations of the Administrative Conference are published in full text in the **Federal Register** upon adoption. Complete lists of recommendations, together with the texts of those deemed to be of continuing interest, are published in the Code of Federal Regulations (1 CFR part 305).

DATES: These recommendations were adopted June 18–19, 1992, and issued June 30, 1992.

FOR FURTHER INFORMATION CONTACT: Renee Barnow, Information Officer, or Jeffrey S. Lubbers, Research Director (202–254–7020).

SUPPLEMENTARY INFORMATION: The Administrative Conference of the United States was established by the Administrative Conference Act, 5 U.S.C. 571–576. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by federal agencies in carrying out administrative programs, and makes recommendations for improvements to the agencies, collectively or individually, and to the President, Congress, and the Judicial Conference of the United States (5 U.S.C. 574(1)).

At its Forty-Fifth Plenary Session, held June 18–19, 1992, the Assembly of the Administrative Conference of the United States adopted six recommendations.#

Recommendation 92–1, The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements, encourages agencies to voluntarily use notice-and-comment procedures in promulgating rules of procedure and practice except in situations in which the costs of such procedures will outweigh the benefits of having public input. The recommendation also proposes that a rule should be found to fall within the statutory exception only when it both (a) relates solely to agency methods of internal operations or of interacting with regulated parties or the public, and (b) does not (i) significantly affect conduct, activity, or a substantive interest that is the subject of agency jurisdiction, or (ii) affect the standards for eligibility for a government program. The Conference urges OMB to refrain from exercising jurisdiction under Executive Order 12,291 with respect to rules relating to procedure and practice that an agency voluntarily publishes for comment.

Recommendation 92–2, Agency Policy Statements, advises agencies to not issue statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using legislative procedures (normally including notice-and-comment). Agencies should not attempt to bind affected persons through policy statements.

Recommendation 92–3, Enforcement Procedures Under the Fair Housing Act, deals with the Department of Housing and Urban Development's implementation of the 1988 amendments to the Fair Housing Act. The Conference recommends that changes be made to ensure that complainant's litigation interests are protected, that HUD continue to study the reasons why parties are choosing to go to court rather than taking advantage of the administrative remedy, and that it take a number of actions to ensure that the enforcement program remains effective.

Recommendation 92–4, Coordination of Migrant and Seasonal Farmworker Service Programs, urges establishment by executive order of an Interagency Coordinating Council on migrant and seasonal farmworker programs. The recommendation suggests that the Council be charged with identifying specific coordination tasks, giving particular attention to gaps in services and unjustified overlap. In most instances, primary responsibility should be given to an appropriately chosen lead agency. The recommendation also calls for development of a reliable and comprehensive migrant and seasonal farmworker population census system, independent of any existing specific programs.

Recommendation 92–5, Streamlining Attorney's Fee Litigation Under the Equal Access to Justice Act, suggest ways in which Congress should amend the Equal Access to Justice Act, a statue providing for the award of attorney's fees to certain individuals and entities who prevail over the United States in court and administrative litigation. The Conference recommends that the Act be amended to reduce collateral litigation over the amount of awardable fees and encourage settlement of fee petitions. In addition, the recommendation proposes that the standard for award of attorney's fees in cases involving individual benefit claims (such as Social Security disability claims) be changed by eliminating the proviso that the United States need not pay fees if its position was substantially justified. The Conference also urges Congress to resolve difficulties concerning the timeliness of fee applications when cases are remanded to agencies and to consider whether certain administrative and Article I court proceedings not now covered by the Equal Access to Justice Act should be included within its coverage.

Recommendation 92–6, Implementation of the Noise Control

Act, responds to a request by the Environmental Protection Agency to assist it in addressing procedural concerns arising in connection with the absence of funding for EPA's responsibilities under the Noise Control Act. The recommendation advises EPA to analyze the preemptive impact of its existing regulations under the Act, taking into account a number of related issues. The recommendation suggests that the analysis be followed by appropriate congressional action, either to repeal the Noise Control Act or to fund whatever responsibilities may be delegated by Congress to EPA under the Act.

The full texts of the recommendations are set out below. The recommendations will be transmitted to the affected agencies and, if so directed, to the Congress of the United States. The Administrative Conference has advisory powers only, and the decision on whether to implement the recommendations must be made by each body to which the various recommendations are directed.

The transcript of the Plenary Session is available for public inspection at the Conference's offices at suite 500, 2120 L Street NW., Washington, DC.

List of Subjects 1 CFR Part 305

Administrative practices and procedure, attorney's fees, the Equal Access to Justice Act, fair housing law enforcement, informal rulemaking procedure, migrant and seasonal farmworker programs, the Notice Control Act, and policy statements.

PART 305—RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

1. The authority citation for part 305 continues to read as follows:

Authority: 5 U.S.C. 571–576.

2. The table of contents to part 305 of title 1 CFR is amended to add the following new sections:

Sec.

305.92–1 The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements (Recommendation No. 92–1).
305.92–2 Agency Policy Statements (Recommendation No. 92–2).
305.92–3 Enforcement Procedures Under the Fair Housing Act (Recommendation No. 92–3).
305.92–4 Coordination of Migrant and Seasonal Farmworker Service Programs (Recommendation No. 92–4).
305.92–5 Streamlining Attorney's Fee Litigation Under the Equal Access to Justice Act (Recommendation No. 92–5).
305.92–6 Implementation of the Noise Control Act (Recommendation No. 92–6).

3. New §§ 305.92–1 through 305.92–6 are added part 305, to read as follows:

§ 305.92–1 The procedural and practice rule exemption from the APA notice-and-comment rulemaking requirements (Recommendation No. 92–1).

The Administrative Procedure Act, 5 U.S.C. 553, establishes the procedural requirements for notice-and-comment rulemaking. It requires that an agency generally publish notice and provide opportunity for public comment before adopting a rule. The section also provides for a number of specific exemptions. One of these exemptions in subsection (b)(A), provides that the requirements for notice and comment do not apply to "rules of agency organization, procedure, or practice * * *."[1]

The scope of APA exceptions has been described as "enshrouded in considerable smog,"[2] and the question of what is a procedural or practice rule has no clear answer.[3] The issues is in a state of flux.[4] Although courts have used a number of different tests to determine whether a rule was one of procedure or practice, none has been particularly satisfactory. Over the years the Conference has addressed the scope of most of the other exceptions to the APA rulemaking requirements.[5] Because the procedural rule exception is a subject of increasing controversy, it is appropriate for the Conference to fill this gap.

The Conference has long advocated the value of notice and comment in rulemaking,[6] and this recommendation encourages agencies to use such processes voluntarily in promulgating rules of procedure or practice. Notice and comment can provide the agency with valuable input from the public as well as furnish enhanced public acceptance of the rules. On the other hand, there can be costs to the agency in using notice-and-comment procedures, including the time and effort of agency personnel, the cost of Federal Register publication, and the additional delay in implementation that results from seeking public comments and responding to them. For significant procedural rule changes, the benefits seem likely to outweigh the costs; but this may not be the case for minor procedural amendments. Thus, unless the costs outweigh the benefits, we strongly encourage agencies voluntarily to use notice and comment even where an APA exemption applies.

The Conference believes, however, that the procedural and practice rule exemption can in appropriate circumstances serve a legitimate governmental purpose, and that Congress intended it to be available in such cases. Where such rules are truly procedural, rather than substantive in a procedural mask, the statutory exemption should be available. The Conference therefore recommends, as a guide to agencies in determining when a rule is procedural, that agencies should establish first that the rule relates to an agency's internal operations[7] methods of interacting with the public and second that the rule has no substantive impact because it neither significantly affects conduct, activity or a substantive interest that is the subject of agency regulation, nor affects the standards for eligibility for government programs.[8]

[1] The term procedural rule will be used herein to refer to rules of agency practice and procedure. Other exemptions from notice-and-comment rulemaking requirements cover interpretive rules policy statements, and situations where good cause exists. See section 553(b). Section 553(a) completely exempts from notice-and-comment rulemaking rules involving military or foreign affairs, agency management or personnel, grants, loans, benefits, or contracts.

[2] *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir 1975); *see also Community Nutrition Institute v. Young*, 818 F. 2d 943, 946 (D.C. Cir. 1987).

[3] There has been less debate about what are rules of agency organization.

[4] *Air Transport Association v. Department of Transportation*, 900 F.2d 369 (D.C. Cir. 1990), *cert granted*, 111 S. Ct. 669 (1991), *judgment vacated and remanded*, 111 S. Ct. 944 (1991), *opinion vacated and petition dismissed on mootness grounds*, 933 F.2d 1043 (D.C. Cir. 1991), has recently focused attention on the scope of the exemption.

[5] Recommendation 69–8, "Elimination of Certain Exemptions from the APA Rulemaking Requirements." 1 CFR 305.69–8. Recommendation 73–5, "Elimination of the 'Military or Foreign Affairs Function' Exemption From APA Rulemaking Requirements." 1 CFR 305.73–5. Recommendation 78–5, "Interpretive Rules of General Applicability and Statements of General Policy." 1 CFR 305.78–5. Recommendation 83–2, "The 'Good Cause' Exemption from APA Rulemaking Requirements." 1 CFR 305.83–2.

[6] See, eg., Recommendation 69–8, supra n.5

[7] It is likely that some rules relating to agency internal operations will also fall within a category of rules exempt from all of section 553's requirements (including publication of a statement of basis and purpose and delayed effective date) as a "matter relating to agency management or personnel." 5 U.S.C. 553(a)(2).

[8] The term "program" is meant to be interpreted broadly to include, among others, those involving benefits, contracts, licenses, permits, and loan guarantees. In this connection, it should be noted that many agencies, following Recommendation 69–8, have voluntarily waived the exemption from notice-and-comment rulemaking for matters relating to loans, grants, benefits, or contracts.

Only if the proposed rule meets both parts of this test, should it be considered as being within the exemption from notice-and-comment requirements as a rule of practice or procedure. Examples of rules that would be procedural under this standard include rules governing conduct of formal hearings or appeals, ex parte rules, and rules concerning the business hours of the agency. Examples of nonexempt rules include rules relating to the criteria for determining the severity of enforcement sanctions, levels of civil money penalties, or application requirements that serve to limit eligibility for a government benefit program.

In order to encourage agencies voluntarily to use notice and comment, the Conference also recommends that the Office of Management and Budget refrain from exercing its jurisdiction to review rules fitting within the definition of rules relating to an agency's procedure or practice when an agency voluntarily publishes them.

Recommendation

1. Federal agencies should exercise restraint in invoking the Administrative Procedure Act's statutory exceptions to the notice-and-comment rulemaking procedures. Thus, the Administrative Conference has consistently urged agencies voluntarily to use notice-and-comment procedures when issuing rules that fall within the terms of most of the exemptions under 5 U.S.C. 553.[9]

2. For rules falling within the "procedure or practice" exception in 5 U.S.C. 553(b)(A), agencies should use notice-and-comment procedures voluntarily except in situations in which the costs of such procedures will outweigh the benefits of having public input and information on the scope and impact of the rules, and of the enhanced public acceptance of the rules that would derive from public comment.

3. In determining whether a proposed rule falls within the statutory exception for rules of agency "procedure or practice," agencies should apply the following standard: A rule is within the terms of the exception when it both (a) relates solely to agency methods of internal operations or of interacting with regulated parties or the public, and (b) does not (i) significantly affect conduct, activity, or a substantive interest that is the subject of agency jurisdiction, or (ii) affect the standards for eligibility for a government program.[10]

4. To assist agencies in implementing this recommendation, the Office of Management and Budget should refrain from exercising jurisdiction under Executive Order 12291 with respect to rules relating to an agency's procedure or practice that an agency voluntarily publishes for notice and comment.

§ 305.92-2 Agency policy statements (Recommendation No. 92-2).

This recommendation addresses use of agency policy statements. Policy statements fall within the category of agency actions that are "rules" within the Administrative Procedure Act's definition because they constitute "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or describe law or policy," 5 U.S.C. 551(4). "Rules" include (a) legislative rules, which have been promulgated through use of legislative rulemaking procedures, usually including the notice-and-comment procedures of the Administrative Procedure Act, 5 U.S.C. 553, and (b) nonlegislative rules—that is, interpretive rules and policy statements—which fall within the above definition of "rules" but which are not required to be promulgated through use of legislative rulemaking procedures. Thus, policy statements include all substantive nonlegislative rules to the extent that they are not limited to interpreting existing law. They come with a variety of labels and include guidances, guidelines, manuals, staff instructions, opinion letters, press releases or other informal captions.

Policy statements that inform agency staff and the public regarding agency policy are beneficial to both. While they do not have the force of law (as do legislative rules) and therefore can be challenged within the agency, they nonetheless are important tools for guiding administration and enforcement of agency statutes and for advising the public of agency policy.

The Conference is concerned, however, about situations where agencies issue policy statements which they treat or which are reasonably regard_d by the public as binding and dispositive of the issues they address.[1] The issuance of such binding pronouncements as policy statements does not offer the opportunity for public comment which is normally afforded during the notice-and-comment legislative rulemaking process for rules which have the force of law. Courts have frequently overruled agency reliance on policy statements as binding on affected persons.

Where the policy statement is treated by the agency as binding, it operates effectively as a legislative rule but without the notice-and-comment protection of section 553. It may be difficult or impossible for affected persons to challenge the policy statement within the agency's own decisional process; they may be foreclosed from an opportunity to contend that the policy statement is unlawful or unwise, or that an alternative policy should be adopted. Of course, affected persons could undergo the application of the policy to them, exhaust administrative remedies and then seek judicial review of agency denials or enforcement actions, at which time they may find that the policy is given deference by the courts. The practical consequence is that this process may be costly and protracted, and that affected parties have neither the opportunity to participate in the process of policy development nor a realistic opportunity to challenge the policy when applied within the agency or on judicial review. The public is therefore denied the opportunity to comment and the agency is denied the educative value of any facts and arguments the party may have tendered.

The Conference believes this outcome should be avoided, first by requiring that when an agency contemplates an announcement of substantive policy (other than through an adjudicative decision), it should decide whether to issue the policy as a legislative rule, in a form that binds affected persons, or as a nonbinding policy statement.[2] Second,

[9] In some cases, the Conference has recommended that agencies generally use notice and comment. Recommendation 76-5, "Interpretive Rules of General Applicability and Statements of General Policy." 1 CFR 305.76-5. Recommendation 83-2, "The 'Good Cause' Exemption from APA Rulemaking Requirements." 1 CFR 305.83-2. In the case of some other exemptions, the Conference has also recommended eliminating them altogether. Recommendation 69-8, "Elimination of Certain Exemptions from the APA Rulemaking Requirements. 1 CFR 305.69-8. Recommendation 73-5, "Elimination of the "Military or Foreign Affairs Function" exemption from APA Rulemaking Requirements." 1 CFR 305.73-5.

[10] The term "program" is meant to be interpreted broadly to include, among others, those involving benefits, contracts, licenses, permits, and loan guarantees. See footnote 7, *supra*.

[1] There are many facets that must be assessed in determining whether a policy statement is operationally a rule that binds affected persons. In general, we apply the concept here to agency statements that are usually issued in permanent form and that are relied upon by an agency and its staff to decide policy whose basis, legality, and soundness cannot be challenged within the agency. Whether a statement is a matter of policy or interpretation, is issued in a permanent form, and is in fact binding (or to what extent it is binding) are often difficult questions that can only be decided in context.

[2] The Conference has already urged agencies to use notice-and-comment procedures, where possible, before promulgating an interpretive rule of

Continued

to prevent policy statements from being treated as binding as a practical matter, the recommendation suggests that agencies establish informal and flexible procedures that allow an opportunity to challenge policy statements. Recognizing that each agency's process differs, the choice of which procedures to change in implementing this recommendation remains in the discretion of each agency. Likewise, actions taken during review of the policy statement would not necessarily be affected by such reconsideration.

Recommendation

The following recommendations applicable to policy statements are intended to ensure that, before an agency promulgates substantive policies which bind [3] affected persons, it provides appropriate notice and opportunity for comment on such policies, and makes sure that policy statements are not treated as binding.

I. Legislative Rulemaking for Binding Policies

A. Agencies should not issue statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using legislative rulemaking procedures (normally including notice-and-comment). Specifically, agencies should not attempt to bind affected persons through policy statements.

B. When an agency publishes a legislative rule (e.g., in the Federal Register and in official agency publications), the preamble to the rule should state that it is a legislative rule intended to bind affected persons. The preamble should also cite the specific statutory authority for issuing the rule in binding form as well as the steps that it has taken to comply with procedural requirements.

II. Policy Statements

A. *Notice of nonbinding noture.* Policy statements of general applicability should make clear that they are not binding. Persons affected by policy statements should be advised that such policy statements may be challenged in the manner described in part B below. Agencies should also ensure, to the extent practicable, that the nonbinding nature of policy statements is communicated to all persons who apply them or advise on the basis of them, including agency staff, counsel, administrative law judges, and relevant state officials.

B. *Procedures for challenges to policy stotements.* Agencies that issue policy statements should examine and, where necessary, change their formal and informal procedures, where they already exist, to allow as an additional subject requests for modification or reconsideration of such statements. Agencies should also consider new procedures separate from the context in which the policy statement is actually applied. The procedures should not merely consist of an opportunity to challenge the applicability of the document or to request waivers or exemption from it; rather, affected persons should be afforded a fair opportunity to challenge the legality or wisdom of the document and to suggest alternative choices in an agency forum that assures adequate consideration by responsible agency officials. The opportunity should take place at or before the time the policy statement is applied to affected persons unless it is inappropriate or impracticable to do so. Agencies should not allow prior publication of the statement to foreclose full consideration of the positions being advanced. When a policy statement is subject to repeated challenges, agencies should consider instituting legislative rulemaking proceedings on the policy.

III. Instructions to Agency Staff

This recommendation does not preclude an agency from making a policy statement which is authoritative for staff officials in the interest of administrative uniformity or policy coherence. Indeed, agencies are encouraged to provide guidance to staff in the form of manuals and other management directives as a means to regularize employee action that directly affects the public. However, they should advise staff that while instructive to them, such policy guidance does not constitute a standard where noncompliance may form an independent basis for action in matters that determine the rights and obligations of any person outside the agency. Further, agencies are encouraged to obtain public comment on such guidance. Finally, in any case in which staff officials' adherence to such directives may affect a member of the public, care should be taken to observe the requirements of 5 U.S.C. 552(a) which imposes a publication requirement independent of any obligation to employ notice-and-comment procedures.

§ 305.92-3 Enforcement procedures under the Fair Housing Act (Recommendation No. 92-3).

Background

The 1968 Fair Housing Act outlaws various types of discrimination in the sale or rental of residential housing. It prohibits discrimination on the basis of race, color, religion, sex, and national origin, and covers sale and rental of residential housing, refusal to deal, and a number of related actions. In 1988, Congress amended the Fair Housing Act, by altering the enforcement provisions for violations of the antidiscrimination provisions, while at the same time extending the Act's coverage to discrimination against the handicapped and families with children.

The 1968 Act contained limited enforcement provisions, under which the Department of Housing and Urban Development (HUD) had a circumscribed role. The Act provided that persons aggrieved by discrimination could file (within 180 days) a complaint with the Secretary of HUD, who was obligated to conduct an investigation and use informal methods (conferences, conciliation and persuasion) to eliminate any discriminatory practices. If a state or local agency provided rights and remedies that were substantially equivalent to those under the federal statute,[1] the Secretary was required to refer the case to that state or local agency.

If neither agency was able to secure voluntary compliance, the aggrieved party was permitted to file a civil action in a United States District Court, unless state or local forums provided substantially equivalent rights and remedies. In such cases, the state or local court had to be used. The Act also provided for a private right of action in U.S. District Court. Remedies were limited to injunctive relief, actual

general applicability or statement of general policy that is likely to have substantial impact on the public. Agencies were urged to use post-promulgation notice-and-comment procedure if it is not practicable to accept and consider comments before the rule is promulgated. See Recommendation 76-5, "Interpretive Rules of General Applicability and Statements of General Policy."

[3] As the term is used here, an agency rule is "binding" when the agency treats it as a standard where noncompliance may form an independent basis for action in matters that determine the rights and obligations of any person outside the agency. This is true whether or not the rule was promulgated in accordance with section 553. A document that was not issued pursuant to section 553, and therefore cannot be binding legally, may nevertheless be binding as a practical matter if the agency treats it as dispositive of the issue it addresses. This recommendation is concerned only with substantive, as opposed to procedural, rules. See Recommendation 92-1, "The Procedural and Practice Rule Exemption From the APA Notice-and-Comment Rulemaking Requirements."

[1] Among the provisions in the Act were subpoena authority and authority to submit interrogatories to respondents.

damages, and punitive damages not in excess of $1,000. The 1968 Act also authorized the Department of Justice to file suit in cases involving "pattern or practice" or issues of "general public importance." Injunctive relief was available in such cases.

These remedies were considered by many to be inadequate, both because of the limited judicial remedies and the lack of an effective administrative enforcement process. In 1988, Congress amended the Act's enforcement provisions, while at the same time expanding the Act's coverage.

The 1988 amendments created two additional categories of people protected from discrimination under the Act. Discrimination with respect to handicapped persons is now prohibited, and is defined to include refusal to permit certain "reasonable modifications" of existing premises at the handicapped person's expense, and refusal to make certain "reasonable accommodations" for access. Discrimination against families with children is also prohibited, although there is an exception for certain "housing for older persons."

The amended enforcement provisions furnished significant new remedies. The Act now provides an administrative enforcement procedure, which requires HUD to investigate filed complaints within 100 days. The statute of limitations has been doubled to a year. During the investigation period, HUD is to undertake conciliation efforts. If those are not successful, and HUD finds "reasonable cause" to believe a violation has occurred, it must issue a formal charge of discrimination. Upon issuance of a formal charge, the complainant and respondent each have 20 days to elect to have the claim adjudicated in court. If neither party so elects, the case is heard in an APA hearing before a HUD administrative law judge, with evidence presented under the Federal Rules of Evidence. The parties to the hearing are HUD (represented by its Office of General Counsel) and the defendant, with the aggrieved party permitted to intervene. The ALJ has the authority to award compensatory damages and injunctive relief, and to impose civil penalties against a defendant of up to $10,000 for the first offense, $25,000 if there has been a prior violation within the previous 5 years, and $50,000 if there have been two or more violations within the previous 7 years. ALJ decisions are reviewable by the Secretary,[1] and appealable to the U.S. Court of Appeals.

If either party elects to "remove" the case to court, the case is litigated by the Department of Justice, and the complainant may intervene. As in the administrative forum, injunctive relief and compensatory damages are available, but instead of civil money penalties, punitive damages may be awarded. A jury trial is also available.

The private right of action remains, with an extended statute of limitations, and removal of the $1000 cap on punitive damages. (Injunctive relief and compensatory damages are also available, but civil penalties are not.) There is no requirement that a party exhaust its administrative remedies before filing suit in court, but if administrative proceedings are pending, a private suit may not be filed. The Department of Justice's authority to file suits in "pattern and practice" cases remains the same, except that available relief has been expended to include civil penalties.

As under the old statute, state and local remedies are to be used to the extent that they are "substantially equivalent" to those provided for in the Act. State and local agencies must be certified by HUD as having equivalent procedures before cases must be referred to them. Agencies that had been certified prior to 1988 were grandfathered in for 40 months with respect to handling discrimination complaints covered by the prior Act. The 40-month period expired in January 1992, but was extended until September 1992. During this "grandfathering" period, state agencies could process housing discrimination complaints involving race, color, sex, religion, and national origin, even though their procedures were not substantially equivalent to the Act's amended provisions. However, until they have been specifically certified to do so, they may not handle complaints involving familial status or the handicapped.

Discussion

Implementation of the new enforcement provisions of the Act is in an early stage. HUD appears to be taking its responsibilities seriously. Some portions of the program seem to be working well, while in some others, emerging trends may be cause for concern.

The administrative hearing portion of the enforcement program appears to be functioning smoothly. To the extent that parties have elected to stay in the administrative adjudication process, their cases have been processed expeditiously. However, in more than half the cases, one of the parties has chosen to "remove" the case to court, and most of these court cases are still pending.

HUD has indicated that it is conducting a study on why so many cases are "removed" to court. The Conference applauds that endeavor, and suggests that such a study be an ongoing effort. HUD should also undertake an education program to advise potential complainants and respondents of the practical considerations that relate to the decision on which process to use. Such explanations should address the potential remedies available in each option, as well as the likely time periods that each will require for resolving the dispute.

In virtually all other civil rights enforcement processes, an existing administrative remedy must be used. In fact, in most administrative processes, parties do not have the choice between using an existing administrative process or going to court. Thus, the Fair Housing Act's provision permitting either party the choice of going through the administrative process or to court is an unusual one, offering the potential for quicker hearings in the administrative forum and larger (punitive) damages in judicial forums.

The Fair Housing Act amendments' system arose out of a political compromise resulting from, among other things, concern about the constitutionality of eliminating a party's opportunity for a jury trail in the context of fair housing rights enforcement. The existence of a right to a jury trail in this situation is a subject of some debate, but in light of this debate, as well as the recent nature of the political compromise that permitted enactment of the Fair Housing Act amendments, the Conference does not at this time recommend eliminating the option of a district court remedy. The Conference is reluctant to strongly encourage parties to use the administrative process rather than the judicial route until it has more information as to why parties select one over the other, and more data on alleged significant differences in the relief granted in each.

Under current law, complainants are not automatically parties to proceedings brought by HUD (at the administrative level) or the Department of Justice (in court) as a result of their complaints. Although procedures for intervention exist, concerns have been raised that, in some cases, the interests of complainants and the government may

[1] HUD regulations provide that the Secretary will review only in extraordinary cases.

diverge at points in the litigation where intervention as of right is no longer available. For example, the Department of Justice may not wish to appeal a determination with which the complainant is unsatisfied. If the complainant is not already a party to the litigation, his or her appeal rights may be lost. Providing that a complainant is automatically a party to any case based on his or her complaint would alleviate this problem. Moreover, HUD should notify complainants of their right to be represented by their own counsel (separate from counsel from the government), not only at the beginning of the litigation process, but at subsequent stages where the interests of the government and of the individual complainant may diverge on a significant or dispositive issue (e.g., on the question whether to appeal an adverse decision).

The Act requires that HUD undertake conciliation efforts in cases in which complaints are filed. Conciliation efforts are made by the HUD investigator assigned to the complaint. It appears that close to 25 percent of the cases are conciliated successfully. Conciliation (and other opportunities to use alternative means of dispute resolution) should continue to be encouraged. HUD should study whether using the investigator as conciliator has been advantageous due to the investigator being knowledgeable about the case and the program, or whether parties may tend to perceive some bias because of the investigator's initial involvement in determining the objective merits of the parties' positions. Proper training in conciliation and mediation would be essential for the investigative staff if they are to continue to have a role in this part of the dispute resolution process.

A major area where HUD has not been successful in meeting its responsibility under the Act is its inability to complete investigations and determine whether or not to file charges within the 100 days allowed by statute. In fact, almost 75 percent of the Fair Housing Act complaints filed in 1990 were not processed within the 100-day statutory deadline. There are several possible reasons for this. There has been a significant increase in the number of complaints filed since the Act's amendment. Much of the burden of this increase falls on HUD, because state and local agencies have not been certified for the cases under the expanded coverage. [3] Moreover, HUD has used a fairly complicated internal review system with respect to making "cause" determinations, which might be simplified, now that its personnel have had some experience. HUD has been taking steps to ensure that complaints are processed in a timely fashion, including delegating some decisional authority to regional personnel. Such efforts are to be encouraged, so long as care is taken to ensure adequate training.

As described above, state and local agencies that provide rights and procedures substantially equivalent to those available under federal law may be certified, in which case complaints must be processed by such agencies rather than by HUD. The automatic grandfathering provisions in the 1988 Act have expired (although they have been extended to the extent permitted by the Act), and many state agencies have not been certified. There are concerns from both ends of the spectrum: Concern that HUD will be overlenient in determining that the processes of state and local agencies are substantially equivalent, and concern that HUD will not act expeditiously enough in certifying those that do have equivalent processes.

As a result of the enlarged coverage of the Fair Housing Act, about one-half of the complaints over the last 2 years have involved allegations of discrimination on the basis of familial status. There also have been a substantial number of complaints involving alleged discrimination against the handicapped. Thus, the earlier concentration on discrimination cases arising under the old Act has necessarily been diluted to some degree. HUD should take care to ensure that the importance of attacking all types of discrimination within its purview continues to be recognized, notwithstanding resource limitations.

Recommendation

1. Congress should amend the Fair Housing Act to provide that each aggrieved person on whose behalf a complaint has been filed shall automatically be deemed a party to a lawsuit or administrative proceeding that results from such complaint.

2. The Department of Housing and Urban Development (HUD) should notify each complainant of his or her option to select private counsel (separate from counsel from the Government), at the time a reasonable cause finding is made, and a future points where action by government counsel is potentially adversely dispositive of that complainant's remedies. This notice should explain the potential implications to the complainant of exercising that option.

3. HUD should continue to study why parties in cases under the Fair Housing Act are opting in a large portion of cases to use the judicial process, rather than the administrative adjudication process. The results of such studies should be shared with the Administrative Conference, the Congress and the public.

4. HUD should undertake an educational program to advise potential complainants and respondents of the practical considerations that bear upon a decision to choose the administrative process or the judicial process in Fair Housing Act cases, including an explanation of the potential remedies and time periods for resolution of the dispute.

5. HUD should increase its efforts to process complaints within the 100-day statutory period. Among the alternatives it should consider are delegating increased authority to regional offices, with concomitant additional training and appropriate headquarters oversight.

6. In deciding whether to certify or maintain certifications of state and local agencies, HUD should examine closely whether such agencies offer substantially equivalent rights and procedures, and move as rapidly as possible to certify those that do.

7. HUD should encourage the use of alternative dispute resolution in all stages of Fair Housing Act cases. It should particularly monitor the conciliation process, to ensure that it is perceived as working fairly. It should continue to offer training in conciliation and mediation skills.

8. HUD should not allow efforts directed towards the newly covered categories of discrimination to diminish the recognized importance of complaints falling under the original categories.

§ 305.92–4 Coordination of migrant and seasonal farmworker service programs (Recommendation No. 92–4).

Since the 1960s, the federal government has established numerous service programs to help meet the needs of migrant farmworkers. From the early days, migrants have been considered a uniquely federal responsibility, primarily because of their interstate movement, which makes it hard for the workers and their families to qualify for local assistance and disrupts other services like schooling for the children. As these programs have evolved, many have come to serve nonmigrant seasonal farmworkers as well.

The programs to meet health, education, housing, job training, and

[3] It may also be that, given the financial pressures facing states, they will not take the necessary actions that would allow HUD to certify them

other needs of migrant and seasonal farmworkers (MSFWs) have developed separately. There are approximately 10 MSFW-specific service programs, and farmworkers also draw upon the assistance of numerous other general programs such as food stamps or Medicaid. The four largest federal programs are Migrant Education, administered by the Department of Education; Migrant Health and Migrant Head Start, both administered by the Department of Health and Human Services; and the Department of Labor's special job training programs for MSFWs under section 402 of the Job Training Partnership Act.

Each program has its own definition of migrant and/or seasonal farmworker, as well as other eligibility standards. The result is a potential for overlap of some services and gaps in others, and there is no overarching provision for effective coordination among the programs. Various efforts have been undertaken at the national level to improve coordination, but with mixed success to date. These include an Interagency Committee on Migrants, a staff-level group that meets quarterly, largely for information-sharing purposes; an Interagency Coordinating Council, established informally as a forum for policy-level decisionmakers involved in the various programs, but now inactive; and a Migrant Inter-Association Coordinating Committee, involving nonprofit grantees and other organizations representing direct service providers.

In addition, MSFWs often qualify for other services provided by state and local governments or funded through private initiative, each governed by its own particular definitions or eligibility standards. These services are especially important in areas where some or all of the major federal programs are not present. Effective local service providers therefore have to be adroit in locating those available services, from whatever source, that can best meet the needs of their clientele. Because of the great variety in locally available services of this kind, much of the task of coordination among MSFW service programs necessarily takes place at the local and state level. Many states are finding ways to encourage this process by the creation of a governor's committee or task force, involving service providers, growers, representative government officials, farmworkers, and others.

The federal government should also take steps to improve coordination of services. For example, the intake procedures for each service program (now typically undertaken separately by each of the agencies, despite considerable duplication) should be streamlined. To effectuate such efforts, and to provide better interagency consultations before program changes are introduced, the President should establish by executive order a policy-level Interagency Coordinating Council on MSFW programs. This Council is not intended to replace, and indeed should promote, existing coordination at the program staff, state, and service delivery level.

To facilitate interagency coordination, whether or not such a Council is created, a reliable system for gathering data on the nation's population of MSFWs is needed. Although each agency has its own mechanism for generating program statistics and estimates of the target population, these vary widely in method and scope, and each suffers from specific inadequacies. They produce widely varying pictures of the nation's population of MSFWs, to the continuing frustration of legislators, service providers, researchers, and others. Agricultural labor data have always been left out of the Department of Labor's regular employment data system, and no other adequate permanent data source now fills the gap. The recommendation provides some guidance on the goals of such an information-gathering effort.

Recommendation

I. Coordination at the National Level

An Interagency Coordinating Council on migrant and seasonal farmworker (MSFW) programs should be established to strengthen national coordination of MSFW service programs. The Council would be charged, inter alia, with identifying specific coordination tasks to be accomplished, in most cases under the primary responsibility of a designated lead agency.

A. To ensure an enduring structure and a clear mandate, the President should issue an executive order creating the Council, specifying the policy-level officials from appropriate agencies who would be permanent members and designating a chair. The order should also designate an agency that would initially have primary responsibility for staffing the Council's meetings and other functions. The Council should be specifically charged to coordinate and review MSFW service programs, giving particular attention to gaps in services and unjustified overlap. It should encourage public participation through public meetings, creation of an advisory committee, or other means.

B. The executive order should provide that the Council, in cooperation with the Office of Management and Budget, review proposals for significant changes in any agency's MSFW service program (including proposed legislation, regulations, and grantee performance standards). OMB should consolidate or coordinate its own oversight of all federal MSFW service programs.

The executive order should assign to the Council the initial responsibility to develop, through delegations to the appropriate agencies, a reliable and comprehensive MSFW population census system, independent of any of the specific programs, along the lines described in part II. Other specific coordination tasks that the Council might wish to take up include development of consolidated or streamlined intake processing for MSFW programs, provision of better linkages among existing MSFW information clearinghouses, and encouragement of cooperation among direct service providers.

D. The Council should identify and assign priorities to the coordination tasks to be accomplished, with a strategy and timetable for their achievement. In most instances, it should assign lead responsibility for each specific coordination task to a designated agency. That agency's coordination efforts with other agencies may include suggesting regulations or other implementation measures.

E. The Council should study the differing eligibility standards of MSFW programs and identify, if appropriate, where consistency could be achieved without substantial impact on the beneficiaries of those programs.

F. The Council should also study and make recommendations on the strengthening of state and local coordination of MSFW programs.

II. Information Gathering on Migrant and Seasonal Farmworkers

A. To improve coordination of and service delivery in MSFW programs, the executive order should:

(1) Authorize the Council to develop an integrated, cost-effective system for gathering data on the number, characteristics, and distribution of MSFWs and their dependents;

(2) Authorize the Council to designate an appropriate agency to have responsibility for collecting the data, with the cooperation of federal agencies with MSFW service programs;

(3) Direct appropriate federal agencies with expertise in gathering these kinds of data, such as the Bureau of the Census, the Bureau of Labor Statistics,

the National Center for Education Statistics, or the National Agricultural Statistics Service, to cooperate with the Council's effort; and

(4) Provide opportunities for submission of data and information from the public.

B. This data system should ensure that the information gathered on MSFWs and their dependents sufficiently describes workers employed in a broad spectrum of U.S. agriculture and related industry. This means that the data should include and distinguish among workers employed, for example, in crop and livestock production, the packing and processing of farm products, and fisheries. Data should be collected on workers and their dependents, including such factors as recency and frequency of migration, farm and nonfarm earnings and periods of employment, and health, education, and housing characteristics. These comprehensive data should be collected in a form designed to be useful to service programs with differing definitions of eligible workers and their dependents.

C. This data system should be designed to help the Council identify general trends—including changes in the total number of MSFWs and their dependents and employment patterns—and opportunities for coordination among MSFW programs. To help achieve this goal, the Council should consider whether there are areas in which a consensus on a set of common characteristics of MSFWs should be developed for statistical purposes.

§ 305.92–5 Streamlining attorney's fee litigation under the Equal Access to Justice Act (Recommendation No. 92–5).

Congress first waived the government's immunity from attorney's fee awards in the Equal Access to Justice Act (EAJA), 5 U.S.C. 504, 28 U.S.C. 2412(d), in 1980 and reenacted the Act in 1985. The EAJA authorizes certain private parties that prevail in nontort civil litigation against the United States in both courts and agencies to recover their fees and expenses. No recovery is allowed, however, if the government demonstrates that its position was substantially justified, which has been construed to require the government to show that its position had a reasonable basis in both law and fact. The Act precludes fee awards to parties that exceed a specified net worth or, in the case of businesses and organizations, number of employees. It also sets a maximum hourly rate for attorney's fees of $75 per hour. The rate can be raised if the court "determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee"; in agency proceedings, the agency must make such a determination through rulemaking. With cost-of-living increases, attorneys can, at present, hope to recover a little over $100 per hour under the EAJA for most court litigation, though they remain limited to $75 per hour for most litigation before agencies.

Congress sought to accomplish two interconnected goals in the Act: To provide an incentive for private parties to contest government overreaching and to deter government wrongdoing. Congress feared that parties with limited resources would not be able to defend vigorously against government enforcement actions or to challenge opprobrious regulation. One-way fee shifting under the Act was intended to help rectify the imbalance in resources. Because fee awards must be paid out of the offending agency's budget, Congress hoped that EAJA litigation would also spur agencies to act more prudently, particularly when determining the rights of parties of modest means.

Congress originally estimated that the EAJA would cost the government $100 million a year; in recent years, approximately 2,000 EAJA applications have been resolved each year, of which the vast majority involve social security disability or similar individual benefits disputes. The total payout of fees in these cases has been only $5 to $7 million per year.

Reducing Litigation and Encouraging Settlement

Although the EAJA may not have been used as often as predicted, it has nevertheless generated a significant amount of contentious litigation. Relatively few EAJA applications appear to be settled, and the empirical evidence available indicates that fee litigation often results in more complicated proceedings than are merited. Ambiguous provisions in the Act—such as the substantial justification standard and the provision permitting enhancements to the fee cap—foster additional litigation and minimize the potential for settlement of fee disputes. The Administrative Conference believes that amendments to the EAJA would produce significant savings in litigation costs.

To reduce litigation over the proper amount of fees awardable under the EAJA, the Conference recommends several technical modifications to the Act. First, Congress should strike the provision allowing enhancement of fees when " a special factor, such as the limited ava ability of qualified attorneys for the proceedings involved, justifies a higher fee." The enhancement provision breeds uncertainty, costs money to litigate, and makes settlement more difficult to obtain. Second, Congress should amend 28 U.S.C. 2412(d)(2) to specify how courts should calculate cost-of-living increases. Little is gained by litigating over issues such as which price index or subcategory of an index to use in these calculations. Third, Congress should make clear that fees are to be calculated at the adjusted rate applicable on the date the judge or adjudicator issues an order granting the EAJA application. Currently, courts are split as to when the cost-of-living increase in applicable—for instance, whether it should be calculated as of the date the work is performed, or as of some later date. Choosing the date when the application is granted creates a bright-line rule that should simplify the calculation and compensate a private party to a limited extent for the delay in payment, *e.g.*, payment in 1992 for work performed in 1988. Fourth, because the Conference recommends eliminating the enhancement provision and including an offer-of judgment provision (described below), both of which should tend to reduce the fees payable by the government, it also recommends raising the fee cap to approximate more closely the prevailing market rate for attorneys, to ensure that the level of compensation under the Act remains adequate to serve its purposes.

In addition to these relatively technical modifications to the Act, the Administrative Conference recommends that Congress enact an offer-of-judgment provision to help encourage settlements of fee disputes arising under the EAJA. Upon receiving a private party's fee application, the government could make an offer of judgment as to the fee award. If the private party rejects that offer and ultimately recovers no more than the offer, it could not recover any fees or expenses incurred for services rendered after the offer was rejected. The offer-of-judgment device should encourage settlement, thereby saving both parties the expense of litigating fee disputes; while the government party gains leverage by extending an offer of judgment, the private party benefits from the opportunity to obtain prompt payment of fees.

This offer of judgment recommendation and the four technical recommendations that precede it involve careful balancing of factors that may either increase or reduce the incentives for attorneys to accept EAJA

cases. The Conference presents them as a single package, rather then separate proposals, and empbasizes the interrelationship among the recommendations.

The Conference also recommends that Congress act to resolve problems involving implementation of the EAJA's requirement that parties seeking fees file applications within 30 days after final judgment (or final disposition in agency proceedings). Thirty days does not always provide adequate time for prevailing parties to prepare the necessary materials, and the jurisdictional nature of the requirement forecloses the option of a time extension. Extending the filing ueadline to 60 days would reduce the preasure on fee applicants without undue prejudice to the government. More importantly, the Supreme Court's recent decision in *Melkonyan* . v. *Sullivan*, 111 S. Ct. 2157 (1991), and *Sullivan* v. *Finkelstein*, 110 S. Ct. 2658 (1990), have spawned significant litigation about the timeliness of EAJA applications when the federal courts remand cases to agencies. Currently, some district court remands to agencies are considered final judgments, thus triggering the 30-day filing limit in the EAJA, even though claimants do not ye; know whether they have "prevailed" in the underlying action. The uncertainty created by these cases could be avoided by making clear in the statute that the filing deadline is not triggered in a proceeding on remand until the party has prevailed in the remanded proceeding. Alternatively, Congress could resolve these problems by deleting the 30-day requirement. Most other attorney's fee statutes do not include any such deadline, and attorneys waiting to be paid for their services will have no incentive to delay filing.

Congress should also encourage private parties litigating against the United States to inform the court or administrative adjudicator before judgment if they intend to apply for EAJA fees should they prevail. This would permit such decision makers, in appropriate cases, to make a determination as to the substantial justification of the government's position at the same time they resolve the merits. That simultaneous finding may obviate the need for more extensive briefs at a later time.

Streamlining Fee Disputes in Individual Benefit Cases

Individual benefit claims brought directly under 42 U.S.C. 405(g) or under a provision cross-referencing 42 U.S.C. 405(g), which include social security disability, SSI, Medicare and similar claims, raise some unique issues deserving special consideration. Currently, the substantial justification issue is litigated in a high percentage of all EAJA disputes arising out of such benefit cases; from July 1989 to June 1990, the government prevailed in less than 15% of these disputes. The average EAJA award in such cases is less than $3,500. In light of these facts, the Conference concludes that the substantial justification standard should be eliminated for benefit cases involving individual claimants (but not for class actions). Although automatic fee shifting in these cases would increase the government's exposure to EAJA awards, that increase would be counterbalanced to some extent by the elimination of considerable government expense in litigating the substantial justification issue.

More importantly, elimination of the substantial justification standard should enable benefit claimants to find representation. Currently, parties seeking to press small disability claims and most SSI claims may have difficulty retaining counsel either through hourly rates or through a contingency fee arrangement; eliminating the substantial justification standard should help ensure the availability of counsel in these cases by making certain that a reasonable fee will be available for any successful claim. In addition, in cases—primarily disability cases—in which claimants can obtain counsel through contingency fee arrangements (restricted, in social security cases, to a reasonable fee not to exceed 25% of back benefits, 42 U.S.C. 406(b)), their counsel currently have little incentive to apply for fees under the EAJA. If counsel have a contingency fee arrangement and obtain an EAJA fee award, they must return the lesser award to the claimant. Public Law 96–481, Section 206, as amended by Public Law 99–80, Section 3, 99 Stat. 186 (August 5, 1985). Not surprisingly, many successful benefits claimants do not apply for EAJA fees (fewer than 40 percent did so from July 1989 to June 1990), even though private parties' success rate in EAJA litigation exceeds 80 percent.

Extending the EAJA's Coverage

Finally, the Conference recommends that Congress consider extending the Act's coverage, on a category-by-category basis, to particular agency and court proceedings that have the same characteristics as those adversary proceedings now covered by the Act. The Act covers only "adversarial adjudications" in agencies, which are defined as "adjodications under section 554 of [utle 5]." The Supreme Court in *Ardestani* v. *INS*, 112 S. Ct. 515 (1991), construed that provision to exclude agency proceedings—such as deportation cases—which have virtually the identical attributes as proceedings under section 554 but are not technically covered by that provision. Similarly, it is unclear whether EAJA covers all litigation against the United States in Article I courts, even though such proceedings are often directly analogous to those covered by the Act in Article III courts. Congress has dealt explicitly with some of these courts; for example, the EAJA was amended in 1985 to include the United States Claims Court, and a separate statute, with somewhat different standards than the EAJA, provides for fee awards in Tax Court proceedings. 26 U.S.C. 7431. But other Article I bodies remain to be considered. The Court of Veterans Appeals, for example, recently decided that it does not have authority to award attorney's fees under the Act. *Jones* v. *Derwinski*, No. 90–58 (March 13, 1992).

Recommendation

1. Congress should amend the Equal Access to Justice Act, 5 U.S.C. 504, 28 U.S.C. 2412(d), as follows:

a. To reduce litigation over the dollar value of fee awards, (1) the provision in the Act allowing enhancement of fees when "a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee" should be stricken, (2) the Act should specify the precise method to be used in calculating future cost-of-living adjustments to the fee cap, (3) the Act should state that the rate to be used is the one that is applicable when the judge's (or administrative adjudicator's) order awarding EAJA fees is issued, and (4) the $75 per hour fee cap should be raised to approximate more closely the prevailing market rate for attorneys.

b. To encourage settlements, the Act should include an offer-of-judgment procedure: after an EAJA application is filed, the government may make an offer of judgment on the EAJA claim; if the private party rejects the government's offer and is ultimately awarded no more than that offer, that party forfeits the right to seek fees or expenses for the EAJA litigation from the time the offer of judgment is rejected.

c. To eliminate litigation on the question of when prevailing parties must file for fees, either the 30-day filing deadline in 5 U.S.C. 504 and 28 U.S.C. 2412(d) should be extended to 60 days, to run from the date of final disposition of the case,[1] or the filing deadline should be eliminated

[1] "Final disposition" occurs when a party has prevailed in a proceeding and the disposition of the proceeding is final and unappealable; in proceedings involving a remand from a court to an agency, final disposition does not occur until the remanded proceeding is concluded and the resulting order is final and unappealable

d. To promote judicial economy, the Act should encourage private parties litigating against the United States to notify the court or administrative adjudicator prior to judgment if they intend to file an EAJA application should they prevail, so as to enable the decisionmaker, in appropriate cases, to determine whether the government's position was substantially justified within the meaning of the Act of the same time that judgment is entered against the United States.

2. Congress should modify the provisions of 28 U.S.C. 2412(d) as they apply to individual benefit claims either brought directly under 42 U.S.C. 405(g) or under a provision cross-referencing 42 U.S.C. 405(g) in the federal courts. For those cases, the Act should provide for fee awards to prevailing claimants in individual actions without reference to whether the position of the United States was substantially justified.

3. Congress should consider whether to extend the Act's coverage, on a category-by-category basis, to:

a. Agency proceedings that, although not technically adjudications "under section 554 [of Title 5]," are required by statute to employ procedures equivalent to those of such formal adversary proceedings.

b. Proceedings before Article I courts that have the same attributes as covered proceedings in Article III courts and in agencies.

§ 305.92-6 Implementation of the Noise Control Act (Recommendation No. 92-6).

In 1981, Congress agreed to the Administration's proposal to cease funding for the Office of Noise Abatement and Control (ONAC) in the Environmental Protection Agency (EPA). Congress, however, did not repeal the Noise Control Act [3] when it eliminated ONAC's funding.

Before the elimination of ONAC, EPA engaged in a wide variety of activities to abate noise pollution under authority of the Noise Control Act and, after 1978, the Quiet Communities Act.[4] These included identifying sources of noise for regulation, promulgating noise emission standards, coordinating federal noise research and noise abatement, working with industry and international, state and local regulators to develop consensus standards, disseminating information and educational materials, and sponsoring research concerning the effects of noise and the methods by which it can be abated. The Quiet Communities Act authorized EPA to provide grants to state and local governments for noise abatement.

EPA ceased virtually all noise abatement activities after ONAC's funding was eliminated. However, the federal noise emission and labeling standards it had promulgated have remained in effect, thereby preempting state and local governments from adopting different standards. Thus, the standards remain frozen, as neither the EPA nor the state or local agencies have been in a position to amend or update possibly outmoded standards despite the technological developments of the last decade. Moreover, some private rights to bring tort or other actions may be affected by these EPA emission and labeling standards.

The Conference recognizes that the decision to end funding was substantive rather than procedural, but, in part, the impact has been procedural.[5] No procedure has been available for a decade to reexamine the existing preemptive standards to take into account developments in science and technology that may bear on implementation of the legislative intent. Elimination of funding for the agency's noise control program has had the additional procedural effect of leaving several proposed but unissued standards pending for a decade without final action by EPA.

EPA retains the statutory responsibility for enforcing the Noise Control Act, and has used minimal resources for engaging in limited enforcement and other related activities.[6] Pursuant to this authority, EPA has asked the Conference to assist it in reevaluating the current status of the Noise Control Act by recommending options that relate to procedural considerations. The Conference takes no position concerning what actions, if any, EPA should take regarding enforcement and implement of the Noise Control Act. If EPA wishes to assess the current situation, however, the Conference has identified considerations that should be part of such reassessment.

The Conference is unaware of any other instance where Congress has eliminated the funding for an ongoing program that preempts state and local actions without also ending the statutory authorization for that program or addressing the preemptive effect of existing regulations. If this situation does exist in other contexts, there may be procedural problems similar to those associated with the Noise Control Act.

Recommendation

1. In considering its authority and responsibility under the Noise Control Act, the Environmental Protection Agency (EPA) should analyze the preemptive impact of its existing and pending noise standards for the purpose of eliminating, where possible, any unintended impacts. EPA should then advise the appropriate congressional committees respecting the preemptive effects of EPA's possibly outmoded regulations under the Noise Control Act,[7] or any other implications of the cessation of funding respecting the agency's responsibilities under the Act.

2. In making the determinations called for under this recommendation, EPA should take into account, among other considerations:

(a) The scientific and technological developments that have occurred since 1981;

(b) Whether there is a need to update EPA's past methodology for measuring and assessing the effects of noise;

(c) The appropriate allocation of responsibility among federal agencies, and between the federal government and the states and localities, in accomplishing any goals determined by Congress respecting regulation of noise, educating the public on the dangers posed by noise, and sponsoring research into noise effects and abatement techniques;

(d) Whether there is a need for additional coordination of the noise abatement activities of federal agencies and the states and localities;

(e) The adequacy of current coordination between the United States and foreign government agencies concerning noise abatement standards and regulations impacting U.S. international trade;[8]

(f) Any appropriate federal government participation in the activities of private-sector standard-setting organizations concerning noise;[9] and

[3] 42 U.S.C. 4901-4918 (1988).

[4] 42 U.S.C. 4913 (1988).

[5] Although Congress eliminated funding for the Noise Control Act after ONAC had adopted some preemptive regulations and proposed others, it did not repeal the Noise Control Act. This situation is different from the more common circumstance where Congress passes legislation but does not fund its implementation.

[6] Since 1981, EPA has engaged only in very limited enforcement of existing noise regulations, disseminating information created during ONAC's existence, and commenting on environmental impact statements issued by the Federal Aviation Administration concerning airport noise. The FAA has independent authority to abate airport noise under the Noise Control Act and the Aviation Noise and Capacity Act, Public Law No. 101-508, sections 9301-09 (1990). Responsibility for the enforcement of EPA's railroad and motor carrier emission standards is located in the Department of Transportation, which has funding for this purpose. The Department, however, does not have authority to promulgate new or amended emission standards different from those adopted by EPA.

[7] See Conference Recommendation 84-5, "Preemption of State Regulation by Federal Agencies," 1 CFR 305.84-5.

[8] See Conference Recommendation 91-1, "Federal Agency Cooperation with Foreign Government Regulators," 1 CFR 305.91-1

[9] See Conference Recommendation 78-4, "Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulations," 1 CFR 305.78-4.

(g) The relative advantages and disadvantages of utilizing public education, market incentives, emission standards, or other approaches for any abatement of noise that Congress may wish to pursue.

3. After reviewing whatever advice may be received from EPA under this recommendation, the appropriate congressional committees should review the issues raised by the foregoing recommendations, including whether the continuation of substantive regulatory requirements without funding, or EPA's inability to reexamine, modify, or rescind those requirements, creates undue procedural burdens upon industry, the states, and the public. Congress should then either repeal the Noise Control Act or fund whatever responsibilities under the Act Congress delegates to EPA.

Dated: June 30, 1992

Jeffrey S. Lubbers,

Research Director.

[FR Doc. 92-15678 Filed 7-7-92; 8:45 am]

BILLING CODE 6110-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 92-CE-02-AD; Amendment 39-8307; AD 92-15-13]

Airworthiness Directives; Beech 99 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes Airworthiness Directive (AD) 90-04-04, which currently requires inspection of the wing front spar lower cap and associated structure for fatigue cracking on certain Beech 99 series airplanes, and replacement if found cracked. AD 90-04-04 also establishes a service life limit on the wing front spar lower caps that have reinforcing straps installed. This action maintains the requirements of AD 90-04-04, but corrects the compliance times and other incorrect information contained in that AD. The actions specified by this AD are intended to prevent fatigue failure of the wing front spar lower cap and associated structure.

DATES: Effective August 24, 1992.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 24, 1992.

ADDRESSES: Service information that is applicable to this AD may be obtained from the Beech Aircraft Corporation, Commercial Service, Department 52, P.O. Box 85, Wichita, Kansas 67201-0085; Telephone (316) 676-7111; or Western Aircraft Maintenance, 4444 Aeronca Street, Boise, Idaho 83705. This information may also be examined at the Federal Aviation Administration (FAA), Central Region, Office of the Assistant Chief Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106; or at the Office of the Federal Register, 1100 L Street NW., room 8401, Washington DC.

FOR FURTHER INFORMATION CONTACT: Mr. Don Campbell, Aerospace Engineer, Airframe Branch, Wichita Aircraft Certification Office, 1801 Airport Road, room 100, Mid-Continent Airport, Wichita, Kansas 67209; Telephone (316) 946-4128.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to include an AD that is applicable to certain Beech 99 series airplanes was published in the Federal Register on March 4, 1992 (57 FR 7562). The action proposed superseding AD 92-04-04, Amendment 39-6487 (55 FR 3581, February 2, 1990), with a new AD that would (1) retain the inspection and possible replacement requirements of the wing front spar lower cap and associated structure that is required by AD 90-04-04; (2) correct certain compliance times referenced in AD 90-04-04 and delete information included in this AD that is not pertinent; and (3) maintain the inspection intervals established by either superseded AD 77-05-01 R3 or AD 90-04-04, which will be superseded by this action.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received on the proposed rule or the FAA's determination of the cost to the public. After careful review, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial corrections. The FAA has determined that these minor corrections will not change the meaning of the AD nor add any additional burden upon the public than was already proposed.

The FAA estimates that 85 airplanes in the U.S. registry will be affected by this AD, that it will take approximately 4 workhours per airplane to accomplish the required action, and that the average labor rate is approximately $55 an hour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $37,400. Since AD 90-04-04, which would be superseded by this action, required the same actions (except for a change in repetitive compliance times, the deletion of impertinent information, and the incorporation of established inspection intervals), there is no additional cost impact of this AD on U.S. operators. The $10,200 cost difference between this AD (estimated $37,400) and AD 90-04-04 (estimated $27,200) is a result of inflationary costs used in determining the cost of labor ($55 per hour as opposed to $40 per hour).

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption "**ADDRESSES**".

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by removing AD 90-04-04, Amendment 39-6487 (55 FR 3581, February 2, 1990), and adding the following new AD:

Administrative Conference of the United States

Fiscal Year 1994
Budget Submission

TAB D

Recommendations of the December 1991 Plenary Session

Rules and Regulations

Federal Register
Vol. 56, No. 250
Monday, December 30, 1991

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.
The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

1 CFR Parts 305

Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure

AGENCY: Administrative Conference of the United States.

ACTION: Recommendations.

SUMMARY: The Administrative Conference of the United States adopted four recommendations at its Forty-Fourth Plenary Session addressing: (1) Implementation of the Farmers Home Administration mediation program; (2) adjudication of civil penalties under the Federal Aviation Act; (3) specialized review of administrative action; and (4) administrative procedures used in antidumping and countervailing duty cases.

The Administrative Conference of the United States is a federal agency established to study the efficiency, adequacy, and fairness of the administrative procedures used by federal agencies in carrying out administrative programs, and to make recommendations for improvements.

Recommendations of the Administrative Conference are published in full text in the Federal Register upon adoption. Complete lists of recommendations, together with the texts of those deemed to be of continuing interest, are published in the Code of Federal Regulations (1 CFR part 305).

DATES: These recommendations were adopted December 12–13, 1991, and issued December 24, 1991.

FOR FURTHER INFORMATION CONTACT: Carl Votava, Information Officer, or Jeffrey S. Lubbers, Research Director (202–254–7020).

SUPPLEMENTARY INFORMATION: The Administrative Conference of the United States was established by the Administrative Conference Act, 5 U.S.C. 571–576. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by federal agencies in carrying out administrative programs, and makes recommendations for improvements to the agencies, collectively or individually, and to the President, Congress, and the Judicial Conference of the United States (5 U.S.C. 574(1)).

At its Forty-Fourth Plenary Session, held December 12–13, 1991, the Assembly of the Administrative Conference of the United States adopted four recommendations.

Recommendation 91–7, Implementation of Farmer-Lender Mediation by the Farmers Home Administration, suggests steps for improving the Farmers Home Administration's implementation of farmer-lender mediation programs under the Agricultural Credit Act. The recommendation calls on FmHA to amend its regulations to give its representatives greater flexibility in engaging in debt restructuring through mediation. It also calls for training of FmHA personnel and other steps to enable them to take full advantage of mediation, and it encourages other federal agencies involved in debt restructuring to be mindful of overall advantages of participation in mediation processes.

Recommendation 91–8, Adjudication of Civil Penalties Under the Federal Aviation Act, proposes to Congress that certain changes be made in adjudication of the administrative civil penalty program for violations of aviation safety. The Conference recommends that the program be made permanent, but that adjudication responsibility for cases involving pilots and flight engineers be transferred from the Federal Aviation Administration to the National Transportation Safety Board, if the relevant agencies and other interests cannot come to a mutually acceptable agreement.

Recommendation 91–9, Specialized Review of Administrative Action, identifies guidelines for Congress to consider in determining whether and how to create specialized courts for review of administrative action. The recommendation opposes creation of a single specialized court for review of all administrative cases and further advises that specialized courts are appropriate for particular administrative programs only if they involve a large volume of cases, the predominance of case-specific factual issues or technical issues requiring special expertise, and a need for uniformity in agency program administration. If Congress should create such a specialized court, the recommendation proposes structural approaches to increase the court's effectiveness and minimize duplication of review functions.

Recommendation 91–10, Administrative Procedures Used in Antidumping and Countervailing Duty Cases, suggests measures that can be taken to reduce the time and expense associated with these proceedings. The Department of Commerce's International Trade Administration and the International Trade Commission are urged to develop factfinding procedures that improve development of the administrative record. Specific reforms are suggested to improve the efficiency of case processing at the ITA and to encourage more collegial decisionmaking by the ITC. The Conference also recommends that Congress authorize and fund a study of possible changes in the agency structure and judicial review procedures for antidumping and countervailing duty cases.

The full texts of the recommendations are set out below. The recommendations will be transmitted to the affected agencies and, if so directed, to the Congress of the United States. The Administrative Conference has advisory powers only, and the decision on whether to implement the recommendations must be made by each body to which the various recommendations are directed.

The transcript of the Plenary Session will be available for public inspection at the Conference's offices at suite 500, 2120 L Street NW., Washington, DC.

List of Subjects in 1 CFR Part 305

Administrative practice and procedure, farmer-lender mediation, federal aviation civil penalties, specialized courts, and international trade procedures.

1 CFR part 305 is amended as follows:

PART 305—RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

1. The authority citation for part 305 continues to read as follows:

Authority: 5 U.S.C. 571–576.

2. New §§ 305.91–7 through 305.91–10 are added to part 305, to read as follows:

§ 305.91–7 Implementation of Farmer-Lender Mediation by the Farmers Home Administration (Recommendation No. 91–7).

The Farmers Home Administration ("FmHA") is charged with serving as a temporary source of supervised credit and technical support to help rural Americans improve their farming enterprises, housing conditions, and other business endeavors until they are able to qualify for private sector resources. During the 1980s, an economic downtown seriously affected the agricultural sector and led FmHA, as a lender of last resort, to increase its loan portfolio. As the decline continued, FmHA and other lenders began more frequently to exercise their rights to accelerate loans and foreclose. Several midwestern states' legislatures responded to these economic (and resultant social) conditions by creating mediation programs, some of which required financial institutions to mediate prior to foreclosure if the borrower opted to do so. FmHA generally declined to participate in these programs or to restructure loans in connection with mediations.

In 1988, Congress passed the Agricultural Credit Act, a broad attempt to deal with problems related to farm debt. Among other things, the Act sought to encourage lenders to restructure loans when doing so would be in the government's interest and would help keep the farmer on the farm. The Act also provided for matching funds from FmHA for state mediation programs that were certified to meet prescribed standards. It further required FmHA to participate in such state mediation programs, and to make "a reasonable effort" to contact creditors and encourage them to take part in a restructuring plan. In carrying out this last requirement, FmHA has provided that delinquent borrowers in all states will routinely be offered a chance to participate in a voluntary meeting of creditors, chaired either by a mediator or a "designated FmHA representative," and has contracted for mediation services in many states that lacked mediation programs.

FmHA has found this venture into mediation to be cost effective. FmHA's approach to mediation pursuant to the Act has been quite diverse, however. This is due in significant part to differences among the certified state programs, but also to the diversity of approaches among the mediation providers in non-certified states, variations in local conditions, dissimilarities in the attitudes of FmHA state directors towards mediation, and varying enthusiasm of other creditors, including some federal agencies. Given the size and diversity of the farm credit program and the speed with which the Act was implemented, this is hardly surprising. On the whole, the Act's mediation provisions appear to have begun to restore frayed communications between numerous farmers and lenders, assisted many farm families to avoid crises, and avoided foreclosure in a large number of cases. Still, administering these statutory provisions has not been free of problems.

In many cases, mediation has occurred too late to produce successful outcomes. The FmHA, at present, is unable to report accurately on the numbers of mediations conducted in either the certified or noncertified states. As stated above, FmHA has sometimes had difficulty in securing satisfactory participation of non-FmHA creditors, including many that are part of the Farm Credit System, and, in some areas, agencies such as the Federal Deposit Insurance Corporation, Internal Revenue Service, Resolution Trust Corporation, and Small Business Administration. Observers have raised concerns that borrowers in FmHA's loan guarantee programs—in which it guarantees loans made by banks—may not receive timely notice of mediation's availability.

Finally, the mediators used have taken strikingly divergent views of their responsibilities and authority. These might be categorized conveniently as "broad" and "narrow." In some areas—particularly states with certified mediation programs—many mediators have taken a "broad" approach and sought to uncover the parties' real interests and develop responsive options. Thus, they have tried to lower barriers to communication and to address issues, such as off-farm employment and intra-family or interpersonal questions, important to the resolution of difficulties between the farmer and lenders. In other regions, especially some states where FmHA has contracted for mediation services, neutrals have typically taken a "narrow" approach; this emphasizes much shorter, more formulaic proceedings that focus almost exclusively on whether non-FmHA creditors will adjust their debts sufficiently to permit FmHA loan restructuring under its Debt and Loan Restructuring System computer program (DALRS). Resort to the latter approach to mediation may have been reinforced in some places by contracting procedures that emphasized low bids and by some FmHA state directors' narrow view of their mandates for restructuring under the Act. Each of these approaches has potential advantages and disadvantages and FmHA's openness to both is understandable, especially given that FmHA's resort to mediation in all but the certified states has been wholly voluntary. However, broader approaches are more likely to improve communication and assist the parties to develop diverse solutions that will meet their needs.

While FmHA's implementation of the Agricultural Credit Act's farmer-lender mediation provisions has been energetic and generally effective, the Conference recommends several steps to enhance the likelihood that mediation will be used, and used successfully, in future disputes.

Recommendation

1. FmHA should take steps to remedy problems associated with the inconsistencies between the broad and narrow approaches to mediation evidenced in farmer-lender mediation by fostering a better understanding of the potential of the broad model of mediation in both certified state mediation programs and FmHA contract mediation programs. To achieve that goal, the FmHA should:

(a) Modify FmHA rules for processing delinquent loans to the extent necessary to give FmHA representatives at farmer-lender mediations greater discretion with respect to loan restructuring and providing new loans. FmHA should advise its personnel, mediators, and others involved in farmer-lender mediation that the Debt and Loan Restructuring System (DALRS) computer program should not significantly limit the purposes of mediation. FmHA also should encourage its county offices to initiate mediation proceedings at an appropriately early stage in the processing of delinquent loans.

(b) Provide additional training, including videotapes, to FmHA and other personnel who will be connected with farmer-lender mediation processes. Training should include approaches to mediation and emphasize problem-solving negotiation skills.

2. FmHA should enhance its ability to manage and improve the farmer-lender mediation program by:

(a) Ensuring that certified state mediation programs make timely, uniform submissions concerning numbers and results of mediations.

(b) Improving the system by which FmHA collects information on mediations conducted through FmHA state offices in noncertified states.

(c) Supporting research dealing with the conduct and short- and long-term outcomes of farmer-lender mediations. This research should examine ecoomic outcomes, the extent to which mediators follow different mediation approaches in practice, and the extent to which varying approaches, as practiced, result in different kinds of outcomes, levels of participation, or levels of satisfaction among the various participants.

3. FmHA should take appropriate measures to notify parties to guaranteed (as opposed to direct) loans of the availability of farmer-lender mediation, without however revealing the borrowers' identities without their consent.

4. FmHA and the Department of Agriculture should:

(a) Continue to encourage additional states to develop farmer-lender mediation programs that can qualify to receive matching funds.

(b) Encourage full participation in farmer-lender mediation by institutions of the Farm Credit System and all appropriate agencies of the Department.

(c) Take steps to encourage the continuing development of a diverse, capable cadre of available mediators, including the use of volunteers.

5. All federal agencies that may be involved in farm credit disputes, such as the Federal Deposit Insurance Corporation, the Internal Revenue Service, the Resolution Trust Corporation, and the Small Business Administration, should consider the overall advantages of broad participation in farmer-lender mediation.

§ 305.91–8 Adjudication of Civil Penalties Under the Federal Aviation Act (Recommendation No. 91–8).

The Federal Aviation Administration is currently operating a demonstration civil penalty program under which the FAA may impose monetary penalties of up to $50,000 for violations of the Federal Aviation Act or its regulations. Under the program, the FAA prosecutes violations, proposing initial civil money penalties according to the discretion of the prosecuting FAA official. The persons on whom the penalties would be imposed, usually pilots, air carriers, mechanics, or airport operators, are entitled to an administrative hearing before an administrative law judge at the Department of Transportation, followed by the right to an administrative appeal to the administrator of the FAA. Judicial review is available in the federal courts of appeals.

Before the demonstration civil penalty program was enacted in 1987, the FAA could propose civil money penalties, but such penalties could be imposed only through a civil action brought in a United States District Court through Justice Department attorneys.

The Federal Aviation Act also provides that violations of the Act or the regulations may result in suspensions or revocations of certificates of pilots, mechanics or air carriers. These cases follow a different administrative path. While "certificate actions" begin with a prosecutorial decision made by an FAA official, exercising the right to a hearing takes the case to the National Transportation Safety Board, an independent agency. If a hearing is requested, an NTSB ALJ holds the hearing, with a right to appeal to the Board. Judicial review is available in the federal courts of appeals.

In 1990, the Administrative Conference of the United States, in Recommendation 90–1, "Civil Money Penalties for Federal Aviation Violations," recommended that the FAA administrative civil money penalty program be made permanent, that the $50,000 ceiling on administratively-imposed penalties be eliminated, and that the responsibility for adjudication be studied further. In response to the Conference's Recommendation 90–1, Congress extended the program for an additional two years. In that legislation, Public Law 101–370, Congress expressly asked the Conference to study and make a recommendation on the issue of "whether the authority to adjudicate administrative complaints under the Federal Aviation Act of 1958 should remain with the Department of Transportation, should be transferred to the NTSB, or should be otherwise modified."

Discussion

Preliminarily, the Conference reiterates its previous recommendation that the civil money penalty program be made permanent and that the $50,000 ceiling on administratively-imposed penalties be removed.

The issues relating to how civil penalties should be adjudicated in the context of this program are controversial. There is no objectively correct resolution; nor do administrative law principles clearly lead to any single solution. Among the various (and not easily resolvable) concerns that arise in this context are:

—The regulated community has concerns about the fairness of FAA's administration of the civil money penalty program, resulting from the fact that appeals of civil penalty cases are heard by the FAA Administrator. The consultant's study, however, found no evidence of actual unfairness or mishandling of cases resulting from commingling prosecutorial and judging functions under the present system.

—The FAA is distinctive in its exercise of operational responsibility for the air traffic control system, which makes it a co-actor with persons or entities subject to its regulatory jurisdiction. The consultant's report noted a continuing perception that there is a conflict of interest between FAA as final adjudicator and its role as overseer of the air traffic control system.

—There is concern that cases based on similar facts being heard in two different agencies could have the potential for inconsistent standards and lead to forum shopping between the FAA civil money penalty program and the NTSB certificate revocation remedy.

—The FAA Administrator, as the Secretary of Transportation's delegate, is the chief policy maker in the area of air safety, and is charged with the responsibility for the safety of the national aviation system. The Administrator therefore has a legitimate interest in having some control over a related enforcement program.

—The NTSB, in its role of recommending air safety improvements, benefits from its review of enforcement cases, as an opportunity to learn about potential safety problems in a context other than an accident investigation.

The best resolution of the controversies associated with civil penalty adjudication authority would be a consensual one, satisfying the legitimate concerns of the FAA and the reasonable needs of all of the affected interests.[1] The Conference encourages

[1] The Conference held a public hearing on Wednesday, June 19, 1991, to provide interested parties with the opportunity to present their views on these issues. 56 Fed. Reg. 22293 (May 10, 1991) (notice of Conference Committee on Adjudication public hearing). After the Conference consultant released his draft report, he convened an informal meeting with affected parties to explore the feasibility of a solution to the controversy that accommodates the reasonable needs of all of the affected interests. Participants in that meeting agreed that informal consultation was desirable and the consultant met further with representatives of the affected interests to discuss alternatives. While no overall resolution was agreed to, the willingness to seek common ground was enhanced.

the FAA Administrator and the NTSB Chairman to convene and jointly host a conference with representatives of affected public and private interests to consider negotiating solutions for allocating adjudicatory authority over the civil money penalty and certificate revocation and suspension programs. The Administrative Conference is available to assist as appropriate. If such a mutually agreeable resolution is developed in the future, the Conference's Committee on Adjudication is available to provide comments to Congress on the proposed solution.

Because the success of an aviation safety program ultimately rests on voluntary compliance, improving the relationships among the regulated communities, public representatives and the government agencies is crucial. Representatives of the FAA and NTSB indicate that the relationship between the two agencies is a cooperative one. To further this cooperative spirit, the Conference recommends that, in addition to meeting to discuss the specific issues of allocating adjudicatory authority for the civil money penalty and certificate programs, the FAA and NTSB should encourage long-term proposals for ways to enhance compliance and enforcement of the Act, through discussions and communication with the regulated community and the traveling public.

In the absence of a consensual resolution on the issue of where adjudicatory authority for FAA enforcement cases should reside, the Conference recommends that adjudicatory authority over a small percentage of selected civil money penalty cases (those involving pilots and flight engineers) be transferred to the NTSB. This recommended solution would address several problems. It would locate both civil money penalty and certificate authority for these cases in one forum, eliminating the potential for forum snopping as to pilots and flight engineers. It would eliminate perceived conflicts of interest as to those classes of cases in which conflict is most likely between FAA employees with operational responsibility for air traffic control and persons subject to civil penalty authority (i.e., pilots and flight engineers). While the unitary enforcement (rather than the split enforcement) model is used in almost all administrative civil money penalty programs, the FAA's distinctive role in administering the air traffic control system is a sufficiently special characteristic to provide plausible justification for recommending this limited expansion of the existing split-enforcement model in this context.

This recommendation to use a split-enforcement model in this particular situation is not to be read as a general endorsement of this model for other government programs. Rather, it reflects the specific circumstances involved here, including the fact that the split-enforcement model is already in use in certificate cases, and that the FAA has a significant operational role in air traffic control that may result in potential conflicts of interest in cases involving pilots or flight engineers.

Removing pilot and flight engineer cases from the FAA also conflicts the least with comprehensive exercise of FAA safety policy authority, given the individual character of most violations involved in these cases. Conversely, retaining civil penalty authority at the FAA for nonpilot and nonengineer cases, which constitute more than 75 percent of the civil money penalty cases, presents less potential for conflict between respondent interests and the FAA's air traffic control responsibility. There is also greater likelihood that the problems exposed by civil penalty actions in air carrier, airport security and hazardous materials cases are more systemic in nature.

For those cases within the Board's authority, the Conference is making additional recommendations. First, because a split-enforcement model involves one agency ruling on the actions of another, the Act should address the issue of the appropriate level of deference that should be given in enforcement cases to the FAA's interpretations of its rules. The Conference recommends that validly adopted FAA interpretations of FAA regulations be deferred to, unless such interpretations are arbitrary, capricious or not in accordance with law. This recommendation is consistent with Recommendation 86–4, "The Split-Enforcement Model for Agency Enforcement." See also *Martin v. Occupational Safety and Health Review Commission*, ___ U.S. ___; 111 S. Ct. 1171 (1991). This does not, however, mean that NTSB should simply defer to litigation positions of the FAA prosecutor. Id. at 1179. In addition, the FAA should be given the authority to appeal to the Board from adverse NTSB decisions at the administrative law judge level and to seek judicial review in the appropriate court of appeals from decisions of the Board. The FAA is still the chief policy making agency in the area of aviation safety, and should have the ability to challenge decisions it believes are inconsistent with those policies.

The merger of sanction authority over pilots and flight engineers in one forum should provide the NTSB with increased flexibility to select the appropriate sanction from the range of available sanctions. However, such flexibility must operate within the bounds of FAA's validly adopted standards and criteria for sanctions. Such criteria may, as with all rules, be adopted through the appropriate rulemaking procedures or through adjudications.[3] In addition, a potential respondent must be on notice of the range of potential sanctions for which he or she potentially would be liable.

The Conference also encourages greater use of a variety of dispute resolution techniques in individual cases. The Administrative Dispute Resolution Act, Public Law No. 101–552, encourages agencies to use such techniques where appropriate. The growing body of alternative dispute resolution literature supports the view that efficiency gains for everyone are available from flexible means of resolving disputes. Such flexibility might be useful in a variety of contexts in civil money penalty and certificate cases. The Conference specifically recommends consideration of the utility of settlement judge procedures.[5]

Recommendation

1. Congress should make permanent the civil money penalty program for violations of the Federal Aviation Act (the Act) and eliminate the $50,000 ceiling on administratively-imposed penalties.[6]

2. The question of where adjudicatory authority over certification and civil money penalty proceedings under the Act should be placed raises complicated policy as well as legal issues. Principles of administrative law provide no single clear answer. The Federal Aviation Administration Administrator and the Chairman of the National Transportation Safety Board jointly should convene a conference with representatives of affected interests to consider possible consensual arrangements for allocating adjudicatory authority over the civil money penalty and certificate suspension and revocation programs.

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[3] See SEC v. Chenery, 332 U.S. 194 (1947). NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

[5] See Conference Recommendations 88–5, "Agency Use of Settlement Judges," 1 CFR § 305.88–5 (1991).

[6] See ACUS Recommendation 90–1, "Civil Money Penalties for Federal Aviation Safety Violations." 1 CFR § 305.90–1 (1991).

The FAA and the NTSB should also encourage long-term proposals for enhancing compliance and enforcement of the Act, and for changing the procedures to achieve the Act's objectives.

3. In the absence of consensus by the affected agencies and interests as to where the Act's certification and civil money penalty proceedings should be adjudicated, Congress should amend the Act consistent with the following recommendations:

A. Authority for adjudicating civil money penalties against pilots and flight engineers should be transferred from the FAA to the NTSB, with all other civil penalty adjudication authority remaining at the FAA. This recommendation is contingent on Congress' transfer of necessary budgetary resources for this purpose to the NTSB.

B. The Act should provide that, for purposes of review of FAA enforcement actions, courts and the NTSB should defer to validly adopted FAA interpretations of its statutes and regulations, unless it is shown that such interpretations are arbitrary, capricious, or otherwise not in accordance with the law.[5]

C. The FAA should be given the right to appeal an NTSB administrative law judge decision to the Board, and to seek judicial review of a decision of the Board in the appropriate court of appeals.

This recommendation is directed only to this specific program and the special circumstances involved, and should not be read as implying any views as to the merits, generally, of the "split enforcement" model as compared to the "unitary agency" model of adjudication in other government programs.

4. In an NTSB adjudication under the Act, the range of possible sanctions for violations of the Act should include certificate revocation, certificate suspension and/or a monetary penalty, as found by the NTSB to be appropriate and consistent with rules validly adopted by the FAA with respect to applicable standards or criteria for the imposition of sanctions. Notice of possible sanctions, as well as those proposed by the FAA in a particular enforcement matter, should be provided to the respondent upon the institution of the proceeding. The selected sanction(s) should be set forth in the ALJ's initial or recommended decision, together with the bases therefor, including a reference to any applicable FAA standard or criterion for the imposition of sanctions.

5. NTSB and FAA adjudicators, as well as FAA prosecutors, should place greater emphasis on alternative dispute resolution in individual cases. In particular, the FAA and NTSB, to the extent each has adjudicatory responsibility, should consider Recommendation 88–5, "Agency Use of Settlement Judges," and make greater use of the techniques described there.

§ 305.91–9 Specialized Review of Administrative Action (Recommendation No. 91–9).

In recent years, there has been much talk of a crisis in the federal courts. In response, Congress empaneled the Federal Courts Study Committee, charging it with responsibility to examine the problems facing the courts and to develop a long-range plan for addressing them. The Committee issued its report in April 1990, touching on many different aspects of the problem, among them those related to judicial review of administrative action.

The Federal Courts Study Committee specifically rejected a proposal to divert all administrative appeals to a specialized court within the Article III judiciary. The Committee recognized that administrative review cases do not form a major percentage of the caseload of the federal courts of appeals. Yet assigning jurisdiction to a specialized court may provide more efficient or effective review for some types of administrative cases. It, therefore, proposed diversion of some cases now in the Article III courts to other adjudicatory bodies; in particular, the Committee recommended creation of an Article I court to review Social Security disability claims and perhaps, eventually, other administrative benefit claims.

Finding the optimal structure for review of administrative cases involves a complex balancing of various factors: the need for uniform law versus the benefits of "percolation" in the decentralized circuits; the value of expert decisionmakers versus the broader perspective of generalists; the efficiency of specialization versus the risk of bias that specialization entails. And the calculation can vary in the context of different administrative programs, which differ in the volume, complexity, and level of technical content of the caseloads they generate. For these reasons, the Conference, like the Federal Courts Study Committee, opposes allocating review of all administrative cases to a single specialized court, whether inside or outside the Article III system.

Should Congress consider the creation of specialized courts for review of particular administrative programs, this recommendation sets forth criteria for Congress to take into account in determining when to create specialized courts and how to structure them to enhance their effectiveness. Certain characteristics held in common by many federal regulatory and benefit programs raise particular problems within the existing system of judicial review. Uniformity in decisionmaking can be especially important in the context of administrative action under national programs. The agencies themselves are structured hierarchically, so as to speak with a single voice in applying law and policy to individual circumstances. But the federal court system that reviews these agency programs is decentralized, and different circuits often reach different outcomes on the same issue. The Supreme Court's capacity to resolve these conflicts is severely limited by the modest number of administrative law cases it considers each year. As a result, agencies often face the choice of refusing to acquiesce in decisions below the Supreme Court level, abandoning policy positions they believe to be correct, or implementing programs differently in different regions (and, consequently, treating similarly situated individuals or entities differently and encouraging forum shopping).

Another special aspect shared by some federal regulatory programs is that they involve complex technical or scientific issues, which may present great challenges to reviewing courts without special expertise in the relevant areas. Cases on review of agency rulemaking and ratemaking actions, in particular, frequently involve lengthy administrative records filled with conflicting material on technical issues of fact and policy; the judges must devote extra time to poring over these records and to producing the longer opinions these cases often engender.

Other federal programs (such as individual benefit programs) produce masses of litigation involving primarily questions of specific fact. Resolution of these issues may be an inefficient allocation of the time of the federal courts.

While review by specialized courts may offer a solution for these problems, specialization brings dangers as well. One premise of the national system of courts of general jurisdiction is that sound decisionmaking results from exposure to a wide range of problems and issues; adjudicative bodies with

[5] See ACUS Recommendation 86–4, "The Split-Enforcement Model for Agency Enforcement," 1 CFR 305.86–4 (1991). See also Martin v. OSHRC, — U.S. —, 111 S. Ct. 1171 (1991). This Recommendation should not be read to suggest that deference should automatically be given to FAA prosecutors' litigation positions. Id. at 1179.

limited subject matter jurisdiction may lack this generalist perspective. Specialization can also produce bias problems of two kinds: the appointments process may be distorted as interest group pressures lead to the selection and confirmation of nominees for their views on specific issues; in addition, the standard of review may be distorted, either because expertise leads the court to substitute its judgment for that of the agency or because familiarity with a particular agency leads the court to accept the agency's positions too readily. Public perception that a court is biased can reduce its effectiveness even when actual bias is not present. Finally, a specialized court may suffer reduced prestige if its repetitive subject matter attracts lower caliber judges.

The recommendations that follow offer guidance to Congress on the considerations it should take into account when it deliberates about whether to assign responsibility for review to a specialized court; they should be read as a whole. Thus, for example, the criteria in recommendation 2 may suggest assignment of Social Security disability cases to a specialized court; if Congress considers such an approach, however, it should take into account recommendations 3(B) and 3(C), favoring a balanced docket and a jurisdictional mix. These recommendations are intended to complement Conference Recommendation 75–3, "The Choice of Forum for Judicial Review of Administrative Action," 1 CFR 305.75–3 (1990), which the Conference continues to believe should form the foundation for decisionmaking about the appropriate forum for judicial review of administrative action within the Article III courts.

Recommendation

1. When considering proposals for the creation of a specialized court or courts to review administrative action, Congress should take into account that federal agency programs vary greatly in the volume, complexity, and level of technical content of the caseloads they generate, and, thus, any solutions adopted should be designed to fit the specific administrative programs to which they will apply. For these reasons, among others, the Conference opposes the creation or designation of a single specialized court, either within the Article III judiciary or under Article I, to handle review of all administrative cases.

2. Congress should recognize that it is appropriate to create specialized courts for particular administrative programs only if such programs are characterized by the following:

A. A program area in which one might reasonably expect a consistently large volume of cases, diversion of which might significantly alleviate burdens on the generalist federal courts;

B. The predominance of factual issues specific to particular cases, or the predominance of scientific or other technical issues requiring special expertise of decisionmakers; and

C. The particular importance of uniformity in agency administration of a program.

3. If Congress creates specialized courts to review particular administrative programs, it should, to the extent possible, structure the courts as follows:

A. To minimize jurisdictional uncertainty, the subject matter before the courts should be segregable from other claims.

B. To ensure that the courts maintain a balanced perspective on the issues before them, the courts' dockets should be designed to expose judges to all sides of pertinent controversies and to the broadest possible scope of related issues within a field of law.

C. To encourage generalist judicial appointments, to minimize distortion of the standard of review resulting from loss of the generalist perspective, and to avoid the fact or appearance of capture by special interests, the courts' subject matter jurisdiction should be diverse.

If the court provides the final stage of judicial review before Supreme Court review, satisfaction of criterion C is essential.

4. If Congress creates specialized courts to review particular administrative programs, it should provide for periodic evaluation of those courts to determine whether there is a continuing need for specialized review.

5. In any legislation providing for specialized review of particular administrative programs, Congress should assign to each court or reviewing body the type of functions it is best suited to perform and should minimize duplication of review functions. In particular, any such legislation should:

A. Avoid *de novo* review of factual issues already subject to formal adjudication at the agency.

B. Make the decisions of specialized courts final on review of questions of fact specific to the case (including the sufficiency of the evidence in that case by whatever standard it is reviewed).

C. When review has been assigned to an Article I specialized court, provide a subsequent layer of judicial review by an Article III court for questions of constitutional or statutory interpretation.

§ 305.91–10 Administrative Procedures Used in Antidumping and Countervailing Duty Cases (Recommendation No. 91–10).

This recommendation discusses several possible reforms of the administrative procedures used in U.S. antidumping (AD) and countervailing duty (CVD) cases. These cases usually arise when a petition is filed on behalf of a U.S. industry by one of several statutorily specified interested parties asking the U.S. Government to impose special duties to offset dumping or subsidization. The Government itself can also initiate cases.

Dumping occurs when foreign companies export goods to the United States for sale at less than their "fair value." Fair value is generally based on the exporter's prices for such goods in its home (or a third country) market or on its cost of producing the goods (including a profit margin). AD duties are imposed to offset the margin of dumping (i.e., the difference between the foreign market value and the U.S. price) if the U.S. industry producing like goods has suffered or is threatened with material injury by reason of the dumped imports, or if the establishment of a U.S. industry producing such goods has been materially retarded.

Countervailing duties may be imposed on goods exported to the United States that benefit from certain types of subsidies granted by a foreign government. In most CVD cases, duties may be imposed only if the U.S. industry producing like goods has suffered or is threatened with material injury by reason of the dumped imports, or if the establishment of a U.S. industry producing such goods has been materially retarded.

The decision whether dumping or subsidization has occurred is made by the International Trade Administration (ITA) of the Department of Commerce; the decision on injury is made by the U.S. International Trade Commission (ITC). These administrative decisions are subject to review, in the first instance, in the Court of International Trade, and then in the Court of Appeals for the Federal Circuit. In the case of Canadian exports, the decisions may be "appealed" instead to a binational panel established under the U.S.-Canada Free Trade Agreement.

In recent years, the use by the United States and other countries of AD and CVD laws has been controversial. While many of the complaints about these laws are essentially about their substantive provisions, a number of the

complaints concern procedural matters. In particular, some critics have contended that the high cost of defending these cases, which are often quite complex proceedings involving the collection and analysis of vast amounts of data and which often continue for years, amounts to a new form of protectionism—process or procedural protectionism. At the same time, U.S. domestic producers complain that the great expense of invoking these laws virtually precludes their use by some petitioners deserving of relief.

The two concerns that seem to be foremost in the minds of trade law practitioners are reducing the time and expense associated with AD and CVD proceedings and improving the decisionmaking process under the relevant statutes. The Conference notes, at the outset, that the complex procedures for AD and CVD cases, involving a division of responsibilities between two agencies with appeals to a specialized court and then to a federal court of appeals, may contribute to the time and expense associated with these proceedings. The Conference recommends in Part A that Congress authorize and fund a study of the agency structures and judicial review for AD and CVD cases. Recommendations B, C and D are intended to address problems arising under the current structure.[1]

The ITA and ITC both view AD/CVD proceedings as investigative rather than adjudicatory. Nonetheless, given the conflicting positions of the parties before the agencies—the domestic industry versus the foreign exporters—and their role in supplying much of the information on which the agency decisions are based, the parties do and should play an important part in the process. That part could be made more useful if hearings at which the factual submissions of the two sides are tested could be conducted more effectively than at present.

In the case of the ITA, the hearing officer typically does not participate in the hearing or engage in interchanges with counsel. The ITA hearing process would be improved if the hearing officer were more knowledgeable about the contested issues and participated more actively in interchanges with counsel than is presently the case.

In the case of the ITC, hearing times for cases are standardized and somewhat inflexible, even though cases vary widely in complexity and number of parties, with the result that in some cases parties have only a few minutes for oral presentations. Testing of factual information at the hearing is limited by practices that discourage cross-examination of witnesses. The ITC hearing process would be improved if, in setting the times for oral presentations, the ITC took into account factors such as the complexity of the case and the number of parties involved. The ITC should also allow reasonable time for cross-examination without subtracting such time from the questioner's time for affirmative presentation.

Several changes could be made to simplify ITA administrative procedures and reduce somewhat the time and expense associated with AD/CVD cases. First, preparing the administrative record more promptly would speed up the appeals of cases. Second, streamlining and standardizing the ITA's procedures for handling routine requests for access to information would reduce the amount of time spent by the parties in preparing such requests, thereby reducing costs. The ITA should also strive to reduce parties' costs by reducing where possible the number of copies of documents required to be filed.

Third, the ITA now sometimes decides to reject a party's factual submissions or to change significantly its methodology for calculating dumping/subsidy margins without notice to the parties. It would be desirable for the ITA to notify the parties when it makes such a decision, so that the parties will not continue to prepare their cases on the assumption that the agency has not taken such actions. Implementation of this recommendation would allow parties to argue their positions more effectively and avoid wasted effort. This recommendation is not intended to suggest that the ITA does not have the right to reject a party's evidentiary submissions, or that a party should have any new rights to more time to comply with ITA information requests or to object to methodology changes. The ITA should also consider whether there are methods within the statutory time constraints to permit parties to comment in response to substantial changes in methodology.

Fourth, at present there are a number of inconsistencies between the way that the ITA's investigations office (which handles the initial investigation to determine whether a AD/CVD order should be issued) and the ITA's compliance office (which reviews shipments made after the issuance of an AD/CVD order to assess the amount of duties owing) handle certain issues. The ITA ought to eliminate those inconsistencies for which there is no justification.

Fifth, under U.S. law the actual amount of AD/CVD duties owed is usually determined after the fact. Exporters deposit an estimated duty when goods are imported into the United States, and that amount may be adjusted upwards or downwards as a result of an annual review, if requested. (If not requested by anyone, the estimated duties are considered to have been collected as the final duties.) The ITA has traditionally had a large backlog of annual reviews, although the backlog has been reduced in recent years, and reduced substantially in recent months. The delay in finally determining duties owed is unnecessarily disruptive to trade flows and unfair to the parties to such cases. Accordingly, the ITA should continue its efforts to eliminate its backlog of annual reviews.

The Commissioners of the ITC apparently do not normally meet as a group to discuss their views of a case before their formal deliberations, evidently because of concerns stemming from the Government in the Sunshine Act. It appears that the Commission's reluctance to meet as a group adversely affects the ITC decisionmaking process. The Commission's general counsel has taken the position that its meetings to dispose of AD/CVD cases are not within the terms of exemption 10 of the Act, which exempts meetings involving determinations "on the record after opportunity for a hearing." Some practitioners, however, believe that exemption 10 applies, and the Commission should decide whether such meetings do or should come within the ambit of exemption 10. If the Commission concludes that the meetings in question are not in fact exempted from the Sunshine Act, then Congress should consider exempting such

[1] In 1973, the Administrative Conference recommended a number of reforms in the then existing procedures for administering AD cases. See Conference Recommendation 73-4, Administration of the Antidumping Law by the Department of the Treasury 39 FR 4846 (1974). In 1984, it recommended reform of one narrow aspect of AD and CVD procedures—the availability of confidential information under protective order in ITC proceedings. See Conference Recommendation 84-6, Disclosure of Confidential Information Under Protective Order in International Trade Commission Proceedings, 1 CFR 305.84-6 (1991).

meetings for AD/CVD cases from the Act. As an interim measure for achieving the benefits of collegial decisionmaking, the ITC should take steps to exchange drafts, views and other information among the commissioners before entering into formal deliberations.

Recommendation

A. Congressional Study

The Congress should authorize and fund a study, by the Administrative Conference or another appropriate agency, of the agency structures for handling AD/CVD cases. The study should address whether responsibility for these cases should continue to be divided between the ITA and the ITC. It should also consider whether the usual procedure for judicial review of agency adjudications should be followed for AD/CVD cases by providing for direct appeals from the ITA and/or ITC to the Court of Appeals for the Federal Circuit, or whether the additional level of specialized court review at the Court of International Trade is required in these cases.[2]

B. Improved Agency Factfinding Procedures

The ITA and the ITC should develop factfinding procedures that improve development of the administrative record, with increased opportunities for the parties and decisionmakers to test the factual submissions made in the proceedings.

1. ITA Procedures

To accomplish this goal, the hearing conducted by the ITA at the end of its investigation should be presided over by a senior official, with adequate staff support, who is knowledgeable about the contested issues in the proceeding and who actively participates in interchanges with counsel for the parties. Where appropriate, the hearing officer should make a recommendation with regard to the issues raised in the hearing.

2. ITC Procedures

To accomplish this goal, the ITC should provide adequate time for oral presentations, taking into account factors, such as multiple parties or countries under investigation, that may justify more time than normally allowed. The ITC should allow reasonable time for cross-examination in appropriate cases without reducing the cross-examiner's time for affirmative presentation at the hearing.

C. ITA Administrative Reforms

To improve the efficiency of case processing, the ITA should adopt the following reforms:

1. To speed judicial review, the ITA should complete the record in individual cases and make that record available to parties promptly.

2. The ITA should streamline its handling of applications for release of information under administrative protective orders and of requests for access to computerized information. It should also require that only a reasonable number of copies of documents be submitted by parties.

3. The ITA should give notice to parties before it (a) rejects portions of parties' evidentiary submissions or (b) adopts significant changes in methodology on which the parties have not had an opportunity to comment. The ITA should also consider whether there are techniques within the statutory time constraints to permit parties to comment in response to substantial changes in methodology.

4. The ITA should eliminate unjustified inconsistencies in the practices and policies of its investigations and compliance offices.

5. The ITA should continue its efforts to eliminate its backlog of annual reviews of the actual duties owed by specific companies subject to AD/CVD orders.

D. The ITC and the Government in the Sunshine Act

To encourage collegial decisionmaking, the ITC should exchange drafts, views and other information before entering into formal deliberations. The Commission should decide whether informal meetings to discuss the disposition of AD/CVD cases constitute meetings exempt from the Sunshine Act under exemption 10. If the Commission determines that such meetings are subject to the Sunshine Act, then Congress should consider amending the Tariff Act to provide that the Sunshine Act does not apply to informal meetings held to discuss the disposition of AD/CVD cases.

Dated: December 24, 1991.

Jeffrey S. Lubbers,

Research Director.

[FR Doc. 91-31124 Filed 12-27-91; 8:45 am]

BILLING CODE 6110-01-M

[2] The Administrative Conference has generally recommended that appeals from administrative agencies should be to the courts of appeals. See Conference Recommendation 75-3, The Choice of Forum for Judicial Review of Administrative Action, 1 CFR 305.75-3 (1991).

Administrative Conference of the United States

Fiscal Year 1994
Budget Submission

TAB E

Supporting Expense Report Schedules

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STANDARD FORM 300
July 1964, Bureau of the Budget
Circular No. A-11, Revised.
300-101

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
SALARIES AND EXPENSES

OJBECT CLASSIFICATION
(in thousands of dollars)

Identification code 95-1700-0-1-751	1992 actual	1993 estimate	1994 estimate
Direct obligations:			
Personnel Compensation:			
11.1 01 Full-time permanent----------	1,115	1,344	1,414
11.3 01 Other than full-time permanent	116	79	51
11.5 01 Other personnel compensation--	32	28	12
11.8 01 Special personal services payments----------	-	-	-
11.9 01 Total personnel compensation	1,263	1,451	1,477
12.1 01 Civilian personnel benefits---	238	270	279
21.0 01 Travel and transportation of persons----------	80	79	74
23.1 01 Rental payments to GSA--------	220	223	228
23.2 01 Rental payments to others-----	12	12	11
23.3 01 Communications, utilities, and miscellaneous charges-------	57	51	52
24.0 01 Printing and reproduction-----	82	59	54
25.0 01 Other services----------	150	67	55
26.0 01 Supplies and materials--------	69	69	58
31.0 01 Equipment----------	51	33	26
99.0 01 Subtotal, direct obligations--	2,222	2,314	2,314
99.0 01 Reimbursable obligations------	109	150	50
99.9 01 Total obligations----------	2,331	2,464	2,364
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STANDARD FORM 300
July 1964, Bureau of the Budget Circular No. A-11, Revised.
300-101

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

PROGRAM AND FNANCING
(in thousands of dollars)

Identification code 95-1700-0-1-751	1992 actual	1993 estimate	1994 estimate
PROGRAM BY ACTIVITIES:			
Direct Program:			
00.01 01 General Administration	479	459	434
00.02 01 Personnel Compensation and Benefits	1,501	1,722	1,756
00.03 01 Formal Recommendations	158	73	69
00.04 01 Implementation and Advisory	40	40	35
00.05 01 Clearinghouse	44	20	20
00.01 01 Total direct program	2,222	2,314	2,314
01.01 01 Reimbursable program:	109	50	50
10.00 01 Total obligations	2,331	2,464	2,364
FINANCING:			
25.00 01 Unobligated balance expiring	-	-	-
39.00 01 Budget authority (gross)	2,331	2,314	2,314
Budget authority:			
Current:			
40.00 01 Appropriation	2,227	2,314	2,314
40.80 01 Reduction pursuant to P.L. 102-141, Sec. 523A reduction	-5	-	-
43.00 01 Appropriation (total)	2,222	2,314	2,314
68.00 01 Spending authority from offsetting collections	109	50	50
Relation of obligations to outlays:			
71.00 01 Total obligations	2,331	2,464	2,364
72.40 01 Obligated balance, start of year	732	709	714
74.40 01 Obligated balance, end of year	-709	-714	-714
87.00 01 Outlays (gross)	2,354	2,459	2,364
Adjustment to budget authority and outlays: Deductions for offsetting collections			
88.0001 Federal funds	-109	-150	-50
89.0001 Budget authority (net)	2,222	2,314	2,314
90.0001 Outlays (net)	2,245	2,309	2,314
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STANDARD FORM 300
July 1964, Bureau of the Budget
Circular No. A-11, Revised
300-101

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

PERSONNEL SUMMARY

Identification code 95-1700-0-1-751	1992 actual	1993 estimate	1994 estimate
Total compensable workyears:			
1001 Full-time equivalent employment	24	24	24
1005 Full-time equivalent of overtime and holiday hours-------	-	-	-
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GPO 1981—O-737—468

APPENDICES TO TESTIMONY OF
BRIAN C. GRIFFIN
Chairman

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

February 24, 1993

Appendix A ..... Conference Membership List

Appendix B.....Titles of Conference Recommendations and Statements--FY68-91

Appendix C .....Full Text of Conference Recommendations--FY91-92

Appendix D ..... Implementation Digest

Appendix E..... Colloquy Programs

Appendix F..... List of Research Projects Approved by Council

Appendix G .....List of Visiting Foreign Dignitaries in 1992

Appendix H ..... Letter to Senate Banking Committee on GSEs

Appendix I.....Report on ACUS Metric Conversion

December 8, 1992

Robert S. Ross, Jr., Acting Chairman

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of the

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PART 305—RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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EDITORIAL NOTE: For an explanation of the publication policy regarding these recommendations, see § 304.3(a) of this chapter.

§ 305.91-1 Federal Agency Cooperation with Foreign Government Regulators (Recommendation No. 91-1).

If American administrative agencies could ever afford to engage in regulatory activities without regard to the policies and practices of administrative agencies abroad, the character and pace of world developments suggest that that era has come to a close. The substantive problems facing agencies have parallels, to a greater or lesser extent, in the problems facing those agencies' counterparts in foreign countries. The policies and procedures developed by governments abroad are likely to be of interest and benefit to American regulators, and those developed here may be of utility abroad.

The case for international regulatory cooperation does not, however, rest entirely on the exchange of information about the current regulatory landscape. As the experience of certain agencies engaged in international regulatory dialogue demonstrates, there still remain regulatory problems to be identified and solutions, both to new and existing problems, to be found. Particularly in areas of fast-changing technology or fast-evolving standards and expectations, regulatory bodies may find that they actually need, or can profitably share, the resources of other governments in addressing common problems of regulation and enforcement. In their continuous efforts at improving their performance, agencies have become increasingly aware that contemporary regulation often entails a powerful research and development burden whose sharing may be in all regulators' best interests.

Regulatory cooperation with foreign counterparts will also produce advantages for regulated interests and for those affected by those interests. Regulated entities generally prefer an orderly regulatory environment, and more particularly one marked by a high degree of commonality among the standards imposed by public authorities in the various markets they serve. Costs of compliance are most obvious when different countries impose mutually inconsistent standards on business products or practices, particularly where the latter by their nature are international in scope. However, even where national standards are not mutually inconsistent, or business products or practices are not inherently international in scope, the cumulative effect of differences in regulatory standards may impose substantial and, in some cases, unjustified burdens. In addition, consumers and other affected persons have an interest in the maintenance of reasonably common protective standards. The internationalization of business has put the need for this kind of environment on an international scale. It accordingly points in the direction of greater and more deliberate

intergovernmentalism in regulatory matters than one generally associates with American administrative processes.

American agencies generally have not developed consistent practices in their efforts at international regulatory cooperation. Such cooperation may, in fact, take a wide variety of forms, from the casual and unsystematic sharing of information at one extreme, to a firm commitment to concerted regulatory action at the other. In between fall a number of different patterns, such as regular consultations, reciprocal participation in foreign agency rulemaking, and various forms of joint study, research and rule development. Since harmonization does not necessarily entail uniformity, but simply a net reduction in regulatory inconsistencies and differences, even harmonization is a matter of degree.

As the following recommendation seeks to make clear, agencies are not all similarly situated with respect to the opportunities for, and advantages of, regulatory cooperation. The functions and regulatory objectives of a particular agency, its past experience in such cooperation, and the feasibility of reliance on a foreign counterpart's technical administrative, or regulatory resources are among the factors determining whether, to what extent, and in what form that agency should engage in such cooperation and pursue regulatory harmonization. Moreover, an agency is likely to be more comfortable in initially experimenting with international cooperation on a limited basis by selected means rather than in developing at once a comprehensive, systematic program of cooperation. Nevertheless, agencies may usefully consider this recommendation, which is based in part on the practice and experience of one agency, the Federal Aviation Administration, that has consciously engaged in forms of concerted activity with counterpart agencies abroad. This case study is of particular interest because the FAA's practice of intergovernmentalism includes, but also goes beyond, cooperation in rulemaking as such to include a certain amount of cooperation in more routine aspects of administration. While this recommendation does not address international assistance in enforcement as such, it recognizes that an increased commonality of substantive standards does tend to increase opportunities for mutual assistance in the enforcement realm.

Of course, care should be taken that the spirit of compromise and mutual consideration that ought to characterize intergovernmental activities not adversely affect the integrity of the regulatory process. It is important that agencies observe the procedural statutes under which they ordinarily operate, and that their processes remain open to public scrutiny and participation. Nor will it do, either in reality or in appearance, for the regulatory standards an agency ultimately adopts to be the product, pure and simple, of intergovernmental negotiations. American agencies and their foreign counterparts work under statutory mandates, which must remain the touchstone so far as the substance of regulatory action is concerned. The zone of compromise within which an agency may then operate in the interest of collegiality with decisionmakers of other nations is necessarily uncertain but necessarily limited. Within that zone, however, international regulatory cooperation has a significant, possibly even a leading, role to play.

RECOMMENDATION

1. Each agency should inform itself of the existence of foreign (including regional and international) regulatory bodies [1] whose activities may relate to the mission of that agency.

2. Each agency should determine whether and to what extent regulatory cooperation with one or more foreign regulatory bodies is appropriate. Desirable forms of cooperation may include the simple exchange of information, coordination of regulatory objectives, consultation in advance of rulemaking, and reciprocal participation in rulemaking processes. Apart from general considerations of cost and staffing, factors to be considered in deciding the importance and intensity of the cooperative effort to be made, the forms of cooperation to adopt, and the geographic range of foreign regulatory bodies with which to cooperate, include:

a. The extent to which the participating regulatory agencies share common regulatory objectives;

b. The importance of commonality, and therefore international harmonization,[2] in the development of regulatory policy in the particular field;

c. The extent to which the capabilities of foreign regulatory bodies justify the agency's reliance on their tech-

[1] Throughout this recommendation, the term "foreign regulatory bodies" includes, where appropriate, also regional and international regulatory bodies.

[2] Harmonization does not necessarily imply regulatory uniformity. It implies a reduction in the differences (including but not limited to inconsistencies) among the regulatory standards of different jurisdictions.

nical, regulatory and administrative resources;

d. The opportunities that international regulatory cooperation presents for improvement in the enforcement and administration of the agency's program (as, for example, through mutual recognition of tests, inspections and certifications or through mutual assistance in information gathering and other forms of assistance);

e. The presence of existing bilateral or multilateral international frameworks for addressing common regulatory concerns;

f. The receptivity of a given foreign regulatory body to meaningful participation by American regulatory and private interests in its policymaking processes; and

g. In appropriate consultation with the Department of State, the foreign policy of the United States.

3. Even when an agency concludes that the factors set out in paragraph 2 do not counsel substantial regulatory cooperation with foreign governments, it should nevertheless explore the possibilities of international cooperation in enforcement, including mutual assistance in information gathering and, where appropriate, reliance upon foreign tests, inspections, and certifications.

4. When an agency concludes that it has a pronounced interest in cooperation with foreign regulatory bodies, it should consider adopting various modes of cooperation with those agencies, including:

a. The establishment of common regulatory agendas;

b. The systematic exchange of information about present and proposed foreign regulation;

c. Concerted efforts to reduce differences between the agency's rules and those adopted by foreign government regulators where those differences are not justified;

d. The creation of joint technical or working groups to conduct joint research and development and to identify common solutions to regulatory problems (for example, through parallel notices of proposed rulemaking);

e. The establishment of joint administrative teams to draft common procedures and enforcement policies;

f. The mutual recognition of foreign agency tests, inspections and certifications, to the extent that the American agency is satisfied that foreign regulatory bodies have sufficient expertise and employ comparable standards; and

g. The holding of periodic bilateral or multilateral meetings to assess the effectiveness of past cooperative efforts and to chart future ones.

5. a. When engaging in international regulatory cooperation, an agency should ensure that it does so in a manner consistent with national statutes and international engagements.

b. An agency engaging in international regulatory cooperation should also be alert to the possibility that foreign regulatory bodies may have different regulatory objectives, particularly where a government-owned or controlled enterprise is involved.

6. To promote acceptance of and compliance with the measures that result from its cooperation with foreign regulatory bodies, an agency should enlist the support and participation of other affected agencies, regulated interests, public interest groups, and other affected domestic interests, as follows:

a. Where appropriate, agencies should, so far as considerations of time and international relations permit, afford affected private and public interests timely notice of any formal system of collaboration with foreign regulatory bodies that exists and an opportunity where reasonable to participate and comment on decisionmaking under such system.

b. The agency should, where appropriate, also encourage the establishment of working relations between domestic interests and their foreign counterparts, including manufacturers, other trade and industry interests, and consumer and other public interest groups.

c. The agency should assemble an interagency advisory group, consisting of the Department of State and other affected agencies such as the Departments of Commerce and Defense and the U.S. Trade Representative's Office, if one does not exist. Each member agency of an advisory group should, without prejudice to its independent decisionmaking, both inform that group about the nature and extent of its concerted activities with foreign regulatory bodies relevant to the purposes of the group and seek that group's advice. In addition, the Chairman of the Administrative Conference should convene a meeting of the heads of interested agencies to discuss the need for establishing a permanent, government-wide mechanism for organizing, promoting, and monitoring international regulatory cooperation on the part of American agencies.

7. Agencies should, consistent with their statutory mandate and the public interest, give sympathetic consideration to petitions by private and public interest groups for proposed rulemaking that contemplate the reduction of differences between agency rules and the rules adopted by foreign government regulators, where those differences are not justified.

8. a. Once an agency has a program of international regulatory cooperation with a foreign regulatory body, it should routinely advise that body before initiating proposed rulemaking, and should seek to engage that body's participation in the rulemaking process.

b. Conversely, the agency should see to it that it is informed of initiatives by those foreign regulatory bodies and ensure that its views are considered by those bodies early in the conduct of their rulemaking procedures.

c. Where, following joint rule development efforts, an agency ultimately proposes a rule that differs from the rule proposed by the foreign counterpart, it should specify the difference in its notice of proposed rulemaking and request that it be specified in any corresponding foreign notice.

9. An agency should adopt reasonable measures to facilitate communication of views by foreign regulatory bodies on proposed rules.

10. While international consultations of the sort described in this recommendation do not appear to necessitate any radical departure from an agency's ordinary practices in compliance with applicable procedural statutes,[3] an agency engaged in such consultations should make reasonable efforts to ensure that affected interests are aware of them. For example, when an agency substantially relies on those consultations in its rulemaking (or where foreign government rules, practices or views have otherwise substantially influenced the agency's proposals), it should describe both the fact and the substance of those consultations in its notices of proposed rulemaking, rulemaking records and statements of basis and purpose under the Administrative Proceedure Act. Where the objective of harmonizing American and foreign agency rules has had a significant influence on the shape of the rule, that fact also should be acknowledged.

11. An agency that engages in systematic exchanges of information and consultation with foreign regulatory bodies should seek to ensure that domestic interests do not suffer competitive disadvantage from the release of valuable information by those bodies to foreign private interests. This may require that the agency seek to reach agreement with its foreign counterparts concerning the conditions under which information will be disclosed.

12. While harmonization of standards with foreign regulatory bodies may be a legitimate objective of any agency whose activities affect transnational interests or transactions (and therefore may appropriately influence the rulemaking outcome), it should be pursued within the overall framework of the agency's statutory mandate and with due regard for the interests that Congress intended the agency to promote. Accordingly, agencies should ensure that any accord informally

[3] See, e.g., *Federal Communications Commission* v. *ITT World Communications, Inc.*, 466 U.S. 463 (1984) (international consultative processes leading to informal policy understandings are not covered by Government in the Sunshine Act); *Public Citizen* v. *United States Department of Justice*, 109 S. Ct. 2558 (1989); *Food Chemical News* v. *Young*, 900 F. 2d 328 (D.C. Cir. 1990); *Center for Auto Safety* v. *Federal Highway Administration*, No. C.A. 89-1045 (D.D.C. Oct. 12, 1990) (groups not formed by the Executive Branch are not "utilized" committees within the meaning of FACA).

reached through international regulatory cooperation is genuinely subject to reexamination and reconsideration in the course of the rulemaking process.

[56 FR 33842, July 24, 1991]

§ 305.91-2 Fair Administrative Procedure and Judicial Review in Commerce Department Export Control Proceedings (Recommendation No. 91-2).

The Export Administration Act (EAA), 50 U.S.C. App. 2401-2420, authorizes the Commerce Department to restrict exports of goods and technology from the United States in the interests of national security, foreign policy objectives, and preservation of this country's access to commodities in short supply. It is the principal element in a scheme of export controls that emerged after World War II to serve three ends, reduction of the domestic impact of worldwide postwar shortages of critical goods, priority allocation of resources to rebuild Europe under the Marshall Plan, and restriction of the access of Eastern Bloc nations to technology useful for military purposes. Over the years, restricting access to useful technology has become the primary goal of the EAA, although the countries against which those restrictions are directed have changed from time to time in the light of shifting political considerations.

The EAA has an international aspect. The United States works with its allies through a coordinating committee on multilateral export controls (CoCom) to identify commodities that should be controlled as well as countries that should be the targets of various export controls. Using the lists thus generated, the Commerce Department is responsible, under the EAA, for a licensing scheme involving three different categories of licenses: (1) General licenses, which are applicable to most export transactions and permit them to occur without specific license applications; (2) individual validated licenses, which the agency grants or denies based on factors including concerns about the ostensible and the possible uses of the commodity, opposition from the Department of Defense or State to the proposed export, available information about the end-user, and policy determinations about the destination country; and (3) special licenses, such as distribution licenses and project licenses, that allow particular exporters to make multiple exports of certain types without applying for an individual license for each export. The Export Administration Act also contains provisions prohibiting participation in unsanctioned foreign boycotts and authorizes the Commerce Department both to make rules to carry out its provisions and to enforce its provisions, including the antiboycott provisions.

The EAA includes a provision explicitly exempting the Department's activities from the administrative process and judicial review provisions of the Administrative Procedure Act. As a result, administrative licensing decisions are final and unreviewable; agency rules implementing the EAA are subject neither to judicial review nor to the notice-and-comment requirements of 5 U.S.C. 553, although, in the latter respect, Congress has said that "to the extent practicable, all regulations imposing controls on exports * * * (should) be issued in proposed form with meaningful opportunity for public comment before taking effect." 50 U.S.C. App. 2412(b). Enforcement decisions are less affected by the exemption, as statutory amendments in recent years have imposed the formal hearing requirements of 5 U.S.C. 558-57 on administrative enforcement proceedings and have authorized judicial review of enforcement decisions according to APA standards.

Because of the broad APA exemption, the Commerce Department has implemented the EAA with relatively little judicial scrutiny. It has had little incentive to provide generally accessible explanations for its actions. The EAA requires that license denials be accompanied by a written statement including, *inter alia*, a statement of the statutory basis for the denial. In practice, however, this statutory requirement has often been met in a minimal and uninformative way. Exporters have often been frustrated in their attempts to learn the reasons for negative licensing decisions or to predict the outcome of future license applications; they have also been without recourse to challenge Commerce Department actions as arbitrary or contrary to statute. Because legislation to reenact and amend the EAA is now pending, reexamination of the APA exemption is timely.

The APA exemption dates back to passage of the first comprehensive export control legislation in 1949. At that time, Congress cited two reasons for the broad exemption: first, the legislation was seen as temporary, essentially an extension of emergency war measures, and second, it was closely related to foreign policy and national security concerns.

[1] The Act expired on September 30, 1990; the export controls program continues in effect, however, by Executive Order issued under authority of the International Emergency Economic Powers Act, 50 U.S.C. 1702. Executive Order 12730, September 30, 1990. Legislation to extend the export controls program was passed by Congress in 1990 but pocket vetoed by the President.

After more than 40 years, the export program gives no indication of being "temporary," albeit sunset dates in the various export control statutes have necessitated several extensions and reenactments. Changes in the statute incident to reenactment and evolving policy at the Commerce Department have gradually increased access to information about the Department's actions and public participation in policymaking. Legislation to reenact the export controls program, passed in 1990 but subjected to a pocket veto by the President, would also have provided for limited judicial review of licensing decisions. But these measures still leave the relevant procedures well short of APA standards. And the need for such a broad exemption from APA provisions based on foreign policy and national security considerations is not at all clear. Much of the business conducted by the Commerce Department under the EAA is similar to that conducted by other regulatory agencies, and the interests at stake for potential exporters are similar to those of regulated entities under other licensing schemes. The agency can expect to benefit from public input in the rulemaking process just as other agencies do. Moreover, the APA includes specific exemptions from its rulemaking and formal adjudication provisions for agencies' military and foreign affairs functions, which would be available to reduce the required level of agency process when necessary,[2] as well as an exception to its judicial review provisions for action "committed to agency discretion by law." Other international trade and export control statutes, which presumably have foreign affairs implications, have operated successfully within this framework.

Increased availability of judicial review would help to ensure that the Department complies with applicable statutory standards and maintains a reasonable level of quality control in its decisionmaking under the EAA. While the presence of military and foreign affairs considerations will impel a reviewing court to give the Commerce Department great latitude to exercise its discretion, a court could usefully review many legal and factual issues under traditional APA standards without interfering with the executive branch's ability to conduct foreign policy or protect national security.

[2] The Administrative Conference has previously recommended that the military and foreign affairs exemption from APA rulemaking requirements be restricted to apply only where there is a need for secrecy in the interest of national defense or foreign policy. ACUS Recommendation 73-5, *Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements*, 1 CFR 305.73-5 (1991).

The Administrative Conference concludes, therefore, that the APA exemption is unnecessary and should be repealed. This conclusion is in accord with that of a recent National Academy of Sciences study on export controls, which also urges repeal of the APA exemption.[3] While the exemption repeal is the heart of this recommendation, the Conference also believes that various additional actions by Congress or the Commerce Department would be useful to enhance the benefits of making the APA applicable. These are explained briefly below.

Judicial review. Although the Conference believes that, as a general matter, judicial review of Commerce Department actions under the standards of the Administrative Procedure Act is entirely appropriate, control of exports nevertheless remains a sensitive area. Thus, it is important to structure judicial review in a manner that will minimize the burdens on the conduct of foreign policy and national security affairs. Direct review in the court of appeals is appropriate here because of the policy considerations involved, because there are not likely to be large numbers of appeals, and because, in the case of rulemaking, the public interest will require prompt, authoritative determinations of a rule's validity. See ACUS Recommendation 75-3, The Choice of Forum for Judicial Review of Administrative Action.[4] Consolidation of review of all export control matters in a single court of appeals would preserve uniformity in statutory interpretation and enable the court to develop expertise in the subject matter. Because it already enjoys some expertise in international trade and technological issues and is likely, based on its experience with many types of litigation involving the federal government, to be sensitive to the government's legitimate need for discretion in implementing export controls as well as to the interests of private parties, the Court of Appeals for the Federal Circuit is the most appropriate court for assignment of this responsibility.

Informal adjudications. Under the APA, Commerce Department action on individual license applications should be treated as informal adjudication. While formal hearing proceedings are used to make decisions in some licensing programs administered by other agencies, there is no indication that such procedures are required here, and the high volume and time sensitivity of export

[3] Panel on the Future Design and Implementation of U.S. National Security Export Controls, Finding Common Ground: U.S. Export Controls in a Changed Global Environment (National Academy Press 1991).

[4] 1 CFR 305.75-3 (1990).

license applications favor retention of the existing informal approach.

Another category of Commerce Department action handled informally is requests for advice as to the proper classification of a commodity. These requests permit an exporter to seek guidance concerning the appropriate category for an item on the list of controlled commodities (because different categories entail different export restrictions) and may be made at an exporter's option; such requests are appropriately treated as informal agency adjudication under the APA.

The Commerce Department should increase exporters' access to information about the decisions it makes in these informal adjudications. Clear statements of the agency's reasons for classifying exports in particular categories or denying licenses will both help exporters to determine how to proceed and provide a record for judicial review of the Department's action. Publication of those licensing and classification decisions that may have precedential value (along with a statement of the reasons for them) will benefit both agency and exporters by bringing a greater measure of predictability to the licensing process.

A special problem arises when license denials turn on classified information. The government has a strong interest in protecting the substance and sources of such information from disclosure, but, without access to the information that forms the basis for a license denial, it can be almost impossible for the exporter to evaluate whether the agency action is correct and to challenge the denial on administrative or judicial review. Steps should be taken to ensure that exporters (or their counsel) have the maximum feasible access to the information supporting the license denial and that agency staff claims that undisclosed classified information supports a denial are carefully scrutinized on administrative review.

Formal adjudications: Current statutory provisions already make enforcement proceedings under the EAA (including both export control and antiboycott enforcement proceedings) formal adjudications by specifically applying sections 556 and 557 of the APA to those proceedings. Deletion of the general exemption from the APA would leave these procedures unchanged. To facilitate the consolidation of judicial review in one court and to conform to generally sound practice respecting administrative sanctions,[4] the Administrative Conference recommends one change in these enforcement procedures: that *de novo* district court penalty collection proceedings be eliminated in favor of on-the-record review in the Court of Appeals for the Federal Circuit, and that the Commerce Department have authority to collect its own civil penalties once the opportunity for judicial review has passed. Under this approach, failure to pay a penalty after it has become final and unappealable, or after the reviewing court has entered final judgment in favor of the agency, would result in a collection action in federal district court in which the validity and appropriateness of the order imposing the penalty would not be reviewable. This change would also have the effect of mooting a current controversy about whether the conduct of administrative enforcement proceedings tolls the 5-year statute of limitations for commencement of a district court action to collect a civil penalty.

The Commerce Department imposes sanctions without the benefit of formal adjudicatory procedures through the issuance of temporary denial orders and the suspension or revocation of licenses without notice or hearing under 15 CFR 770.3(b). Under the EAA, the Department may issue temporary denial orders denying exporting authority without notice where necessary to prevent an imminent violation of the EAA. Licenses may be suspended or revoked under Commerce Department regulations whenever the Office of Export Licensing believes that the terms and conditions of the licenses are not being followed, or when required to implement a change in regulatory policy.

Because these actions are taken to prevent imminent or continuing violations of the EAA, the Conference recognizes that the Commerce Department may need to take unilateral action. Nevertheless, when the circumstances requiring the action are individual to an exporter or a commodity and not, for example, related to an abrupt change in a destination country's status, exporters should be afforded a full opportunity to defend themselves in post-denial formal hearings. Existing procedures for temporary denial orders provide for prompt post-denial review, although with a full formal hearing; these existing procedures may offer a valuable avenue for seeking emergency relief from a denial order, but a full-scale administrative hearing should be available at the request of the party subject to the denial order. Concomitantly, judicial review of temporary denial orders, now governed solely by an arbitrary and capricious standard, should include substantial evidence review. At present, unilateral license suspensions are reviewable only through an informal agency process like that afforded license denials, and not at all in court. Because of their impact on existing economic

[4] See ACUS Recommendation 72-6, *Civil Money Penalties as a Sanction*, 1 CFR 305.73-6 (1991); ACUS Recommendation 79-3, *Agency Assessment and Mitigation of Civil Money Penalties*, 1 CFR 305.79-5 (1991).

relationships, the Administrative Conference believes suspensions grounded in the unique circumstances of a particular exporter or validated license should be followed by full formal procedures at the licensee's request.

Rulemaking: Once brought under the APA, Commerce Department rulemaking under the Export Administration Act would still be subject to the military and foreign affairs exception to notice-and-comment procedures; not every rulemaking under EAA necessarily falls within the terms of that exception, but some do. In recommending that the APA apply to export control proceedings, the recent National Academy of Sciences study proposed that section 13(b) of the EAA be retained, to reflect Congress' belief that military and foreign affairs considerations do not require that all EAA rulemakings fit the APA exemption and to encourage the Department to exercise some restraint in applying the exemption. The Conference endorses this recommendation.

The Conference also recommends that "foreign availability determinations," not specifically designated as rulemaking under the EAA, be so treated by the Commerce Department whenever possible. Under the Act, exports that would otherwise be restricted are permitted when the product involved is already available to the end-user from a foreign source. These determinations may often affect many potential exporters, rather than just one, and provision of an opportunity for public comment before making such a determination will enable Commerce to get a clearer picture of the relevant considerations. The Conference's recommendation, however, acknowledges that foreign availability determinations may sometimes initially arise in the context of license determinations where time is of the essence; in such cases, public comment might be solicited after the determination rather than before.

Recommendation

1. *Repeal of APA exemption.* Congress should repeal section 13(a) of the Export Administration Act, which exempts functions exercised under that Act from the administrative process and judicial review provisions of the Administrative Procedure Act (5 U.S.C. 551, 553-559, 701-706).

2. *Judicial review.* Congress should amend the Export Administration Act to provide for judicial review in a single forum, the United States Court of Appeals for the Federal Circuit, of all Commerce Department actions (including the imposition of civil penalties) under the Act that are reviewable by the standards of APA section 706.

3. *Informal adjudications.* Requests for proper classification of proposed exports and applications for validated licenses or reexport authorizations are appropriately treated as informal adjudications under the APA. The Department of Commerce should make the following improvements in the applicable procedures:

a. Whenever the Commerce Department initially denies a license application or responds to a classification request by placing the item in a category different from that proposed by the requester, it should provide sufficient written explanation for its decisions to enable applicants to understand the basis on which decisions have been reached and to pursue internal appeals.

b. Review by the Secretary or the Secretary's delegate of staff decisions on classification requests or license applications should be available on request of the applicant. To the extent possible, the decision on review at the secretarial level should be in detail sufficient to permit others to evaluate its precedential value. The Commerce Department should publish and index these decisions in an appropriate manner, together with other decisions on requests for classification and individual license applications that have possible precedential value and any general written guidance on classification issues.

c. To eliminate a duplicative review procedure, Congress should repeal section 13(e) of the Export Administration Act, which provides for limited appeals of license denials through an administrative law judge hearing process.

d. When a license application has been denied, or has been the subject of negative consideration or recommendations under section 10(f)(2) of the Export Administration Act, based on classified information, the Commerce Department should adopt procedures to permit the maximum disclosure of such information consistent with national security and foreign policy (including, where appropriate, disclosure to the applicant or applicant's counsel under protective order). On adminis-

trative appeal of any license denial based on undisclosed classified information, the Secretary (or the Secretary's delegate) should personally review the classified information and certify that it is properly classified and supports the action taken.

4. *Formal adjudications.* a. Congress should amend the Export Administration Act to provide the right to a prompt post-denial (or post-suspension) hearing on the record, subject to the formal adjudication provisions of the Administrative Procedure Act, for parties subject (1) To unilateral Commerce Department decisions to suspend or revoke validated licenses when the suspension or revocation turns on the specific circumstances of a particular exporter or commodity, or (2) to temporary denial orders under section 13(d) of the Export Administration Act. Congress should establish appropriate deadlines for the conduct of such hearings.

b. The Commerce Department should, to the extent possible, limit the scope of unilateral license suspensions and temporary denial orders to the circumstances posing a threat of violation of the Export Administration Act.

c. Congress should amend the civil penalty provisions of 50 U.S.C. App. 2410 and 2412 to eliminate the requirement of *de novo* proceedings in federal district court and provide instead that any assessment of civil penalties is final, subject to judicial review under 5 U.S.C. 706 in the Court of Appeals for the Federal Circuit; a civil penalty assessment that survives judicial review or becomes final without judicial review should be enforceable by the agency in a summary collection action in federal district court.[6]

5. *Rulemaking.* a. Although the military and foreign affairs exemption of section 553 of the APA will be available to the Department of Commerce for some of its rulemaking under the Export Administration Act, the Conference supports the recent recommendation of the National Academy of Sciences that Congress should retain section 13(b) of the Export Administration Act. That section, which exhorts the Department to provide "meaningful opportunity for public comment" in departmental rulemaking "to the extent practicable," plainly expresses a congressional understanding that not all departmental rulemaking falls within the appropriate bounds of the military and foreign affairs exemption,[7] and thus appropriately encourages the Department to exercise restraint in its application.

b. To the extent feasible, the Department of Commerce should treat foreign availability determinations under sections 5(f)(1) and 5(f)(2) of the Export Administration Act as rulemaking within the terms of section 553 of the APA. Where, for reasons of time or other considerations, such determinations must be made in the context of decisions on individual license applications, the Department should publish the determination made with an invitation for public comment respecting related future determinations.

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[6] *See* ACUS Recommendation 72-6, supra n. 4.

[7] *Cf.* ACUS Recommendation 72-5, supra n. 2.

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55 FR 33844, July 24, 1991

§ 305.91-3 The Social Security Representative Payee Program (Recommendation No. 91-3).

As part of the Social Security program, Congress has authorized the Social Security Administration (SSA) to pay certain beneficiaries' benefits to other persons or organizations where the Secretary determines that payment to such a "representative payee" would be in the interest of the beneficiary.[1] SSA currently pays about $20 billion annually in social security benefits to representative payees of more than 4 million (or about 10%) beneficiaries. Because the program has been the subject of some concern and litigation, SSA asked the Administrative Conference of the United States to study certain procedural aspects of the representative payee program. While the study was underway, Congress addressed some of the procedural issues as part of the Omnibus Budget Reconciliation Act of 1990 (OBRA), Public Law 101-508, section 5015.

A. *Rulemaking.* The representative payee program operates under a statute that for the most part paints program requirements with a broad brush. SSA has some regulations, but many of the operating instructions are found in the Program Operating Manual System (POMS), the agency's internal operating manual. There are a number of issues the Conference believes should be the subject of regulations, either because they are not adequately addressed anywhere, or because they should be addressed in regulations rather than only in the POMS. These issues are discussed below. This recommendation contains specific suggestions for modifying the procedures for appointing representative payees (see section B, below). For a number of other issues, involving the establishment of program criteria, the Conference takes no position on the content of the rules, but recommends that the issues be addressed in the context of notice-and-comment rulemaking.

First, there currently exists no clear standard for when a representative payee should be appointed in a particular case. The Social Security Act provides that "(i)f the Secretary determines that the interest of any individual under this title would be served thereby, certification of payment of such individual's benefit under this title may be made * * * (to a representative payee)."[2] The Act does not contain any standard for determining when appointment of a representative payee is in the beneficiary's interest. Current SSA regulations provide only that a representative payee will be appointed when "due to a mental or physical condition or due to * * * youth," a beneficiary is "not able to manage or direct the management of" his or her own benefits.[3] The regulations neither indicate what constitutes an inability to manage benefits, nor what mental or physical condition must be found. This lack of a standard requires SSA personnel to make largely discretionary decisions that are difficult to challenge individually or to evaluate programmatically.

While the Administrative Conference takes no position on what the substance of a standard for representative payee appointment should be, it believes that the promulgation of a more detailed standard through rulemaking is important to promote the appearance and reality of fairness and consistency in operation of the representative payee program.[4]

Second, concerns have been raised that persons interested in gaining access to beneficiary funds may provoke SSA action to appoint a representative payee without sufficient factual basis. Thus, a standard should be developed for a minimum amount of evidence necessary to trigger the initiation of procedures that could result in the appointment of a representative payee.

Third, the Conference recommends that SSA promulgate clarifying rules relating to eligibility to serve as a representative payee, including a method for determining priorities where there are competing applicants for such payee status. Although SSA has some internal guidelines for selecting appropriate representative payees, the Conference believes that such issues should be addressed in regulations, to provide public participation in their development and to provide easier access to their contents.

Finally, the question of SSA's responsibility to monitor representative payee performance has been a subject of concern. Although a court has ruled that the Constitution's due process clause requires annual accounting by all representative payees,[5] the decision's continued applicability is not clear.[6] The Social Security Act currently re-

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[1] The term "beneficiary" as used in this recommendation refers to those receiving benefits under both title II (old age survivors and disability benefits) and title XVI (supplemental security income payments). Those receiving benefits under this latter program are technically referred to as "recipients."

[2] 42 U.S.C. 405(j)(1) (Title II). For title XVI, the provisions are comparable. See 42 U.S.C. 1383(a)(2)(A).

[3] 20 CFR 404.2001, 416.601 (1990).

[4] Among the issues that might be addressed are how the specific standard should balance interests in beneficiary autonomy versus government beneficence, what factors should be considered in determining whether a beneficiary's interest would be served by appointing a payee, what should constitute inability to manage benefits, and who should be the decisionmaker (e.g., the states in guardianship proceedings, the state disability determination services, or trained agency lay or medical staff). Any rule setting a standard for appointing a representative payee should also address the question of what types of evidence are either appropriate or necessary in making the determination.

SSA should also itself carefully consider the education levels and other qualifications of agency officials making determinations on representative payee status, to ensure that such decisionmakers have the necessary skills to apply whatever standard is developed.

[5] *Jordon* v. *Schweiker*, 744 F.2d 1387 (10th Cir. 1984); Jordan v. Bowen, 808 F.2d 733 (10th Cir. 1987).

[6] The *Jordon* case was a class action, certified in 1980. The court held that the Constitution required annual accounting for all payees. The impact of time on the class, as well as the impact of subsequent legislation, raises some questions concerning the case's current applicability.

quires annual accounting by representative payees, except certain institutions.[7] Congress in the OBRA amendments expressly required SSA to study more stringent monitoring of "high risk" payees (e.g., representative payees who are not related to the beneficiary or who are creditors) SSA should undertake rulemaking to promulgate procedures for monitoring representative payee performance in a manner that will be both effective and efficient.[8]

B. *Procedures*—1. *Current procedures.* When SSA receives information that a particular beneficiary may need a representative payee, it seeks to gather evidence with which to determine whether the beneficiary is incapable of managing his or her own benefits.[9] If SSA decides that the beneficiary is incapable, its first step is to select a representative payee. SSA then sends what is called an "advance notice" to the beneficiary, informing the beneficiary that he or she has been found incapable of managing benefits and that SSA intends to appoint the named representative payee. The beneficiary is allowed 10 days to respond to SSA and provide additional facts. This is often the first notice that the beneficiary receives that appointment of a representative payee is being contemplated. If, after receiving any further information, SSA confirms its decision, it sends the beneficiary notice of its "initial decision," which is implemented immediately. The beneficiary may seek "reconsideration" from SSA, following which the beneficiary is entitled to a hearing before an administrative law judge and appeal to the Appeals Council.

Under these current procedures, the beneficiary generally is provided no notice that SSA is considering appointing a representative payee until the agency has already preliminary decided that one is necessary and has selected a candidate. The "advance notice" does not explain the basis for the decision to appoint a representative payee. Nor is the beneficiary given an opportunity to meet with SSA face-to-face before a representative payee decision is implemented. While the present procedures appear to satisfy constitutional minima, considerations of efficiency, fairness and appearance of fairness suggest certain modifications to these procedures

2. *Conference recommendations.* The Conference recommends several changes in the process, that, consistent with its other recommendations involving the Social Security program, encourage increased procedural safeguards at the beginning of the process in order to maximize correct decisions in the early stages and lessen the need for additional proceedings.[10] The Conference recommends that SSA notify a beneficiary as soon as the threshold for initiating action, discussed above, is met, offering the beneficiary an opportunity to have an informal face-to-face interview with an SSA claims representative. To the extent practicable, the notice (and all other notices) should be designed to be understandable to the beneficiary, taking into consideration information already in the file (e.g., what language the beneficiary understands).[11] The notice should also inform the beneficiary that appointment of a representative payee is being considered, describe the standard for and basic reason(s) why it is being considered, ask for all relevant information concerning the need for and selection of a representative payee, and ask the beneficiary to suggest a possible candidate. SSA should also notify the beneficiary of any person(s) it knows to be under consideration as a representative payee.

If, after completing its investigation, SSA decides to appoint a representative payee, it should notify the beneficiary of this determination, informing him or her of the right to review the evidence and appeal.[12] The determination then would be implemented, after which appeal to an ALJ and the Appeals Council would be available, as it is now. These procedures would eliminate the current opportunity for "reconsideration" that is provided after implementation but before the ALJ hearing.

The rationale for these recommended procedures is that a beneficiary should have notice and the opportunity to respond concerning his or her alleged inability to manage benefits before the SSA has made a de facto determination that a representative payee is required and who that payee should be. The ability to manage benefits is not always strictly a medical determination; it may well involve consideration of observed behavior. Thus, it is likely that a decisionmaker who has had an opportunity to see and talk with the beneficiary will often make a more accurate determination of the need for a representative payee.[13] The Conference believes that, as in the disability adjudication itself, procedures that encourage as complete a record as early in the process as possible offer significant advantages that far outweigh any short-term costs occasioned by adding an earlier notice and opportunity for a face-to-face meeting. Not only will early notice to beneficiaries and an opportunity for personal contact with SSA allow beneficiaries to provide any relevant information that they have at a predecisional level, it may also give them more confidence in the process, thus resulting in fewer appeals at later stages. Moreover, as noted above, the opportunity for "reconsideration" that is currently provided after implementation but before the ALJ hearing would no longer be required.

Under current procedures, beneficiaries are permitted to have assistance, by attorneys or non-attorneys, in disputes over representative payee status. However, because of the lack of formal procedures until late in the process and, more important, the lack of an "award" out of which to pay attorneys, there has been little attorney or lay assistance involvement in this program. It would thus be especially useful for SSA to develop and provide beneficiaries with information about legal assistance and other relevant organizations that may be available in their areas.[14]

In situations where someone applies to replace a representative payee, both the payee and the beneficiary should be given notice of the possible replacement. Both should be given an opportunity to file comments and to meet informally with SSA officials. If the representative payee is replaced, the beneficiary (but not the payee) should have the right to appeal the determination.

Although a beneficiary in representative payee status may apply to have such status terminated, no procedure currently exists for reexamining the need for a representative payee on any periodic basis. Because there are certain types of beneficiaries for whom a representative payee is less likely to be needed permanently (e.g., stroke victims, persons with reactive depression), it is in the interests of both the agency and beneficiaries to reassess periodically the need for representative payees for such individuals. Thus, the Conference recommends that SSA attempt to determine which, if any, types of beneficiaries in representative payee status ought to have their status periodically reevaluated and provide a method for doing so.

C. *Misuse of funds and restitution*—1. *Current practice.* Currently, determinations by SSA that beneficiary funds have been misused are not appealable. This means that neither the beneficiary nor the representative payee may challenge such determinations. Moreover, SSA does not currently have an effective mechanism for requiring payees who misuse beneficiary funds to return such funds to beneficiaries.[15] SSA currently has only the options of referring cases to the Department of Justice for criminal prosecution or requesting the representative payee to return funds. Most cases are too small to warrant Justice Department action, and SSA has no authority to force a representative payee to pay restitution.

2. *Conference recommendations.* Beneficiaries should be permitted to appeal an administrative determination that their benefits have not been used properly.[16] Representative payees should also be permitted to appeal misuse determinations. Although they have no right to payee status, a determination that they have misused funds will be entered into a data bank, will prevent them from being appointed as a representative payee in the future, and may have other negative ramifications. These consequences suggest that more process may be due. ACUS recommends that a determination of whether representative payee misuse of beneficiary funds has occurred be considered an "initial determination," which triggers the right to reconsideration and, if necessary, a subsequent ALJ hearing.

The Administrative Conference also recommends that Congress authorize an administrative remedy that would allow SSA to (1) require representative payees who have misused beneficiary funds to pay restitution, and (2) impose civil monetary penalties on such payees. Such authority would

[7] 42 U.S.C. 405(j)(3).

[8] Such a rulemaking could address such issues as what type of information is needed to make decisions, how often it should be reported or collected, whether different requirements should apply to different types of payees, and what SSA will do with the information it obtains in terms of its internal use and public availability.

[9] Such evidence may include state adjudications of incompetence, a physician's opinion that a beneficiary is unable to manage benefits, or lay evidence to that effect.

[10] See, e.g., Recommendation No. 90-4, "The Social Security Disability Program Appeals Process: Supplementary Recommendation," 1 CFR 305.90-4

[11] The expectation is that there would be several form notices with the clearest practicable wording in different languages, normal and large type sizes, and perhaps braille.

[12] OBRA amendments require such notice. See 42 U.S.C. 405(j)(2)(E); 1631(a)(2)(B)(x)-(xii).

[13] The Administrative Conference has recommended that face-to-face meetings be available in the context of medical disability determinations. Recommendation 89-10, "Improved Use of Medical Personnel in Social Security Disability Determinations," 1 CFR 305.89-10.

[14] The Conference has encouraged the use of nonlawyers in agency proceedings. See Recommendation 86-1, "Nonlawyer Assistance and Representation," 1 CFR 305.86-1.

[15] In cases where SSA has been negligent in investigating or monitoring representative payees, SSA must make restitution to the beneficiary. OBRA 5103(c).

[16] Beneficiaries do have the right to use state court remedies.

enable SSA to address the problem without burdening the courts.[17]

The OBRA amendments made clear that, where SSA's negligent failure to investigate or monitor a representative payee results in misuse of benefits, SSA must make restitution to the beneficiary for any such benefits, and then may seek repayment from the payee.[18] The negative impact on a beneficiary caused by misuse of his or her benefits, however, is independent of whether any SSA negligence was involved. Congress should authorize research on the scope, causes and effects of representative payee misuse of benefits, and methods to ease the resulting burden on beneficiaries, including the use of loss underwriting arrangements.

D. *Other issues.* When this study was undertaken, the issue of SSA's need to investigate representative payees before their appointment was of major concern. The recent OBRA amendments, however, require SSA to undertake certain investigations of potential representative payees. For the present, those steps would appear to be adequate, but, after sufficient time has passed, their effectiveness should be reevaluated.

In the past, where SSA has determined that a representative payee is required, but has not found a suitable candidate, SSA has suspended benefit payments until a payee could be found, at which time the withheld payments would be released to that payee. In the OBRA amendments, Congress authorized SSA to suspend payments for no more than 30 days, where direct payment would substantially harm the beneficiary. However, where the beneficiary is legally incompetent, under the age of 18, or a drug addict or alcoholic, there is no time limit on the suspension of benefits. The Conference believes that SSA should study the impacts of the indefinite suspension of benefits on beneficiaries in these groups, with the objective of making legislative recommendations to Congress if the study suggests that time limits should exist for all classes of beneficiaries or that suspension should not permitted at all.

[17] See Recommendation 73-6, "Civil Money Penalties as a Sanction," 1 CFR 305.73-6, Recommendation 79-3, "Agency Assessment and Mitigation of Civil Money Penalties," 1 CFR 305.79-3. The Program Fraud Civil Remedies Act, 31 U.S.C. 3801, authorizes the imposition of administrative civil penalties for false claims against the government and for certain types of false statements. However, it is not clear whether this Act would apply to representative payee actions, and in any even, it does not provide a remedy of restitution.

[18] OBRA 8105(c)(1), to be codified at 42 U.S.C. 405(j)(5).

In many cases, finding an appropriate representative payee is a significant problem. SSA should take steps to ease its burden by widening the pool of potential representative payees, and by periodically seeking input from beneficiaries. It would be useful for SSA to ask beneficiaries, at the time that they apply for benefits and periodically thereafter, to designate a person whom, at that time, they would prefer to serve as a representative payee, should one become necessary. While such a designation would not bind the agency, in many cases, the designation of someone whom the beneficiary thought was appropriate could make the selection process easier for SSA and make the beneficiary more comfortable with the representative payee. SSA also should develop lists of national, regional and local organizations that could serve as representative payees on a volunteer basis, and evaluate carefully the performance of these and compensated or reimbursed representative payees.[19]

Recommendation

1. The Social Security Administration (SSA) should develop and promulgate by regulations criteria for deciding the following issues:

(a) Whether appointment of a representative payee should be made;

(b) What evidence constitutes a threshold for initiating procedures that could result in appointment of a representative payee;

(c) Who is eligible for appointment as a representative payee and whether the existing priorities among categories of payees should be modified, including which payee should be selected when there are competing payee applicants from the same category of payee; and

(d) How payee performance should be monitored and evaluated.

2. SSA should amend its procedures for appointing representative payees for beneficiaries[20] aged 15 and above as follows:

[19] Congress has authorized the use of reimbursed representative payees on a very limited basis. OBRA of 1990, Pub.L. 101-508, sec. 8105(a)(3).

[20] The term "beneficiary" as used in this recommendation refers to those receiving benefits under both Title II (old age survivors and disability benefits) and Title XVI (supplemental security income payments) of the Social Security Act. Those receiving

Continued

(a) At such time as the threshold described in ¶1(a)(ii) is met, SSA should send a notice to the beneficiary that, to the extent practicable, is in language designed to be understandable to the beneficiary. This notice should contain the following information:

(i) That representative payee status is being considered;

(ii) A description of the standard for appointment of representative payee;

(iii) A request that the beneficiary provide all information relevant to the need for and selection of a payee;

(iv) An offer for the beneficiary to meet in an informal face-to-face interview with an SSA representative;

(v) The names of any person(s) known by the agency to be under consideration as a representative payee, and a request for suggestions for possible representative payees, should one be determined necessary; and

(vi) A statement that the beneficiary may be assisted by an attorney or other person, and a list of legal aid and other relevant resources available in the area.

(b) If, after completion of the above procedures, a determination is made to appoint a representative payee, the beneficiary should be notified of the basis for that determination, the name of the payee, and the beneficiary's appeal rights. These should include the right to an administrative law judge hearing and review by the Appeals Council, but the currently provided "reconsideration" stage that precedes the ALJ hearing could be eliminated upon implementation of this recommendation.

(c) Direct payment should continue to the beneficiary until a representative payee appointment is effective.

3. Where a person applies to replace an existing representative payee, SSA should give notice to the beneficiary and to the existing payee. The notice to the beneficiary and to the payee should offer them the opportunity to meet in an informal face-to-face interview with an SSA official and to provide any relevant information, in writing or orally. If the existing payee is replaced, the beneficiary should be notified of the replacement and of his or her right to an ALJ hearing on the decision and review by the Appeals Council.

4. SSA should attempt to determine which, if any, type of beneficiaries in representative payee status are most likely to regain their ability to manage or direct the management of their own benefits, and provide a method for periodic reevaluations of their need for a representative payee.

5. SSA should amend its regulations to provide that a decision on whether beneficiary funds have been misused by representative payees should be considered an "initial determination" appealable by either the beneficiary or the representative payee.

6. SSA should take the following steps to facilitate the search for approprate representative payees:

(a) At the time of application for benefits and periodically thereafter, request beneficiaries to identify their current choice of a representative payee who could be considered for the position, after appropriate investigation, in the event that one may be required in the future.

(b) Identify and use national, regional and local organizations that offer representative payee services on a volunteer basis and evaluate their performance in light of other representative payees.

(c) Evaluate the need for further use of organizations that serve as representative payees on a reimbursed or compensated basis.

(d) To the extent possible, make referrals to social welfare agencies or take other appropriate action to ensure that beneficiaries for whom representative payees are not available are not harmed by the absence of the social security benefits.

7. Congress should authorize SSA to use administrative adjudications to require representative payees who have misused beneficiary funds to pay restitution and to impose civil monetary penalties on such payees.

8. Congress should authorize research on the scope, causes and effects of representative payee misuse of benefits, and methods to ease the resulting burden on beneficiaries, including

benefits under this latter program are technically referred to as "recipients."

the use of loss underwriting arrangements.

9. SSA should develop data and study the effect on beneficiaries of suspending benefits when a representative payee is not available, with the objective of making recommendations on whether there should be time limits on suspension of payments for all categories of beneficiaries or whether suspensions should not be permitted at all.

[56 FR 33847, July 24, 1991]

§ 305.91-4 The National Vaccine Injury Compensation Program (Recommendation No. 91-4).

The National Vaccine Injury Compensation Program (the Program), sections 2110 *et seq.* of the Public Health Service Act, codified at 42 U.S.C. 300aa-10 *et seq.*, is a federal compensation system for permanent injuries and deaths resulting from vaccines to prevent seven infectious diseases of childhood (diphtheria, tetanus, whooping cough, measles, mumps, rubella, and polio). State laws generally require that children be immunized against such diseases for school entry.

The Program, which became effective October 1, 1988, is unique among federal benefit programs in its organizational structure and decisionmaking processes. It was intended to provide an alternative to the tort system for dealing with claims of vaccine-related injury, awarding compensation quickly, fairly, and efficiently. It was also intended to contribute to improving immunization rates, stabilizing the supply and price of vaccines, encouraging new and improved vaccines, and reducing the burden and uncertainty of litigation.

Decisionmaking authority is vested in the United States Claims Court. Claimants submit petitions for compensation to the Claims Court, and bear the burden of proving both entitlement and the losses and expenses to be compensated. The Secretary of Health and Human Services (HHS) is designated as respondent. The National Vaccine Injury Compensation Program Office in HHS (the Program Office) acts on behalf of the Secretary and may oppose compensation in individual cases. The vaccine manufacturer and whoever administered the vaccine are not involved as a party to the proceedings.

Two procedural innovations in the Program are especially noteworthy. First, determinations of eligibility and the amounts of compensation are made by special masters employed by the Claims Court. Under current procedures, the special master issues a judgment that is final unless review by a Claims Court judge is requested by either claimant or respondent. Further review is available in the United States Court of Appeals for the Federal Circuit.

Second, the Act contains a Vaccine Injury Table, which defines the injuries compensable under the Program. This was a policy decision by Congress, intended to avoid controversy over what disabilities were in fact caused by vaccines and to expedite decisions on claims by eliminating difficult, time-consuming disputes over causation in individual cases.[1] Nevertheless, disputes over whether particular injuries qualify for compensation have sometimes proved time-consuming, even though the Table is accompanied by "Qualifications and Aids to Interpretation." Moreover, in cases of injury, determining the amount of compensation can be difficult and time-consuming because of the need to take into account the net present value of actual unreimbursable expenses for medical, rehabilitative, and custodial care, actual and anticipated lost earnings, and actual and projected pain and suffering. Paragraphs 2, 3, and 4 address these issues by suggesting that Congress consider whether further clarification would be appropriate, and by recommending development of guidelines that may be used by the Claims Court and the parties. Paragraph 5 suggests study of ways to minimize transaction costs in administering awards under the Program.

The Department of Justice has recently taken steps to speed the processing of vaccine cases by increasing the Assistant Attorney General's settlement authority and modifying its settlement review and approval procedures.[2] Paragraph 6 encourages continued review of the appropriate level of such authority.

No one administrative agency is charged with the duty of interpreting the enabling legislation or issuing general regulations. The Advisory Commission on Childhood Vaccines is empowered to advise the Secretary of HHS on Program implementation. The Secretary may revise the Vaccine Injury Table, but has no authority to impose decisionmaking rules on the United States Claims Court. The Secretary was also required to develop and disseminate vaccine information materials, including a summary of the availability of the Program, not later than December 22, 1988.[3]

[1] The Act also allows for compensation if a petitioner can prove that an injury was actually caused by a covered vaccine, even if the specific injury is not listed in the Table.

[2] See 56 FR 6023 (March 4, 1991).

[3] A proposal was published at 54 FR 9180 (March 3, 1989), but the final version has not been published as of the date of this recommendation.

Claimants may seek compensation under the Program regardless of when the injury occurred. However, the starting date of the Program, October 1, 1988, serves as a line of demarcation between two somewhat different sets of rules and remedies. Claims based on immunizations prior to that date—"retrospective cases"—may not have received an award based on a judgment or settlement in a civil action. Awards in retrospective cases are paid out of a limited fund specially authorized by Congress.

For injuries arising from immunizations on or after October 1, 1988—"prospective cases"—no civil action may be filed unless the claimant has filed a claim under the Program and received and rejected a determination under it. For such cases, the Program is a "first resort," but not an exclusive source of compensation. Awards for prospective cases are paid from the Vaccine Injury Compensation Trust Fund supported by a tax on covered vaccine sales. The Act tolls the statute of limitations governing the civil action until a final judgment is issued on the petition. This tolling provision was intended to preserve a petitioner's right to commence a civil action after the petitioner has exhausted the remedies under the Act. However, because the petitioner has 60 days to accept or reject a final judgment by the Claims Court or the Court of Appeals, the immediate end to the tolling upon final judgment might operate to extinguish an unwary petitioner's right to commence a civil action. Paragraph 7 would remedy this anomaly.

Under the Act, as amended, a final deadline of January 31, 1991, was set for filing claims in retrospective cases. More than 3000 cases were filed in the 5 months preceding this deadline, the vast majority of them retrospective. The large number of filings during this period has created an unusual burden on the Program that can be expected to dissipate in the next few years, as a more regular pattern of filing claims develops. However, a special response, as suggested in paragraph 8, is warranted to ease the temporary burden of deciding these petitions. Measures suggested include a temporary increase in staffing, with funding to support the additional positions.[4]

[4] Congress should consider the effects on the Program if money in the Vaccine Injury Compensation Trust Fund is used for this purpose. Currently, section 9601(r) of the Omnibus Budget Reconciliation Act of 1989, Pub. Law No. 101-239, 103 Stat. 2203, authorizes separate appropriations of funds to HHS, Justice and the Claims Court (for FY 1990 and 1991) from the Trust Fund.

Paragraph 9 is intended to address the possibility that there will be sufficient funding due to the substantial number of retrospective cases that have been filed; under the statute the Program would cease to be in effect if there are insufficient funds to pay all of the claims payable for 180 days.

The Claims Court has used teleconferencing successfully in connection with the Program. Congress may find it useful to study this experience and to consider the possible use of the technique in other proceedings.

Finally, we note that section 2117 of the Act grants the Trust Fund the right of subrogation for compensation paid under the Program. The Departments of Health and Human Services and Justice should continue to be alert to appropriate opportunities to pursue this course.

Recommendation

1. The National Vaccine Injury Compensation Program Office in the Department of Health and Human Services, in consultation with the Advisory Commission on Childhood Vaccines, should continue to explore additional effective ways and take appropriate steps to disseminate information nationally about the Program, including eligibility and documentation requirements and filing deadlines for petitions, to ensure that affected persons are aware of the available legal remedies and to help them identify necessary supporting information.

2. To simplify the process of determining eligibility, Congress should examine whether further clarification is needed of the "Qualifications and Aids to Interpretation" applicable to the Vaccine Injury Table, which are set forth in section 2114(b) of the Act to explain the symptoms and conditions to be considered evidence of an injury described in the Table.[5]

3. The Advisory Commission on Childhood Vaccines should develop uniform guidelines, such as discount rates for the value of medical and other services to be purchased in future years, for calculating the net present value of specific elements of

[5] Congress may also wish to consider any relevant information from the studies performed by the Institute of Medicine of the National Academy of Sciences pursuant to Pub. L. 99-660, 100 Stat. 3779, 312,313.

compensation to be awarded to petitioners. Such guidelines may be used to compute the amount of awards promptly and consistently in similar cases. The guidelines should be reviewed at least annually to ensure that they remain consistent with reasonable estimates of future economic performance.

4. The Advisory Commission on Childhood Vaccines should also consider developing guidelines for the total amount of compensation payable and, where appropriate, for individual elements of compensation, in light of evolving case law and experience with the alternative dispute resolution process used by the Claims Court. The guidelines should provide for appropriate variations on the basis of age, severity of injury, intensity of services, and other relevant factors. The guidelines should present a range of values in each category, with flexible ceilings and floors, to accommodate special circumstances.

5. The Department of Health and Human Services and the Advisory Commission on Childhood Vaccines should study the current use of brokers to provide structured settlements, and should explore alternatives that will decrease transaction costs that result in reducing the funds available for awards to plaintiffs.

6. The Department of Justice should continue to examine the appropriate level of approval authority and dollar limit for settling vaccine injury cases, taking into account the magnitude of awards actually made under the Program, to reduce delay in obtaining final approvals.

7. Congress should amend section 2116(c) of the Act to stay the statute of limitations governing civil actions for personal injuries arising out of a vaccination covered by the Act until the date that the petitioner files an election, or is deemed to file an election, pursuant to section 2121 of the Act, accepting or refusing to accept the judgment.

8. Congress should take the following steps to reduce the burdens placed upon the Program by large fluctuations in the numbers of petitions filed:

(a) Congress should delete section 2121(b)(2) of the Act, as added by the Vaccine and Immunization Amendments of 1990, which withdraws jurisdiction over any petition that is not decided within the time required by the Act.

(b) Congress should amend section 2112(d)(3) of the Act, as amended by the Vaccine and Immunization Amendments of 1990, to permit the chief special master to extend the time for deciding petitions filed in retrospective cases for up to 2 years, in addition to the 240-day time limit plus all other extensions and suspensions currently permitted, when the chief special master determines that the number of filings and resulting work load require such action in the interest of justice.

(c) Congress should amend section 2112(c)(1) of the Act to increase substantially the authorized maximum number of special masters to handle the temporary burden of decisionmaking in retrospective cases. Congress should also authorize additional funds for a limited time period to support these positions, as well as increased staffing needed within the Program Office and the Department of Justice.

9. Congress should address the potential consequences if there were to be insufficient funding for the Program, in view of section 323(b) of Public Law 99-660, 100 Stat. 3784, which provides that the Program shall cease to be in effect if there are insufficient funds to pay all of the claims payable for 180 days.

10. Congress should extend the January 1, 1992 deadline for the Secretary of Health and Human Services to report the results of the evaluation of the Program required by section 6601(t) of the Omnibus Budget Reconciliation Act of 1989, Public Law No. 101-239, 103 Stat. 2293, until the temporary burden of retrospective cases in substantially reduced, because inclusion of information with respect to these cases is essential to a useful evaluation of the Program.

[56 FR 33850, July 24, 1991]

§ 305.91-5 Facilitating the Use of Rulemaking by the National Labor Relations Board (Recommendation No. 91-5).

The National Labor Relations Board (the Board) has formulated policy almost exclusively through the process of administrative adjudication despite having been granted both rulemaking and adjudicatory power in its statutory charter more than half a century ago. Even as rulemaking eclipsed adjudication as the preferred method of policymaking among major federal agencies, the Board steadfastly relied upon the quasi-judicial approach.

The appropriateness of agency discretion to choose between rulemaking and adjudication to determine policy has been widely acknowledged. In the last several decades, however, the use of rulemaking in major federal agencies has grown and a body of commentary and judicial opinion has encouraged and approved this trend. Agency power to use rulemaking authority to resolve by general principle issues that recur in adjudicatory hearings has been broadly asserted and approved. Gains in administrative efficiency through the use of rules have been frequently seen as outweighing the benefits of incremental policymaking through case-by-case consideration. Controversy, then, has centered on the Board's insistence on adjudication as virtually the only means for the development of policy and on the practical implications this has had for the Board's accomplishment of its regulatory mission.

The type of decisionmaking engaged in by the Board has implications for the type of data gathered by the Board and the openness of policymaking. Policy formulated in the context of case-by-case adjudication is based solely upon the argument and evidence that the parties to the proceeding offer. Rulemaking, however, offers broader opportunity for public participation and more meaningful notice to affected parties of potential changes in regulatory standards.

In addition, the choice between rulemaking and adjudication may affect the clarity and stability of the particular policy involved. In general, rulemaking provides greater clarity in the identification of a decision as a policy choice and requires that agency policy not be changed without a process focused on the policy choice. Where bright line rules are helpful and feasible, this may be an important consideration. Rulemaking also can resolve more efficiently important policy choices that would require a series of adjudications over a long period of time; thus, it can promote efficient enforcement of agency policy. Moreover, rulemaking enables the Board to set its policymaking agenda internally and directly with a view toward enforcement needs, rather than depending on the issues presented in cases that parties choose to press.

Despite its historical reluctance to formulate policy through rulemaking, the Board announced in 1987 its intention to initiate a rulemaking proceeding to determine bargaining units in health care facilities.[1] The Board's choice of this subject for its first major substantive rulemaking is inextricably intertwined with the agency's struggle with it for almost 18 years. The Board gave two rationales for its decision to use rulemaking. First, the Board believed that there would be value in obtaining from affected parties empirical data on the effect on labor relations of unit configuration in the health care industry. Second, the Board acknowledged the longstanding criticism of its reluctance to use rulemaking as a policymaking vehicle and concluded that rulemaking, though perhaps time consuming at the outset, might prove valuable over the long term in terms of the predictability and efficiency of determinations of viable bargaining units in the health care industry.

While the notice-and-comment procedures of section 553 of the APA require only an opportunity for written comments on the proposed rule, the Board decided to hold four public hearings around the country to receive oral and writtem comments, and to permit limited cross-examination. The Board provided for greater public participation than was strictly required because it desired to assure affected persons that there would be the fullest opportunity to participate as the Board undertook a new method of policy formulation. In addition, the Board was concerned that without oral testimony and cross-examination, it would receive (through written comments) only the kind of legal arguments that it traditionally heard in adjudications. A final rule was adopted on April 21, 1989. Judicial review was sought by the American Hospital Association (on the grounds that the rule exceeded the Board's statutory authority, the Board was required by statute to make unit determinations on a case-by-case basis, and that the rule was arbitrary and capricious).[2]

[1] 52 FR 25,142 (1987).

[2] The U.S. District Court for the Northern District of Illinois found the rule unlawful and granted a permanent injunction against its enforcement. The U.S. Court of Appeals for the Seventh Circuit reversed the district court decision. The Supreme Court granted certiorari and issued an unanimous decision upholding the Board rule and recognizing the Board's broad rulemaking powers under 6 of the National Labor Relations Act. See 111 S. Ct. 639 (1991).

The Supreme Court ultimately upheld the rule.

The Conference has examined the Board's "experiment" with rulemaking. Putting aside the particular legal issues yet unresolved in the "test" case before the courts, it seems clear that the proceeding accomplished the major putative purposes of rulemaking. First, the Board accumulated and utilized an enormous volume of empirical data that had not been available to it in previous adjudications. Second, the process provided a degree of openness and broad-scale participation unmatched by traditional Board proceedings (even in those few adjudications where amici are invited to an oral argument). Third, the product of the rulemaking is a model of clarity as expression of policy in an area historically marked by excessive subtlety and complexity. Finally, the rule, if upheld, promises a degree of stability for a policy area that had been overwhelmed by change.

It cannot be said, however, that the Board's choice to use rulemaking represents a broad new commitment to formulating national labor policy by this means. This rulemaking was an exercise in pragmatism—a thorough, careful, and productive administrative response to a particular set of circumstances. Nevertheless, the rulemaking gives the Board experience upon which it can build. This recommendation, while recognizing that the Board will justifiably continue to make policy through adjudication, suggests steps to facilitate further rulemaking by the Board. These steps include publishing standard rulemaking procedures, identifying subjects that are appropriate for rulemaking, and amending the National Labor Relations Act to include a provision that (following previous Conference recommendations) specifies an appropriate procedure for judicial review of Board rules.

RECOMMENDATION

1. The National Labor Relations Board should supplement its practice of policymaking through case-by-case adjudication by continuing to use its general rulemaking authority in appropriate situations.

2. To facilitate the rulemaking process, the Board should take the following steps:

(a) Rulemaking Procedures

The Board should publish rulemaking procedures that conform to the informal rulemaking procedures of the Administrative Procedure Act. These procedures should not require oral hearings or other procedures in addition to notice and the opportunity for comment, as a general matter, although such additional procedures may be useful for particular rulemakings.[3]

(b) Identification of Subjects for Rulemaking

To assist the Board in identifying manageable and timely subjects for which rulemaking might be appropriate, it should consider, among others, the following factors:

(i) The need for submissions and information, including empirical data, beyond that normally available through adjudication.

(ii) The value of participation by affected persons beyond the parties likely to participate in adjudication, with particular attention to possible reliance on prior policy and the breadth of impact of a new policy.

(iii) The need to establish policy promptly in new areas of responsibility or for new enforcement initiatives.

(iv) The opportunity for stabilizing policy in the particular subject area.

(v) The likelihood that future litigation and enforcement costs may be lessened if a readily applicable rule is developed.

(vi) The need to achieve control over the subject and timing of policy review and development.

(c) Existing law

The Board should develop a policy to govern situations in which the subject of a proposed rule has already been the focus of consideration in prior adjudicatory proceedings. The Board should seek to anticipate enforcement issues that may arise during the pendency of the rulemaking and possible judicial review. During the pendency of a rulemaking, the Board and its independent General Counsel ordinarily should continue to act under its body of precedent, but they should be prepared to depart from precedent in individual cases where

[3] See ACUS Recommendation 76-3, "Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking." 1 CFR 305.76-3 (1990).

the application of such precedent would be unfair or inefficient.

3. Congress should amend the National Labor Relations Act to confine preenforcement review of final Board rules to a single proceeding. Review should be authorized in the appropriate court of appeals.[4] This authorization should include a reasonable time limit on the seeking of preenforcement review and preclude judicial review of rules at the enforcement state concerning issues relating to whether (a) the procedures employed in the rulemaking were adequate, or (b) there was adequate support for the rule in the administrative record.[5]

[56 FR 33851, July 24, 1991]

§ 305.91-6 Improving the Supervision of the Safety and Soundness of Government-Sponsored Enterprises (Recommendation No. 91-6).

The federal government has established and chartered numerous "government-sponsored enterprises" [1] (GSEs) to facilitate the flow of credit to certain categories of borrowers, such as homebuyers, farmers and students. GSEs do this by raising funds in the capital markets to make or purchase loans or by guaranteeing securities based on pools of loans. GSEs share many attributes of private companies: they are privately owned, sell stock, are generally profitmaking institutions, and are exempt from federal civil service, procurement and appropriations restrictions. However, they also share many characteristics of public institutions. They usually have some government-appointed directors on their boards; they have charters that preempt some state laws and exempt them from many taxes; and, for many of them, the federal Treasury is statutorily authorized to invest in stated amounts of their securities. Moreover, their obligations and mortgage-backed securities are implicitly (but not explicitly) guaranteed by the federal government, thus raising the value of these securities while creating at least some risk for the taxpayers by virtue of the implicit guarantees of almost one trillion dollars in the aggregate.

In July 1989, the Administrative Conference began a study of the structures and procedures employed by the government to oversee the safety and soundness of these institutions.[2] During the pendency of the study, numerous other legislative and executive branch studies of the operations of the GSEs have been completed.[3] The Conference has been informed by all of these studies in its consideration of this recommendation and it recognizes the desirability of the current examination of these institutions. In so saying, the Conference wishes to make clear that it implies no special concern about the financial condition of any of these entities—indeed, the studies concluded that they pose no imminent financial threat. But in the past some GSEs have encountered financial difficulties, and concerns have been raised about the capital adequacy of some GSEs and their possible vulnerability to economic downturns. Accordingly, it is prudent to ensure that adequate federal supervisory mechanisms are in place before, rather than after, they might be needed.

ISSUES OF SUPERVISORY AGENCY ORGANIZATION AND PROCEDURE

At present, three federal agencies are responsible for overseeing the major GSEs: The Farm Credit Administration (which supervises the Farm Credit System and the

[4] See ACUS Recommendation 75-3, "The Choice of Forum for Judicial Review of Administrative Action," 1 CFR 305.75-3 (1990).

[5] This is not meant to limit parties' ability, at the enforcement stage, to challenge a rule as arbitrary and capricious as applied. See ACUS Recommendation 83-7, "Judicial Review of Rules in Enforcement Proceedings," 1 CFR 305.82-7 (1990).

[1] A Government-sponsored enterprise is a privately owned, federally-chartered financial institution with nationwide scope and specialized lending powers that benefits from an implicit federal guarantee to enhance its ability to borrow money. See Stanton, *Administrative and Legal Aspects of Federal Supervision of Safety and Soundness of Government Sponsored Enterprises*, Report to the Administrative Conference (May 1991) at 3 (hereinafter, Stanton Report).

[2] Stanton Report, *supra* note 1.

[3] Congressional Budget Office, *Controlling the Risks of Government-Sponsored Enterprises* (April 1991); General Accounting Office, *Government-Sponsored Enterprises—The Government's Exposure to Risks*, (GAO/GCD—90-97) (August 1990); General Accounting Office, *Government-Sponsored Enterprises: A Framework for Limiting the Government's Exposure to Risks* (GAO/GCD—91-90, May 1991); Office of Management and Budget, *Budget of the United States Fiscal Year 1991*, Chapter VI, pp. 231-256; Treasury Department, *Report of the Secretary of the Treasury on Government-Sponsored Enterprises* (May 1990); Treasury Department *Report of the Secretary of the Treasury on Government-Sponsored Enterprises* (April 1991).

Federal Agricultural Mortgage Corporation (Farmer Mac)), the newly-created Federal Housing Finance Board (which oversees the Federal Home Loan Bank System), and the Department of Housing and Urban Development (which oversees the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac)). One major GSE, the Student Loan Marketing Association (Sallie Mae), has no overseer.

The general consensus among the various studies of GSEs is that additional oversight of GSE risk-taking and capital levels is needed. With respect to regulatory organization or procedure, the studies recognize the need for a better system of monitoring to ensure that the federal government obtains timely information on the risks undertaken by GSEs. They also urge that each GSE be subject to effective federal supervision, including appropriate enforcement authority, and generally recommend the primacy of safety and soundness regulation over program regulation. Indeed, the General Accounting Office has suggested the centralization of the financial supervision of all enterprises in a single (existing or new) agency.[4]

Although the Conference does not have an opinion on what would constitute the optimum structure,[5] it does feel strongly that however the regulatory authority is organized, the agency or agencies should be given adequate supervisory authority and enforcement tools to do the job. Several of the studies reference the bank regulatory model as a suitable starting point for designing an effective system of government oversight.[6] If the banking regulatory model were applied, some modifications would be appropriate. Most importantly, for those GSEs with low risk profiles, a less intrusive, more streamlined oversight process would be appropriate—including assessment of management quality and operations risk and use of computerized financial models to examine credit and interest rate risk. Because capital would be adequate and risks low, the supervisory agency would not become involved in management decisions of the GSE.

At least several of the GSEs would seem to be likely candidates for such streamlined oversight. As an institution's risk profile worsened, however, or if factors develop that prevent effective use of this process, then more intensive financial examination might be invoked. If an institution's risk profile worsened even further, then appropriate enforcement powers, including the authority to issue capital directives and cease-and-desist orders, would be available. Similarly, the supervisory agency would have authority to reorganize the affairs of a failing institution and thereby reduce the chance that losses might be compounded.

It would be helpful for the GSEs as well as the public to have a better sense of the applicable supervisory objectives and standards as they develop. Thus, the supervisory agencies should promulgate such guidelines through notice-and-comment rulemaking.

The Conference recognizes that GSEs are undergoing the study and scrutiny their importance warrants. This recommendation is an attempt to add a procedural, comparative framework to executive and legislative proposals for strengthening their oversight.

Recommendation

The Conference recommends that the following principles should apply to federal supervision of safety and soundness of government-sponsored enterprises (GSEs):

1. *Institutional capacity.* Each GSE should be supervised for safety and soundness by a federal agency. Any federal agency responsible for supervising safety and soundness of one or more GSEs should be funded so that it is capable of overseeing the activities of often large institutions involving great numbers of often complex transactions.

2. *Administrative authority and enforcement powers.* A federal agency responsible for supervising GSE safety and soundness should have the express authority to (a) Examine financial condition (including collecting such financial information as may be desirable) and risk-taking by the institution, (b) set and enforce effective risk-related and minimum capital requirements, (c) enforce necessary safety and soundness measures with cease-and-desist orders and other enforcement powers available to financial regulators, and (d) reorganize the affairs of a failing institution.

3. *Supervision.* A federal agency responsible for supervising GSE safety and soundness should obtain prompt and timely information and develop and maintain risk ratings of each GSE it supervises. Only if an institution's risk profile is significant should the agency extend its involvement to management issues, as necessary to protect the financial integrity of the GSE.

4. *Promulgation of guidelines.* A federal agency responsible for supervising GSE safety and soundness should, to the extent feasible, develop guidelines for invoking its supervisory and enforcement powers. These guidelines should be promulgated through notice-and-comment rulemaking.

[4] 1990 GAO report, *supra* note 2 at 107, and 1991 GAO report at 4, 47-57.

[5] The Conference wishes to emphasize that the GSEs studied are not fungible entities. Each has its own particular characteristics, and any regulatory scheme should be implemented with this in mind.

[6] See, *e.g.*, the 1990 GAO report, *supra* note 2 at 4, 104, and the 1991 Treasury report, *supra* note 2 at 10. Congress has already provided that the Farm Credit System is supervised by an agency with the institutional capabilities and range of administrative authority and enforcement powers available to bank regulators.

(55 FR 32852, July 24, 1991]

§ 305.91-7 Implementation of Farmer-Lender Mediation by the Farmers Home Administration (Recommendation No. 91-7).

The Farmers Home Administration ("FmHA") is charged with serving as a temporary source of supervised credit and technical support to help rural Americans improve their farming enterprises, housing conditions, and other business endeavors until they are able to qualify for private sector resources. During the 1980s, an economic downturn seriously affected the agricultural sector and led FmHA, as a lender of last resort, to increase its loan portfolio. As the decline continued, FmHA and other lenders began more frequently to exercise their rights to accelerate loans and foreclose. Several midwestern states' legislatures responded to these economic (and resultant social) conditions by creating mediation programs, some of which required financial institutions to mediate prior to foreclosure if the borrower opted to do so. FmHA generally declined to participate in these programs or to restructure loans in connection with mediations.

In 1988, Congress passed the Agricultural Credit Act, a broad attempt to deal with problems related to farm debt. Among other things, the Act sought to encourage lenders to restructure loans when doing so would be in the government's interest and would help keep the farmer on the farm. The Act also provided for matching funds from FmHA for state mediation programs that were certified to meet prescribed standards. It further required FmHA to participate in such state mediation programs, and to make "a reasonable effort" to contact creditors and encourage them to take part in a restructuring plan. In carrying out this last requirement, FmHA has provided that delinquent borrowers in all states will routinely be offered a chance to participate in a voluntary meeting of creditors, chaired either by a mediator or a "designated FmHA representative," and has contracted for mediation services in many states that lacked mediation programs.

FmHA has found this venture into mediation to be cost effective. FmHA's approach to mediation pursuant to the Act has been quite diverse, however. This is due in significant part to differences among the certified state programs, but also to the diversity of approaches among the mediation providers in non-certified states, variations in local conditions, dissimilarities in the attitudes of FmHA state directors towards mediation, and varying enthusiasm of other creditors, including some federal agencies. Given the size and diversity of the farm credit program and the speed with which the Act was implemented, this is hardly surprising. On the whole, the Act's mediation provisions appear to have begun to restore frayed communications between numerous farmers and lenders, assisted many farm families to avoid crises, and avoided foreclosure in a large number of cases. Still, administering these statutory provisions has not been free of problems.

In many cases, mediation has occurred too late to produce successful outcomes. The FmHA, at present, is unable to report accurately on the numbers of mediations conducted in either the certified or noncertified states. As stated above, FmHA has sometimes had difficulty in securing satisfactory participation of non-FmHA creditors, including many that are part of the Farm Credit System, and, in some areas, agencies such as the Federal Deposit Insurance Corporation, Internal Revenue Service, Resolution Trust Corporation, and Small Business Administration. Observers have raised concerns that borrowers in FmHA's loan guarantee programs—in which it guarantees loans made by banks—may not receive timely notice of mediation's availability.

Finally, the mediators used have taken strikingly divergent views of their responsibilities and authority. These might be categorized conveniently as "broad" and "narrow." In some areas—particularly states with certified mediation programs—many mediators have taken a "broad" approach and sought to uncover the parties' real interests and develop responsive options. Thus, they have tried to lower barriers to communication and to address issues, such as off-farm employment and intra-family or interpersonal questions, important to the resolution of difficulties between the farmer and lenders. In other regions, especially

some states where FmHA has contracted for mediation services, neutrals have typically taken a "narrow" approach; this emphasizes much shorter, more formulaic proceedings that focus almost exclusively on whether non-FmHA creditors will adjust their debts sufficiently to permit FmHA loan restructuring under its Debt and Loan Restructuring System computer program (DALR$). Resort to the latter approach to mediation may have been reinforced in some places by contracting procedures that emphasized low bids and by some FmHA state directors' narrow view of their mandates for restructuring under the Act. Each of these approaches has potential advantages and disadvantages and FmHA's openness to both is understandable, especially given that FmHA's resort to mediation in all but the certified states has been wholly voluntary. However, broader approaches are more likely to improve communication and assist the parties to develop diverse solutions that will meet their needs.

While FmHA's implementation of the Agricultural Credit Act's farmer-lender mediation provisions has been energetic and generally effective, the Conference recommends several steps to enhance the likelihood that mediation will be used, and used successfully, in future disputes.

RECOMMENDATION

1. FmHA should take steps to remedy problems associated with the inconsistencies between the broad and narrow approaches to mediation evidenced in farmer-lender mediation by fostering a better understanding of the potential of the broad model of mediation in both certified state mediation programs and FmHA contract mediation programs. To achieve that goal, the FmHA should:

(a) Modify FmHA rules for processing delinquent loans to the extent necessary to give FmHA representatives at farmer-lender mediations greater discretion with respect to loan restructuring and providing new loans. FmHA should advise its personnel, mediators, and others involved in farmer-lender mediation that the Debt and Loan Restructuring System (DALR$) computer program should not significantly limit the purposes of mediation. FmHA also should encourage its county offices to initiate mediation proceedings at an appropriately early stage in the processing of delinquent loans.

(b) Provide additional training, including videotapes, to FmHA and other personnel who will be connected with farmer-lender mediation processes. Training should include approaches to mediation and emphasize problem-solving negotiation skills.

2. FmHA should enhance its ability to manage and improve the farmer-lender mediation program by:

(a) Ensuring that certified state mediation programs make timely, uniform submissions concerning numbers and results of mediations.

(b) Improving the system by which FmHA collects information on mediations conducted through FmHA state offices in noncertified states.

(c) Supporting research dealing with the conduct and short- and long-term outcomes of farmer-lender mediations. This research should examine economic outcomes, the extent to which mediators follow different mediation approaches in practice, and the extent to which varying approaches, as practiced, result in different kinds of outcomes, levels of participation, or levels of satisfaction among the various participants.

3. FmHA should take appropriate measures to notify parties to guaranteed (as opposed to direct) loans of the availability of farmer-lender mediation, without however revealing the borrowers' identities without their consent.

4. FmHA and the Department of Agriculture should:

(a) Continue to encourage additional states to develop farmer-lender mediation programs that can qualify to receive matching funds.

(b) Encourage full participation in farmer-lender mediation by institutions of the Farm Credit System and all appropriate agencies of the Department.

(c) Take steps to encourage the continuing development of a diverse, capable cadre of available mediators, including the use of volunteers.

5. All federal agencies that may be involved in farm credit disputes, such as the Federal Deposit Insurance Corporation, the Internal Revenue Service, the Resolution Trust Corporation, and the Small Business Administration, should consider the overall advantages of broad participation in farmer-lender mediation.

[58 FR 67140, Dec. 30, 1991]

§ 305.91-8 Adjudication of Civil Penalties Under the Federal Aviation Act (Recommendation No. 91-8).

The Federal Aviation Administration is currently operating a demonstration civil penalty program under which the FAA may impose monetary penalties of up to $50,000 for violations of the Federal Aviation Act or its regulations. Under the program, the FAA prosecutes violations, proposing initial civil money penalties according to the discretion of the prosecuting FAA official. The persons on whom the penalties would be imposed, usually pilots, air carriers, mechanics, or airport operators, are entitled to an administrative hearing before an administrative law judge at the Department of Transportation, followed by the right to an administrative appeal to the administrator of the FAA. Judicial review is available in the federal courts of appeals.

Before the demonstration civil penalty program was enacted in 1987, the FAA could propose civil money penalties, but such penalties could be imposed only through a civil action brought in a United States District Court through Justice Department attorneys.

The Federal Aviation Act also provides that violations of the Act or the regulations may result in suspensions or revocations of certificates of pilots, mechanics or air carriers. These cases follow a different administrative path. While "certificate actions" begin with a prosecutorial decision made by an FAA official, exercising the right to a hearing takes the case to the National Transportation Safety Board, an independent agency. If a hearing is requested, an NTSB ALJ holds the hearing, with a right to appeal to the Board. Judicial review is available in the federal courts of appeals.

In 1990, the Administrative Conference of the United States, in Recommendation 90-1, "Civil Money Penalties for Federal Aviation Violations," recommended that the FAA administrative civil money penalty program be made permanent, that the $50,000 ceiling on administratively-imposed penalties be eliminated, and that the responsibility for adjudication be studied further. In response to the Conference's Recommendation 90-1, Congress extended the program for an additional two years. In that legislation, Public Law 101-370, Congress expressly asked the Conference to study and make a recommendation on the issue of "whether the authority to adjudicate administrative complaints under the Federal Aviation Act of 1958 should remain with the Department of Transportation, should be transferred to the NTSB, or should be otherwise modified."

Discussion

Preliminarily, the Conference reiterates its previous recommendation that the civil money penalty program be made permanent and that the $50,000 ceiling on administratively-imposed penalties be removed.

The issues relating to how civil penalties should be adjudicated in the context of this program are controversial. There is no objectively correct resolution; nor do administrative law principles clearly lead to any single solution. Among the various (and not easily resolvable) concerns that arise in this context are:

—The regulated community has concerns about the fairness of FAA's administration of the civil money penalty program, resulting from the fact that appeals of civil penalty cases are heard by the FAA Administrator. The consultant's study, however, found no evidence of actual unfairness or mishandling of cases resulting from commingling prosecutorial and judging functions under the present system.

—The FAA is distinctive in its exercise of operational responsibility for the air traffic control system, which makes it a co-actor with persons or entities subject to its regulatory jurisdiction. The consultant's report noted a continuing perception that there is a conflict of interest between FAA as final adjudicator and its role as overseer of the air traffic control system.

—There is concern that cases based on similar facts being heard in two different agencies could have the potential for inconsistent standards and lead to forum shopping between the FAA civil money penalty program and the NTSB certificate revocation remedy.

—The FAA Administrator, as the Secretary of Transportation's delegate, is the chief policy maker in the area of air safety, and is charged with the responsibility for the safety of the national aviation system. The Administrator therefore has a legitimate interest in having some control over a related enforcement program.

—The NTSB, in its role of recommending air safety improvements, benefits from its review of enforcement cases, as an opportunity to learn about potential safety problems in a context other than an accident investigation.

The best resolution of the controversies associated with civil penalty adjudication authority would be a consensual one, satisfying the legitimate concerns of the FAA and the reasonable needs of all of the affected interests.[1] The Conference encourages the FAA Administrator and the NTSB Chairman to convene and jointly host a conference with representatives of affected public and private interests to consider negotiating solutions for allocating adjudicatory authority over the civil money penalty and certificate revocation and suspension programs. The Administrative Conference is available to assist as appropriate. If such a mutually agreeable resolution is developed in the future, the Conference's Committee on Adjudication is available to provide comments to Congress on the proposed solution.

Because the success of an aviation safety program ultimately rests on voluntary compliance, improving the relationships among the regulated communities, public representatives and the government agencies is crucial. Representatives of the FAA and NTSB indicate that the relationship between the two agencies is a cooperative one. To further this cooperative spirit, the Conference recommends that, in addition to meeting to discuss the specific issues of allocating adjudicatory authority for the civil money penalty and certificate programs, the FAA and NTSB should encourage long-term proposals for ways to enhance compliance and enforcement of the Act, through discussions and communication with the regulated community and the traveling public.

In the absence of a consensual resolution on the issue of where adjudicatory authority for FAA enforcement cases should reside, the Conference recommends that adjudicatory authority over a small percentage of selected civil money penalty cases (those involving pilots and flight engineers) be transferred to the NTSB. This recommended solution would address several problems. It would locate both civil money penalty and certificate authority for these cases in one forum, eliminating the potential for forum shopping as to pilots and flight engineers. It would eliminate perceived conflicts of interest as to those classes of cases in which conflict is most likely between FAA employees with operational responsibility for air traffic control and persons subject to civil penalty authority (i.e., pilots and flight engineers). While the unitary enforcement (rather than the split enforcement) model is used in almost all administrative civil money penalty programs, the FAA's distinctive role in administering the air traffic control system is a sufficiently special characteristic to provide plausible justification for recommending this limited expansion of the existing split-enforcement model in this context.

This recommendation to use a split-enforcement model in this particular situation is not to be read as a general endorsement of this model for other government programs. Rather, it reflects the specific circumstances involved here, including the fact that the split-enforcement model is already in use in certificate cases, and that the FAA has a significant operational role in air traffic control that may result in potential conflicts of interest in cases involving pilots or flight engineers.

Removing pilot and flight engineer cases from the FAA also conflicts the least with comprenensive exercise of FAA safety policy authority, given the individual character of most violations involved in these cases. Conversely, retaining civil penalty authority at the FAA for nonpilot and nonengineer cases, which constitute more than 75 percent of the civil money penalty cases, presents less potential for conflict between respondent interests and the FAA's air traffic control responsibility. There is also greater likelihood that the problems exposed by civil penalty actions in air carrier, airport security and hazardous materials cases are more systemic in nature.

For those cases within the Board's authority, the Conference is making additional recommendations. First, because a split-enforcement model involves one agency ruling on the actions of another, the Act should address the issue of the appropriate level of deference that should be given in enforcement cases to the FAA's interpretations of its rules. The Conference recommends that validly adopted FAA interpretations of FAA regulations be deferred to, unless such interpretations are arbitrary, capricious or not in accordance with law. This recommendation is consistent with Recommendation 88-4, "The Split-Enforcement Model for Agency Enforcement." See also *Martin v. Occupational Safety and Health Review Commission*, — U.S. —; 111 S. Ct. 1171 (1991). This does not, however, mean that NTSB should simply defer to litigation positions of the FAA prosecutor. Id. at 1179. In addition, the FAA should be given the authority to appeal to the Board from adverse NTSB decisions at the administrative law judge level and to seek judicial review in the appropriate court of appeals from decisions of the Board. The FAA is still the chief policy making agency in the area of aviation safety, and should have the ability to challenge decisions it believes are inconsistent with those policies.

The merger of sanction authority over pilots and flight engineers in one forum should provide the NTSB with increased flexibility to select the appropriate sanction from the range of available sanctions. However, such flexibility must operate within the bounds of FAA's validly adopted standards and criteria for sanctions. Such criteria may, as with all rules, be adopted through the appropriate rule-making procedures or through adjudications.[2] In addition, a potential respondent must be on notice of the range of potential sanctions for which he or she potentially would be liable.

The Conference also encourages greater use of a variety of dispute resolution techniques in individual cases. The Administrative Dispute Resolution Act, Public Law No. 101-552, encourages agencies to use such techniques where appropriate. The growing body of alternative dispute resolution literature supports the view that efficiency gains for everyone are available from flexible means of resolving disputes. Such flexibility might be useful in a variety of contexts in civil money penalty and certificate cases. The Conference specifically recommends consideration of the utility of settlement judge procedures.[3]

Recommendation

1. Congress should make permanent the civil money penalty program for violations of the Federal Aviation Act (the Act) and eliminate the $50,000 ceiling on administratively-imposed penalties.[4]

2. The question of where adjudicatory authority over certification and civil money penalty proceedings under the Act should be placed raises complicated policy as well as legal issues. Principles of administrative law provide no single clear answer. The Federal Aviation Administration Administrator and the Chairman of the National Transportation Safety Board jointly should convene a conference with representatives of affected interests to consider possible consensual arrangements for allocating adjudicatory authority over the civil money penalty and certificate suspension and revocation programs. The FAA and the NTSB should also encourage long-term proposals for enhancing compli-

[1] The Conference held a public hearing on Wednesday, June 19, 1991, to provide interested parties with the opportunity to present their views on these issues. 56 FR 22893 (May 16, 1991) (notice of Conference Committee on Adjudication public hearing). After the Conference consultant released his draft report, he convened an informal meeting with affected parties to explore the feasibility of a solution to the controversy that accommodates the reasonable needs of all of the affected interests. Participants in that meeting agreed that informal consultation was desirable and the consultant met further with representatives of the affected interests to discuss alternatives. While no overall resolution was agreed to, the willingness to seek common ground was enhanced.

[2] See SEC v. Chenery, 332 U.S. 194 (1947); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

[3] See Conference Recommendations 88-8, "Agency Use of Settlement Judges," 1 CFR 305.88-8 (1991).

[4] See ACUS Recommendation 90-1, "Civil Money Penalties for Federal Aviation Safety Violations," 1 CFR 305.90-1 (1991).

ance and enforcement of the Act, and for changing the procedures to achieve the Act's objectives.

3. In the absence of consensus by the affected agencies and interests as to where the Act's certification and civil money penalty proceedings should be adjudicated, Congress should amend the Act consistent with the following recommendations:

A. Authority for adjudicating civil money penalties against pilots and flight engineers should be transferred from the FAA to the NTSB, with all other civil penalty adjudication authority remaining at the FAA. This recommendation is contingent on Congress' transfer of necessary budgetary resources for this purpose to the NTSB.

B. The Act should provide that, for purposes of review of FAA enforcement actions, courts and the NTSB should defer to validly adopted FAA interpretations of its statutes and regulations, unless it is shown that such interpretations are arbitrary, capricious, or otherwise not in accordance with the law.[4]

C. The FAA should be given the right to appeal an NTSB administrative law judge decision to the Board, and to seek judicial review of a decision of the Board in the appropriate court of appeals.

This recommendation is directed only to this specific program and the special circumstances involved, and should not be read as implying any views as to the merits, generally, of the "split enforcement" model as compared to the "unitary agency" model of adjudication in other government programs.

4. In an NTSB adjudication under the Act, the range of possible sanctions for violations of the Act should include certificate revocation, certificate suspension and/or a monetary penalty, as found by the NTSB to be appropriate and consistent with rules validly adopted by the FAA with respect to applicable standards or criteria for the imposition of sanctions. Notice of possible sanctions, as well as those proposed by the FAA in a particular enforcement matter, should be provided to the respondent upon the institution of the proceeding. The selected sanction(s) should be set forth in the ALJ's initial or recommended decision, together with the bases therefor, including a reference to any applicable FAA standard or criterion for the imposition of sanctions.

5. NTSB and FAA adjudicators, as well as FAA prosecutors, should place greater emphasis on alternative dispute resolution in individual cases. In particular, the FAA and NTSB, to the extent each has adjudicatory responsibility, should consider Recommendation 88-5, "Agency Use of Settlement Judges," and make greater use of the techniques described there.

[55 FR 67141, Dec. 30, 1991]

§ 305.91-9 Specialized Review of Administrative Action (Recommendation No. 91-9).

In recent years, there has been much talk of a crisis in the federal courts. In response, Congress empaneled the Federal Courts Study Committee, charging it with responsibility to examine the problems facing the courts and to develop a long-range plan for addressing them. The Committee issued its report in April 1990, touching on many different aspects of the problem, among them those related to judicial review of administrative action.

The Federal Courts Study Committee specifically rejected a proposal to divert all administrative appeals to a specialized court within the Article III judiciary. The Committee recognized that administrative review cases do not form a major percentage of the caseload of the federal courts of appeals. Yet assigning jurisdiction to a specialized court may provide more efficient or effective review for some types of administrative cases. It, therefore, proposed diversion of some cases now in the Article III courts to other adjudicatory bodies, in particular, the Committee recommended creation of an Article I court to review Social Security disability claims and perhaps, eventually, other administrative benefit claims.

Finding the optimal structure for review of administrative cases involves a complex balancing of various factors: the need for uniform law versus the benefits of "percolation" in the decentralized circuits; the value of expert decisionmakers versus the broader perspective of generalists; the efficiency of specialization versus the risk of bias that specialization entails. And the calculation can vary in the context of different administrative programs, which differ in the volume, complexity, and level of technical content of the caseloads they generate. For these reasons, the Conference, like the Federal Courts Study Committee, opposes allocating review of all administrative cases to a single specialized court, whether inside or outside the Article III system.

Should Congress consider the creation of specialized courts for review of particular administrative programs, this recommendation sets forth criteria for Congress to take into account in determining when to create specialized courts and how to structure them to enhance their effectiveness. Certain characteristics held in common by many federal regulatory and benefit programs raise particular problems within the existing system of judicial review. Uniformity in decisionmaking can be especially important in the context of administrative action under national programs. The agencies themselves are structured hierarchically, so as to speak with a single voice in applying law and policy to individual circumstances. But the federal court system that reviews these agency programs is decentralized, and different circuits often reach different outcomes on the same issue. The Supreme Court's capacity to resolve these conflicts is severely limited by the modest number of administrative law cases it considers each year. As a result, agencies often face the choice of refusing to acquiesce in decisions below the Supreme Court level, abandoning policy positions they believe to be correct, or implementing programs differently in different regions (and, consequently, treating similarly situated individuals or entities differently and encouraging forum shopping).

Another special aspect shared by some federal regulatory programs is that they involve complex technical or scientific issues, which may present great challenges to reviewing courts without special expertise in the relevant areas. Cases on review of agency rulemaking and ratemaking actions, in particular, frequently involve lengthy administrative records filled with conflicting material on technical issues of fact and policy; the judges must devote extra time to poring over these records and to producing the longer opinions these cases often engender.

Other federal programs (such as individual benefit programs) produce masses of litigation involving primarily questions of specific fact. Resolution of these issues may be an inefficient allocation of the time of the federal courts.

While review by specialized courts may offer a solution for these problems, specialization brings dangers as well. One premise of the national system of courts of general jurisdiction is that sound decisionmaking results from exposure to a wide range of problems and issues; adjudicative bodies with limited subject matter jurisdiction may lack this generalist perspective. Specialization can also produce bias problems of two kinds: the appointments process may be distorted as interest group pressures lead to the selection and confirmation of nominees for their views on specific issues; in addition, the standard of review may be distorted, either because expertise leads the court to substitute its judgment for that of the agency or because familiarity with a particular agency leads the court to accept the agency's positions too readily. Public perception that a court is biased can reduce its effectiveness even when actual bias is not present. Finally, a specialized court may suffer reduced prestige if its repetitive subject matter attracts lower caliber judges.

The recommendations that follow offer guidance to Congress on the considerations it should take into account when it deliberates about whether to assign responsibility for review to a specialized court; they should be read as a whole. Thus, for example, the criteria in recommendation 2 may suggest assignment of Social Security disability cases to a specialized court; if Congress considers such an approach, however, it should take into account recommendations 3(B) and 3(C), favoring a balanced docket and a jurisdictional mix. These recommendations are intended to complement Conference Recommendation 75-3, "The Choice of Forum for Judicial Review of Administrative Action," 1 CFR 305.75-3 (1990), which the Conference continues to believe should form the foundation for decisionmaking about the appropriate forum for judicial review of administrative action within the Article III courts.

Recommendation

1. When considering proposals for the creation of a specialized court or courts to review administrative action, Congress should take into account that federal agency programs vary greatly in the volume, complexity, and level of technical content of the caseloads they generate, and, thus, any solutions adopted should be designed to fit the specific administrative programs to which they will apply. For these reasons, among others, the Conference opposes the creation or designation of a single specialized court,

[4] See ACUS Recommendation 88-4, "The Split-Enforcement Model for Agency Enforcement," 1 CFR 305.88-4 (1991). See also Martin v. OSHRC, ___ U.S. ___; 111 S. Ct. 1171 (1991). This Recommendation should not be read to suggest that deference should automatically be given to FAA prosecutors' litigation positions. Id. at 1179.

either within the Article III judiciary or under Article I, to handle review of all administrative cases.

2. Congress should recognize that it is appropriate to create specialized courts for particular administrative programs only if such programs are characterized by the following:

A. A program area in which one might reasonably expect a consistently large volume of cases, diversion of which might significantly alleviate burdens on the generalist federal courts;

B. The predominance of factual issues specific to particular cases, or the predominance of scientific or other technical issues requiring special expertise of decisionmakers; and

C. The particular importance of uniformity in agency administration of a program.

3. If Congress creates specialized courts to review particular administrative programs, it should, to the extent possible, structure the courts as follows:

A. To minimize jurisdictional uncertainty, the subject matter before the courts should be segregable from other claims.

B. To ensure that the courts maintain a balanced perspective on the issues before them, the courts' dockets should be designed to expose judges to all sides of pertinent controversies and to the broadest possible scope of related issues within a field of law.

C. To encourage generalist judicial appointments, to minimize distortion of the standard of review resulting from loss of the generalist perspective, and to avoid the fact or appearance of capture by special interests, the courts' subject matter jurisdiction should be diverse.

If the court provides the final stage of judicial review before Supreme Court review, satisfaction of criterion C is essential.

4. If Congress creates specialized courts to review particular administrative programs, it should provide for periodic evaluation of those courts to determine whether there is a continuing need for specialized review.

5. In any legislation providing for specialized review of particular administrative programs, Congress should assign to each court or reviewing body the type of functions it is best suited to perform and should minimize duplication of review functions. In particular, any such legislation should:

A. Avoid de novo review of factual issues already subject to formal adjudication at the agency.

B. Make the decisions of specialized courts final on review of questions of fact specific to the case (including the sufficiency of the evidence in that case by whatever standard it is reviewed).

C. When review has been assigned to an Article I specialized court, provide a subsequent layer of judicial review by an Article III court for questions of constitutional or statutory interpretation.

[55 FR 57143, Dec. 20, 1991]

§ 305.91-10 Administrative Procedures Used in Antidumping and Countervailing Duty Cases (Recommendation No. 91-10).

This recommendation discusses several possible reforms of the administrative procedures used in U.S. antidumping (AD) and countervailing duty (CVD) cases. These cases usually arise when a petition is filed on behalf of a U.S. industry by one of several statutorily specified interested parties asking the U.S. Government to impose special duties to offset dumping or subsidization. The Government itself can also initiate cases.

Dumping occurs when foreign companies export goods to the United States for sale at less than their "fair value." Fair value is generally based on the exporter's prices for such goods in its home (or a third country) market or on its cost of producing the goods (including a profit margin). AD duties are imposed to offset the margin of dumping (i.e., the difference between the foreign market value and the U.S. price) if the U.S. industry producing like goods has suffered or is threatened with material injury by reason of the dumped imports, or if the establishment of a U.S. industry producing such goods has been materially retarded.

Countervailing duties may be imposed on goods exported to the United States that benefit from certain types

of subsidies granted by a foreign government. In most CVD cases, duties may be imposed only if the U.S. industry producing like goods has suffered or is threatened with material injury by reason of the dumped imports, or if the establishment of a U.S. industry producing such goods has been materially retarded.

The decision whether dumping or subsidization has occurred is made by the International Trade Administration (ITA) of the Department of Commerce; the decision on injury is made by the U.S. International Trade Commission (ITC). These administrative decisions are subject to review, in the first instance, in the Court of International Trade, and then in the Court of Appeals for the Federal Circuit. In the case of Canadian exports, the decisions may be "appealed" instead to a binational panel established under the U.S.-Canada Free Trade Agreement.

In recent years, the use by the United States and other countries of AD and CVD laws has been controversial. While many of the complaints about these laws are essentially about their substantive provisions, a number of the complaints concern procedural matters. In particular, some critics have contended that the high cost of defending these cases, which are often quite complex proceedings involving the collection and analysis of vast amounts of data and which often continue for years, amounts to a new form of protectionism—process or procedural protectionism. At the same time, U.S. domestic producers complain that the great expense of invoking these laws virtually precludes their use by some petitioners deserving of relief.

The two concerns that seem to be foremost in the minds of trade law practitioners are reducing the time and expense associated with AD and CVD proceedings and improving the decisionmaking process under the relevant statutes. The Conference notes, at the outset, that the complex procedures for AD and CVD cases, involving a division of responsibilities between two agencies with appeals to a specialized court and then to a federal court of appeals, may contribute to the time and expense associated with these proceedings. The Conference recommends in Part A that Congress authorize and fund a study of the agency structures and judicial review for AD and CVD cases. Recommendations B, C and D are intended to address problems arising under the current structure.[1]

The ITA and ITC both view AD/CVD proceedings as investigative rather than adjudicatory. Nonetheless, given the conflicting positions of the parties before the agencies—the domestic industry versus the foreign exporters—and their role in supplying much of the information on which the agency decisions are based, the parties do and should play an important part in the process. That part could be made more useful if hearings at which the factual submissions of the two sides are tested could be conducted more effectively than at present.

In the case of the ITA, the hearing officer typically does not participate in the hearing or engage in interchanges with counsel. The ITA hearing process would be improved if the hearing officer were more knowledgeable about the contested issues and participated more actively in interchanges with counsel than is presently the case.

In the case of the ITC, hearing times for cases are standardized and somewhat inflexible, even though cases vary widely in complexity and number of parties, with the result that in some cases parties have only a few minutes for oral presentations. Testing of factual information at the hearing is limited by practices that discourage cross-examination of witnesses. The ITC hearing process would be improved if, in setting the times for oral presenta-

[1] In 1973, the Administrative Conference recommended a number of reforms in the then existing procedures for administering AD cases. See Conference Recommendation 73-4, Administration of the Antidumping Law by the Department of the Treasury, 39 FR 4845 (1974). In 1984, it recommended reform of one narrow aspect of AD and CVD procedures—the availability of confidential information under protective order in ITC proceedings. See Conference Recommendation 84-5, Disclosure of Confidential Information Under Protective Order in International Trade Commission Proceedings, 1 CFR 305.84-5 (1991).

tions, the ITC took into account factors such as the complexity of the case and the number of parties involved. The ITC should also allow reasonable time for cross-examination without subtracting such time from the questioner's time for affirmative presentation.

Several changes could be made to simplify ITA administrative procedures and reduce somewhat the time and expense associated with AD/CVD cases. First, preparing the administrative record more promptly would speed up the appeals of cases. Second, streamlining and standardizing the ITA's procedures for handling routine requests for access to information would reduce the amount of time spent by the parties in preparing such requests, thereby reducing costs. The ITA should also strive to reduce parties' costs by reducing where possible the number of copies of documents required to be filed.

Third, the ITA now sometimes decides to reject a party's factual submissions or to change significantly its methodology for calculating dumping/subsidy margins without notice to the parties. It would be desirable for the ITA to notify the parties when it makes such a decision, so that the parties will not continue to prepare their cases on the assumption that the agency has not taken such actions. Implementation of this recommendation would allow parties to argue their positions more effectively and avoid wasted effort. This recommendation is not intended to suggest that the ITA does not have the right to reject a party's evidentiary submissions, or that a party should have any new rights to more time to comply with ITA information requests or to object to methodology changes. The ITA should also consider whether there are methods within the statutory time constraints to permit parties to comment in response to substantial changes in methodology.

Fourth, at present there are a number of inconsistencies between the way that the ITA's investigations office (which handles the initial investigation to determine whether a AD/CVD order should be issued) and the ITA's compliance office (which reviews shipments made after the issuance of an AD/CVD order to assess the amount of duties owing) handle certain issues. The ITA ought to eliminate those inconsistencies for which there is no justification.

Fifth, under U.S. law the actual amount of AD/CVD duties owed is usually determined after the fact. Exporters deposit an estimated duty when goods are imported into the United States, and that amount may be adjusted upwards or downwards as a result of an annual review, if requested. (If not requested by anyone, the estimated duties are considered to have been collected as the final duties.) The ITA has traditionally had a large backlog of annual reviews, although the backlog has been reduced in recent years, and reduced substantially in recent months. The delay in finally determining duties owed is unnecessarily disruptive to trade flows and unfair to the parties to such cases. Accordingly, the ITA should continue its efforts to eliminate its backlog of annual reviews.

The Commissioners of the ITC apparently do not normally meet as a group to discuss their views of a case before their formal deliberations, evidently because of concerns stemming from the Government in the Sunshine Act. It appears that the Commission's reluctance to meet as a group adversely affects the ITC decisionmaking process. The Commission's general counsel has taken the position that its meetings to dispose of AD/CVD cases are not within the terms of exemption 10 of the Act, which exempts meetings involving determinations "on the record after opportunity for a hearing." Some practitioners, however, believe that exemption 10 applies, and the Commission should decide whether such meetings do or should come within the ambit of exemption 10. If the Commission concludes that the meetings in question are not in fact exempted from the Sunshine Act, then Congress should consider exempting such meetings for AD/CVD cases from the Act. As an interim measure for achieving the benefits of collegial decisionmaking, the ITC should take steps to exchange drafts, views and other information among

the commissioners before entering into formal deliberations.

RECOMMENDATION

A. Congressional Study

The Congress should authorize and fund a study, by the Administrative Conference or another appropriate agency, of the agency structures for handling AD/CVD cases. The study should address whether responsibility for these cases should continue to be divided between the ITA and the ITC. It should also consider whether the usual procedure for judicial review of agency adjudications should be followed for AD/CVD cases by providing for direct appeals from the ITA and/or ITC to the Court of Appeals for the Federal Circuit, or whether the additional level of specialized court review at the Court of International Trade is required in these cases.[8]

B. Improved Agency Factfinding Procedures

The ITA and the ITC should develop factfinding procedures that improve development of the administrative record, with increased opportunities for the parties and decisionmakers to test the factual submissions made in the proceedings.

1. ITA Procedures

To accomplish this goal, the hearing conducted by the ITA at the end of its investigation should be presided over by a senior official, with adequate staff support, who is knowledgeable about the contested issues in the proceeding and who actively participates in interchanges with counsel for the parties. Where appropriate, the hearing officer should make a recommendation with regard to the issues raised in the hearing.

[8] The Administrative Conference has generally recommended that appeals from administrative agencies should be to the courts of appeals. See Conference Recommendation 75-3, The Choice of Forum for Judicial Review of Administrative Action, 1 CFR 305.75-3 (1991).

2. ITC Procedures

To accomplish this goal, the ITC should provide adequate time for oral presentations, taking into account factors, such as multiple parties or countries under investigation, that may justify more time than normally allowed. The ITC should allow reasonable time for cross-examination in appropriate cases without reducing the cross-examiner's time for affirmative presentation at the hearing.

C. ITA Administrative Reforms

To improve the efficiency of case processing, the ITA should adopt the following reforms:

1. To speed judicial review, the ITA should complete the record in individual cases and make that record available to parties promptly.

2. The ITA should streamline its handling of applications for release of information under administrative protective orders and of requests for access to computerized information. It should also require that only a reasonable number of copies of documents be submitted by parties.

3. The ITA should give notice to parties before it (a) rejects portions of parties' evidentiary submissions or (b) adopts significant changes in methodology on which the parties have not had an opportunity to comment. The ITA should also consider whether there are techniques within the statutory time constraints to permit parties to comment in response to substantial changes in methodology.

4. The ITA should eliminate unjustified inconsistencies in the practices and policies of its investigations and compliance offices.

5. The ITA should continue its efforts to eliminate its backlog of annual reviews of the actual duties owed by specific companies subject to AD/CVD orders.

D. The ITC and the Government in the Sunshine Act

To encourage collegial decisionmaking, the ITC should exchange drafts, views and other information before entering into formal deliberations. The Commission should decide whether in-

formal meetings to discuss the disposition of AD/CVD cases constitute meetings exempt from the Sunshine Act under exemption 10. If the Commission determines that such meetings are subject to the Sunshine Act, then Congress should consider amending the Tariff Act to provide that the Sunshine Act does not apply to informal meetings held to discuss the disposition of AD/CVD cases.

[56 FR 67144 Dec. 30, 1991]

Rules and Regulations

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.
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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

1 CFR Part 305

Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure

AGENCY: Administrative Conference of the United States.

ACTION: Recommendations.

SUMMARY: The Administrative Conference of the United States adopted six recommendations at its Forty-Fifth Plenary Session addressing: (1) The procedural and practice rule exemption from the APA notice-and-comment rulemaking requirements; (2) agency policy statements; (3) enforcement procedures under the Fair Housing Act; (4) coordination of migrant and seasonal farmworker service programs; (5) streamlining attorney's fee litigation under the Equal Access to Justice Act; and (6) implementation of the Noise Control Act.

The Administrative Conference of the United States is a federal agency established to study the efficiency, adequacy, and fairness of the administrative procedures used by federal agencies in carrying out administrative programs, and to make recommendations for improvements.

Recommendations of the Administrative Conference are published in full text in the Federal Register upon adoption. Complete lists of recommendations, together with the texts of those deemed to be of continuing interest, are published in the Code of Federal Regulations (1 CFR part 305).

DATES: These recommendations were adopted June 18–19, 1992, and issued June 30, 1992.

FOR FURTHER INFORMATION CONTACT: Renee Bernow, Information Officer, or Jeffrey S. Lubbers, Research Director (202–254–7020).

SUPPLEMENTARY INFORMATION: The Administrative Conference of the United States was established by the Administrative Conference Act, 5 U.S.C. 571–576. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by federal agencies in carrying out administrative programs, and makes recommendations for improvements to the agencies, collectively or individually, and to the President, Congress, and the Judicial Conference of the United States (5 U.S.C. 574(1)).

At its Forty-Fifth Plenary Session, held June 18–19, 1992, the Assembly of the Administrative Conference of the United States adopted six recommendations.#

Recommendation 92–1, The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements, encourages agencies to voluntarily use notice-and-comment procedures in promulgating rules of procedure and practice except in situations in which the costs of such procedures will outweigh the benefits of having public input. The recommendation also proposes that a rule should be found to fall within the statutory exception only when it both (a) relates solely to agency methods of internal operations or of interacting with regulated parties or the public, and (b)" does not (i) significantly affect conduct, activity, or a substantive interest that is the subject of agency jurisdiction, or (ii) affect the standards for eligibility for a government program. The Conference urges OMB to refrain from exercising jurisdiction under Executive Order 12,291 with respect to rules relating to procedure and practice that an agency voluntarily publishes for comment.

Recommendation 92–2, Agency Policy Statements, advises agencies to not issue statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using legislative procedures (normally including notice-and-comment). Agencies should not attempt to bind affected persons through policy statements.

Recommendation 92–3, Enforcement Procedures Under the Fair Housing Act, deals with the Department of Housing and Urban Development's implementation of the 1988 amendments to the Fair Housing Act. The Conference recommends that changes be made to ensure that complainant's litigation interests are protected, that HUD continue to study the reasons why parties are choosing to go to court rather than taking advantage of the administrative remedy, and that it take a number of actions to ensure that the enforcement program remains effective.

Recommendation 92–4, Coordination of Migrant and Seasonal Farmworker Service Programs, urges establishment by executive order of an Interagency Coordinating Council on migrant and seasonal farmworker programs. The recommendation suggests that the Council be charged with identifying specific coordination tasks, giving particular attention to gaps in services and unjustified overlap. In most instances, primary responsibility should be given to an appropriately chosen lead agency. The recommendation also calls for development of a reliable and comprehensive migrant and seasonal farmworker population census system, independent of any existing specific programs.

Recommendation 92–5, Streamlining Attorney's Fee Litigation Under the Equal Access to Justice Act, suggest ways in which Congress should amend the Equal Access to Justice Act, a statue providing for the award of attorney's fees to certain individuals and entities who prevail over the United States in court and administrative litigation. The Conference recommends that the Act be amended to reduce collateral litigation over the amount of awardable fees and encourage settlement of fee petitions. In addition, the recommendation proposes that the standard for award of attorney's fees in cases involving individual benefit claims (such as Social Security disability claims) be changed by eliminating the proviso that the United States need not pay fees if its position was substantially justified. The Conference also urges Congress to resolve difficulties concerning the timeliness of fee applications when cases are remanded to agencies and to consider whether certain administrative and Article I court proceedings not now covered by the Equal Access to Justice Act should be included within its coverage.

Recommendation 92–6, Implementation of the Noise Control

Act, responds to a request by the Environmental Protection Agency to assist it in addressing procedural concerns arising in connection with the absence of funding for EPA's responsibilities under the Noise Control Act. The recommendation advises EPA to analyze the preemptive impact of its existing regulations under the Act, taking into account a number of related issues. The recommendation suggests that the analysis be followed by appropriate congressional action, either to repeal the Noise Control Act or to fund whatever responsibilities may be delegated by Congress to EPA under the Act.

The full texts of the recommendations are set out below. The recommendations will be transmitted to the affected agencies and, if so directed, to the Congress of the United States. The Administrative Conference has advisory powers only, and the decision on whether to implement the recommendations must be made by each body to which the various recommendations are directed.

The transcript of the Plenary Session is available for public inspection at the Conference's offices at suite 500, 2120 L Street NW., Washington, DC.

List of Subjects 1 CFR Part 305

Administrative practices and procedure, attorney's fees, the Equal Access to Justice Act, fair housing law enforcement, informal rulemaking procedure, migrant and seasonal farmworker programs, the Notice Control Act, and policy statements.

PART 305—RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

1. The authority citation for part 305 continues to read as follows.

Authority: 5 U.S.C. 571–576

2. The table of contents to part 305 of title 1 CFR is amended to add the following new sections:

Sec.

305.92–1 The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements (Recommendation No. 92–1).
305.92–2 Agency Policy Statements (Recommendation No. 92–2).
305.92–3 Enforcement Procedures Under the Fair Housing Act (Recommendation No. 92–3)
305.92–4 Coordination of Migrant and Seasonal Farmworker Service Programs (Recommendation No. 92–4)
305.92–5 Streamlining Attorney's Fee Litigation Under the Equal Access to Justice Act (Recommendation No. 92–5).
305.92–6 Implementation of the Noise Control Act (Recommendation No. 92–6).

3. New §§ 305.92–1 through 305.92–6 are added part 305, to read as follows:

§ 305.92–1 The procedural and practice rule exemption from the APA notice-and-comment rulemaking requirements (Recommendation No. 92–1).

The Administrative Procedure Act, 5 U.S.C. 553, establishes the procedural requirements for notice-and-comment rulemaking. It requires that an agency generally publish notice and provide opportunity for public comment before adopting a rule. The section also provides for a number of specific exemptions. One of these exemptions in subsection (b)(A), provides that the requirements for notice and comment do not apply to "rules of agency organization, procedure, or practice * * *."[1]

The scope of APA exceptions has been described as "enshrouded in considerable smog,"[2] and the question of what is a procedural or practice rule has no clear answer.[3] The issues is in a state of flux.[4] Although courts have used a number of different tests to determine whether a rule was one of procedure or practice, none has been particularly satisfactory. Over the years the Conference has addressed the scope of most of the other exceptions to the APA rulemaking requirements.[5] Because the procedural rule exception is a subject of increasing controversy, it is appropriate for the Conference to fill this gap.

The Conference has long advocated the value of notice and comment in rulemaking,[6] and this recommendation encourages agencies to use such processes voluntarily in promulgating rules of procedure or practice. Notice and comment can provide the agency with valuable input from the public as well as furnish enhanced public acceptance of the rules. On the other hand, there can be costs to the agency in using notice-and-comment procedures, including the time and effort of agency personnel, the cost of Federal Register publication, and the additional delay in implementation that results from seeking public comments and responding to them. For significant procedural rule changes, the benefits seem likely to outweigh the costs; but this may not be the case for minor procedural amendments. Thus, unless the costs outweigh the benefits, we strongly encourage agencies voluntarily to use notice and comment even where an APA exemption applies.

The Conference believes, however, that the procedural and practice rule exemption can in appropriate circumstances serve a legitimate governmental purpose, and that Congress intended it to be available in such cases. Where such rules are truly procedural, rather than substantive in a procedural mask, the statutory exemption should be available. The Conference therefore recommends, as a guide to agencies in determining when a rule is procedural, that agencies should establish first that the rule relates to an agency's internal operations[7] methods of interacting with the public and second that the rule has no substantive impact because it neither significantly affects conduct, activity or a substantive interest that is the subject of agency regulation, nor affects the standards for eligibility for government programs.[8]

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[1] The terms procedural rule will be used herein to refer to rules of agency practice and procedure. Other exemptions from notice-and-comment rulemaking requirements cover interpretive rules, policy statements, and situations where good cause exists. See section 553(b). Section 553(a) completely exempts from notice-and-comment rulemaking rules involving military or foreign affairs, agency management or personnel, grants, loans, benefits or contracts.

[2] *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975). *See also Community Nutrition Institute v. Young*, 818 F. 2d 943, 946 (D.C. Cir. 1987).

[3] There has been less debate about what are rules of agency organization.

[4] *Air Transport Association v. Department of Transportation*, 900 F.2d 369 (D. C. Cir. 1990), *cert. granted*, 111 S. Ct. 869 (1991), *judgment vacated and remanded*, 111 S. Ct. 944 (1991), *opinion vacated and petition dismissed on mootness grounds*, 933 F.2d 1043 (D.C. Cir. 1991), has recently focused attention on the scope of the exemption.

[5] Recommendation 69–8, "Elimination of Certain Exemptions from the APA Rulemaking Requirements," 1 CFR 305.69–8, Recommendation 73–5 "Elimination of the 'Military or Foreign Affairs Function' Exemption From APA Rulemaking Requirements," 1 CFR 305.73–5, Recommendation 76–5, "Interpretive Rules of General Applicability and Statements of General Policy," 1 CFR 305.76–5 Recommendation 83–2, "The 'Good Cause' Exemption from APA Rulemaking Requirements," 1 CFR 305.83–2.

[6] See, eg., Recommendation 69–8, supra n.5

[7] It is likely that some rules relating to agency internal operations will also fall within a category of rules exempt from all of section 553 a requirements (including publication of a statement of basis and purpose and delayed effective date) as a matter relating to agency management or personnel." 5 U.S.C. 553(a)(2).

[8] The term "program" is meant to be interpreted broadly to include, among others, those involving benefits, contracts, licenses, permits and loan guarantees. In this connection, it should be noted that many agencies following Recommendation 69–8, have voluntarily waived the exemption from notice-and-comment rulemaking for matters relating to loans, grants, benefits or contracts.

Only if the proposed rule meets both parts of this test, should it be considered as being within the exemption from notice-and-comment requirements as a rule of practice or procedure. Examples of rules that would be procedural under this standard include rules governing conduct of formal hearings or appeals, ex parte rules, and rules concerning the business hours of the agency. Examples of nonexempt rules include rules relating to the criteria for determining the severity of enforcement sanctions, levels of civil money penalties, or application requirements that serve to limit eligibility for a government benefit program.

In order to encourage agencies voluntarily to use notice and comment, the Conference also recommends that the Office of Management and Budget refrain from exercing its jurisdiction to review rules fitting within the definition of rules relating to an agency's procedure or practice when an agency voluntarily publishes them.

Recommendation

1. Federal agencies should exercise restraint in invoking the Administrative Procedure Act's statutory exceptions to the notice-and-comment rulemaking procedures. Thus, the Administrative Conference has consistently urged agencies voluntarily to use notice-and-comment procedures when issuing rules that fall within the terms of most of the exemptions under 5 U.S.C. 553.[9]

2. For rules falling within the "procedure or practice" exception in 5 U.S.C. 553(b)(A), agencies should use notice-and-comment procedures voluntarily except in situations in which the costs of such procedures will outweigh the benefits of having public input and information on the scope and impact of the rules, and of the enhanced public acceptance of the rules that would derive from public comment.

3. In determining whether a proposed rule falls within the statutory exception for rules of agency "procedure or practice," agencies should apply the following standard: A rule is within the terms of the exception when it both (a) relates solely to agency methods of internal operations or of interacting with regulated parties or the public, and (b) does not (i) significantly affect conduct, activity, or a substantive interest that is the subject of agency jurisdiction, or (ii) affect the standards for eligibility for a government program.[10]

4. To assist agencies in implementing this recommendation, the Office of Management and Budget should refrain from exercising jurisdiction under Executive Order 12291 with respect to rules relating to an agency's procedure or practice that an agency voluntarily publishes for notice and comment.

§ 305.92-2 Agency policy statements (Recommendation No. 92-2).

This recommendation addresses use of agency policy statements. Policy statements fall within the category of agency actions that are "rules" within the Administrative Procedure Act's definition because they constitute "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or describe law or policy." 5 U.S.C. 551(4). "Rules" include (a) legislative rules, which have been promulgated through use of legislative rulemaking procedures, usually including the notice-and-comment procedures of the Administrative Procedure Act, 5 U.S.C. 553, and (b) nonlegislative rules—that is, interpretive rules and policy statements—which fall within the above definition of "rules" but which are not required to be promulgated through use of legislative rulemaking procedures. Thus, policy statements include all substantive nonlegislative rules to the extent that they are not limited to interpreting existing law. They come with a variety of labels and include guidances, guidelines, manuals, staff instructions, opinion letters, press releases or other informal captions.

Policy statements that inform agency staff and the public regarding agency policy are beneficial to both. While they do not have the force of law (as do legislative rules) and therefore can be challenged within the agency, they nonetheless are important tools for guiding administration and enforcement of agency statutes and for advising the public of agency policy.

The Conference is concerned, however, about situations where agencies issue policy statements which they treat or which are reasonably regarded by the public as binding and dispositive of the issues they address.[1] The issuance of such binding pronouncements as policy statements does not offer the opportunity for public comment which is normally afforded during the notice-and-comment legislative rulemaking process for rules which have the force of law. Courts have frequently overruled agency reliance on policy statements as binding on affected persons.

Where the policy statement is treated by the agency as binding, it operates effectively as a legislative rule but without the notice-and-comment protection of section 553. It may be difficult or impossible for affected persons to challenge the policy statement within the agency's own decisional process; they may be foreclosed from an opportunity to contend that the policy statement is unlawful or unwise, or that an alternative policy should be adopted. Of course, affected persons could undergo the application of the policy to them, exhaust administrative remedies and then seek judicial review of agency denials or enforcement actions, at which time they may find that the policy is given deference by the courts. The practical consequence is that this process may be costly and protracted, and that affected parties have neither the opportunity to participate in the process of policy development nor a realistic opportunity to challenge the policy when applied within the agency or on judicial review. The public is therefore denied the opportunity to comment and the agency is denied the educative value of any facts and arguments the party may have tendered.

The Conference believes this outcome should be avoided, first by requiring that when an agency contemplates an announcement of substantive policy (other than through an adjudicative decision), it should decide whether to issue the policy as a legislative rule, in a form that binds affected persons, or as a nonbinding policy statement.[2] Second,

[9] In some cases, the Conference has recommended that agencies generally use notice and comment. Recommendation 76-5, "Interpretive Rules of General Applicability and Statements of General Policy," 1 CFR 305.76-5, Recommendation 83-2, "The 'Good Cause' Exemption from APA Rulemaking Requirements," 1 CFR 305.83-2. In the case of some other exemptions, the Conference has also recommended eliminating them altogether. Recommendation 69-8, "Elimination of Certain Exemptions from the APA Rulemaking Requirements, 1 CFR 305.69-8, Recommendation 73-5, "Elimination of the "Military or Foreign Affairs Function" exemption from APA Rulemaking Requirements," 1 CFR 305.73-5.

[10] The term "program" is meant to be interpreted broadly to include, among others, those involving benefits, contracts, licenses, permits, and loan guarantees. See footnote 7, *supra*.

[1] There are many facets that must be assessed in determining whether a policy statement is operationally a rule that binds affected persons. In general, we apply the concept here to agency statements that are usually issued in permanent form and that are relied upon by an agency and its staff to decide policy whose basis, legality, and soundness cannot be challenged within the agency. Whether a statement is a matter of policy or interpretation, is issued in a permanent form, and is in fact binding (or to what extent it is binding) are often difficult questions that can only be decided in context.

[2] The Conference has already urged agencies to use notice-and-comment procedures, where possible, before promulgating an interpretive rule of

Continued

to prevent policy statements from being treated as binding as a practical matter, the recommendation suggests that agencies establish informal and flexible procedures that allow an opportunity to challenge policy statements. Recognizing that each agency's process differs, the choice of which procedures to change in implementing this recommendation remains in the discretion of each agency. Likewise, actions taken during review of the policy statement would not necessarily be affected by such reconsideration.

Recommendation

The following recommendations applicable to policy statements are intended to ensure that, before an agency promulgates substantive policies which bind [3] affected persons, it provides appropriate notice and opportunity for comment on such policies, and makes sure that policy statements are not treated as binding.

I. Legislative Rulemaking for Binding Policies

A. Agencies should not issue statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using legislative rulemaking procedures (normally including notice-and-comment). Specifically, agencies should not attempt to bind affected persons through policy statements.

B. When an agency publishes a legislative rule (e.g., in the Federal Register and in official agency publications), the preamble to the rule should state that it is a legislative rule intended to bind affected persons. The preamble should also cite the specific statutory authority for issuing the rule in binding form as well as the steps that it has taken to comply with procedural requirements.

II. Policy Statements

A. *Notice of nonbinding nature.* Policy statements of general applicability should make clear that they are not binding. Persons affected by policy statements should be advised that such policy statements may be challenged in the manner described in part B below. Agencies should also ensure, to the extent practicable, that the nonbinding nature of policy statements is communicated to all persons who apply them or advise on the basis of them, including agency staff, counsel, administrative law judges, and relevant state officials.

B. *Procedures for challenges to policy statements.* Agencies that issue policy statements should examine and, where necessary, change their formal and informal procedures, where they already exist, to allow as an additional subject requests for modification or reconsideration of such statements. Agencies should also consider new procedures separate from the context in which the policy statement is actually applied. The procedures should not merely consist of an opportunity to challenge the applicability of the document or to request waivers or exemption from it; rather, affected persons should be afforded a fair opportunity to challenge the legality or wisdom of the document and to suggest alternative choices in an agency forum that assures adequate consideration by responsible agency officials. The opportunity should take place at or before the time the policy statement is applied to affected persons unless it is inappropriate or impracticable to do so. Agencies should not allow prior publication of the statement to foreclose full consideration of the positions being advanced. When a policy statement is subject to repeated challenges, agencies should consider instituting legislative rulemaking proceedings on the policy.

III. Instructions to Agency Staff

This recommendation does not preclude an agency from making a policy statement which is authoritative for staff officials in the interest of administrative uniformity or policy coherence. Indeed, agencies are encouraged to provide guidance to staff in the form of manuals and other management directives as a means to regularize employee action that directly affects the public. However, they should advise staff that while instructive to them, such policy guidance does not constitute a standard where noncompliance may form an independent basis for action in matters that determine the rights and obligations of any person outside the agency. Further, agencies are encouraged to obtain public comment on such guidance. Finally, in any case in which staff officials' adherence to such directives may affect a member of the public, care should be taken to observe the requirements of 5 U.S.C. 552(a) which imposes a publication requirement independent of any obligation to employ notice-and-comment procedures.

§ 305.92-3 Enforcement procedures under the Fair Housing Act (Recommendation No. 92-3).

Background

The 1968 Fair Housing Act outlaws various types of discrimination in the sale or rental of residential housing. It prohibits discrimination on the basis of race, color, religion, sex, and national origin, and covers sale and rental of residential housing, refusal to deal, and a number of related actions. In 1988, Congress amended the Fair Housing Act, by altering the enforcement provisions for violations of the antidiscrimination provisions, while at the same time extending the Act's coverage to discrimination against the handicapped and families with children.

The 1968 Act contained limited enforcement provisions, under which the Department of Housing and Urban Development (HUD) had a circumscribed role. The Act provided that persons aggrieved by discrimination could file (within 180 days) a complaint with the Secretary of HUD, who was obligated to conduct an investigation and use informal methods (conferences, conciliation and persuasion) to eliminate any discriminatory practices. If a state or local agency provided rights and remedies that were substantially equivalent to those under the federal statute,[1] the Secretary was required to refer the case to that state or local agency.

If neither agency was able to secure voluntary compliance, the aggrieved party was permitted to file a civil action in a United States District Court, unless state or local forums provided substantially equivalent rights and remedies. In such cases, the state or local court had to be used. The Act also provided for a private right of action in U.S. District Court. Remedies were limited to injunctive relief, actual

general applicability or statement of general policy that is likely to have substantial impact on the public. Agencies were urged to use post-promulgation notice-and-comment procedure if it is not practicable to accept and consider comments before the rule is promulgated. See Recommendation 76-6, "Interpretive Rules of General Applicability and Statements of General Policy."

[3] As the term is used here, an agency rule is "binding" when the agency treats it as a standard where noncompliance may form an independent basis for action in matters that determine the rights and obligations of any person outside the agency. This is true whether or not the rule was promulgated in accordance with section 553. A document that was not issued pursuant to section 553, and therefore cannot be binding legally, may nevertheless be binding as a practical matter if the agency treats it as dispositive of the issue it addresses. This recommendation is concerned only with substantive, as opposed to procedural, rules. See Recommendation 92-1, "The Procedural and Practice Rule Exemption From the APA Notice-and-Comment Rulemaking Requirements."

[1] Among the provisions in the Act were subpoena authority and authority to submit interrogatories to respondents.

damages, and punitive damages not in excess of $1,000. The 1968 Act also authorized the Department of Justice to file suit in cases involving "pattern or practice" or issues of "general public importance." Injunctive relief was available in such cases.

These remedies were considered by many to be inadequate, both because of the limited judicial remedies and the lack of an effective administrative enforcement process. In 1988, Congress amended the Act's enforcement provisions, while at the same time expanding the Act's coverage.

The 1988 amendments created two additional categories of people protected from discrimination under the Act. Discrimination with respect to handicapped persons is now prohibited, and is defined to include refusal to permit certain "reasonable modifications" of existing premises at the handicapped person's expense, and refusal to make certain "reasonable accommodations" for access. Discrimination against families with children is also prohibited, although there is an exception for certain "housing for older persons."

The amended enforcement provisions furnished significant new remedies. The Act now provides an administrative enforcement procedure, which requires HUD to investigate filed complaints within 100 days. The statute of limitations has been doubled to a year. During the investigation period, HUD is to undertake conciliation efforts. If those are not successful, and HUD finds "reasonable cause" to believe a violation has occurred, it must issue a formal charge of discrimination. Upon issuance of a formal charge, the complainant and respondent each have 20 days to elect to have the claim adjudicated in court. If neither party so elects, the case is heard in an APA hearing before a HUD administrative law judge, with evidence presented under the Federal Rules of Evidence. The parties to the hearing are HUD (represented by its Office of General Counsel) and the defendant, with the aggrieved party permitted to intervene. The ALJ has the authority to award compensatory damages and injunctive relief, and to impose civil penalties against a defendant of up to $10,000 for the first offense, $25,000 if there has been a prior violation within the previous 5 years, and $50,000 if there have been two or more violations within the previous 7 years. ALJ decisions are reviewable by the Secretary,[3] and appealable to the U.S. Court of Appeals.

If either party elects to "remove" the case to court, the case is litigated by the Department of Justice, and the complainant may intervene. As in the administrative forum, injunctive relief and compensatory damages are available, but instead of civil money penalties, punitive damages may be awarded. A jury trial is also available.

The private right of action remains, with an extended statute of limitations, and removal of the $1000 cap on punitive damages. (Injunctive relief and compensatory damages are also available, but civil penalties are not.) There is no requirement that a party exhaust its administrative remedies before filing suit in court, but if administrative proceedings are pending, a private suit may not be filed. The Department of Justice's authority to file suits in "pattern and practice" cases remains the same, except that available relief has been expanded to include civil penalties.

As under the old statute, state and local remedies are to be used to the extent that they are "substantially equivalent" to those provided for in the Act. State and local agencies must be certified by HUD as having equivalent procedures before cases must be referred to them. Agencies that had been certified prior to 1988 were grandfathered in for 40 months with respect to handling discrimination complaints covered by the prior Act. The 40-month period expired in January 1992, but was extended until September 1992. During this "grandfathering" period, state agencies could process housing discrimination complaints involving race, color, sex, religion, and national origin, even though their procedures were not substantially equivalent to the Act's amended provisions. However, until they have been specifically certified to do so, they may not handle complaints involving familial status or the handicapped.

Discussion

Implementation of the new enforcement provisions of the Act is in an early stage. HUD appears to be taking its responsibilities seriously. Some portions of the program seem to be working well, while in some others, emerging trends may be cause for concern.

The administrative hearing portion of the enforcement program appears to be functioning smoothly. To the extent that parties have elected to stay in the administrative adjudication process, their cases have been processed expeditiously. However, in more than half the cases, one of the parties has chosen to "remove" the case to court, and most of these court cases are still pending.

HUD has indicated that it is conducting a study on why so many cases are "removed" to court. The Conference applauds that endeavor, and suggests that such a study be an ongoing effort. HUD should also undertake an education program to advise potential complainants and respondents of the practical considerations that relate to the decision on which process to use. Such explanations should address the potential remedies available in each option, as well as the likely time periods that each will require for resolving the dispute.

In virtually all other civil rights enforcement processes, an existing administrative remedy must be used. In fact, in most administrative processes, parties do not have the choice between using an existing administrative process or going to court. Thus, the Fair Housing Act's provision permitting either party the choice of going through the administrative process or to court is an unusual one, offering the potential for quicker hearings in the administrative forum and larger (punitive) damages in judicial forums.

The Fair Housing Act amendments' system arose out of a political compromise resulting from, among other things, concern about the constitutionality of eliminating a party's opportunity for a jury trail in the context of fair housing rights enforcement. The existence of a right to a jury trail in this situation is a subject of some debate, but in light of this debate, as well as the recent nature of the political compromise that permitted enactment of the Fair Housing Act amendments, the Conference does not at this time recommend eliminating the option of a district court remedy. The Conference is reluctant to strongly encourage parties to use the administrative process rather than the judicial route until it has more information as to why parties select one over the other, and more data on alleged significant differences in the relief granted in each.

Under current law, complainants are not automatically parties to proceedings brought by HUD (at the administrative level) or the Department of Justice (in court) as a result of their complaints. Although procedures for intervention exist, concerns have been raised that, in some cases, the interests of complainants and the government may

[3] HUD regulations provide that the Secretary will review only in extraordinary cases

diverge at points in the litigation where intervention as of right is no longer available. For example, the Department of Justice may not wish to appeal a determination with which the complainant is unsatisfied. If the complainant is not already a party to the litigation, his or her appeal rights may be lost. Providing that a complainant is automatically a party to any case based on his or her complaint would alleviate this problem. Moreover, HUD should notify complainants of their right to be represented by their own counsel (separate from counsel from the government), not only at the beginning of the litigation process, but at subsequent stages where the interests of the government and of the individual complainant may diverge on a significant or dispositive issue (e.g., on the question whether to appeal an adverse decision).

The Act requires that HUD undertake conciliation efforts in cases in which complaints are filed. Conciliation efforts are made by the HUD investigator assigned to the complaint. It appears that close to 25 percent of the cases are conciliated successfully. Conciliation (and other opportunities to use alternative means of dispute resolution) should continue to be encouraged. HUD should study whether using the investigator as conciliator has been advantageous due to the investigator being knowledgeable about the case and the program, or whether parties may tend to perceive some bias because of the investigator's initial involvement in determining the objective merits of the parties' positions. Proper training in conciliation and mediation would be essential for the investigative staff if they are to continue to have a role in this part of the dispute resolution process.

A major area where HUD has not been successful in meeting its responsibility under the Act is its inability to complete investigations and determine whether or not to file charges within the 100 days allowed by statute. In fact, almost 75 percent of the Fair Housing Act complaints filed in 1990 were not processed within the 100-day statutory deadline. There are several possible reasons for this. There has been a significant increase in the number of complaints filed since the Act's amendment. Much of the burden of this increase falls on HUD, because state and local agencies have not been certified for the cases under the expanded coverage. [3] Moreover, HUD has used a fairly complicated internal review system with respect to making "cause" determinations, which might be simplified, now that its personnel have had some experience. HUD has been taking steps to ensure that complaints are processed in a timely fashion, including delegating some decisional authority to regional personnel. Such efforts are to be encouraged, so long as care is taken to ensure adequate training.

As described above, state and local agencies that provide rights and procedures substantially equivalent to those available under federal law may be certified, in which case complaints must be processed by such agencies rather than by HUD. The automatic grandfathering provisions in the 1988 Act have expired (although they have been extended to the extent permitted by the Act), and many state agencies have not been certified. There are concerns from both ends of the spectrum: Concern that HUD will be overlenient in determining that the processes of state and local agencies are substantially equivalent, and concern that HUD will not act expeditiously enough in certifying those that do have equivalent processes.

As a result of the enlarged coverage of the Fair Housing Act, about one-half of the complaints over the last 2 years have involved allegations of discrimination on the basis of familial status. There also have been a substantial number of complaints involving alleged discrimination against the handicapped. Thus, the earlier concentration on discrimination cases arising under the old Act has necessarily been diluted to some degree. HUD should take care to ensure that the importance of attacking all types of discrimination within its purview continues to be recognized, notwithstanding resource limitations.

Recommendation

1. Congress should amend the Fair Housing Act to provide that each aggrieved person on whose behalf a complaint has been filed shall automatically be deemed a party to a lawsuit or administrative proceeding that results from such complaint.

2. The Department of Housing and Urban Development (HUD) should notify each complainant of his or her option to select private counsel (separate from counsel from the Government), at the time a reasonable cause finding is made, and a future points where action by government counsel is potentially adversely dispositive of that complainant's remedies. This notice should explain the potential implications to the complainant of exercising that option.

3. HUD should continue to study why parties in cases under the Fair Housing Act are opting in a large portion of cases to use the judicial process, rather than the administrative adjudication process. The results of such studies should be shared with the Administrative Conference, the Congress and the public.

4. HUD should undertake an educational program to advise potential complainants and respondents of the practical considerations that bear upon a decision to choose the administrative process or the judicial process in Fair Housing Act cases, including an explanation of the potential remedies and time periods for resolution of the dispute.

5. HUD should increase its efforts to process complaints within the 100-day statutory period. Among the alternatives it should consider are delegating increased authority to regional offices, with concomitant additional training and appropriate headquarters oversight.

6. In deciding whether to certify or maintain certifications of state and local agencies, HUD should examine closely whether such agencies offer substantially equivalent rights and procedures, and move as rapidly as possible to certify those that do.

7. HUD should encourage the use of alternative dispute resolution in all stages of Fair Housing Act cases. It should particularly monitor the conciliation process, to ensure that it is perceived as working fairly. It should continue to offer training in conciliation and mediation skills.

8. HUD should not allow efforts directed towards the newly covered categories of discrimination to diminish the recognized importance of complaints falling under the original categories.

§ 305.92–4 Coordination of migrant and seasonal farmworker service programs (Recommendation No. 92–4).

Since the 1960s, the federal government has established numerous service programs to help meet the needs of migrant farmworkers. From the early days, migrants have been considered a uniquely federal responsibility, primarily because of their interstate movement, which makes it hard for the workers and their families to qualify for local assistance and disrupts other services like schooling for the children. As these programs have evolved, many have come to serve nonmigrant seasonal farmworkers as well.

The programs to meet health, education, housing, job training, and

[3] It may also be that, given the financial pressures facing states, they will not take the necessary actions that would allow HUD to certify them.

other needs of migrant and seasonal farmworkers (MSFWs) have developed separately. There are approximately 10 MSFW-specific service programs, and farmworkers also draw upon the assistance of numerous other general programs such as food stamps or Medicaid. The four largest federal programs are Migrant Education, administered by the Department of Education; Migrant Health and Migrant Head Start, both administered by the Department of Health and Human Services; and the Department of Labor's special job training programs for MSFWs under section 402 of the Job Training Partnership Act.

Each program has its own definition of migrant and/or seasonal farmworker, as well as other eligibility standards. The result is a potential for overlap of some services and gaps in others, and there is no overarching provision for effective coordination among the programs. Various efforts have been undertaken at the national level to improve coordination, but with mixed success to date. These include an Interagency Committee on Migrants, a staff-level group that meets quarterly, largely for information-sharing purposes; an Interagency Coordinating Council, established informally as a forum for policy-level decisionmakers involved in the various programs, but now inactive; and a Migrant Inter-Association Coordinating Committee, involving nonprofit grantees and other organizations representing direct service providers.

In addition, MSFWs often qualify for other services provided by state and local governments or funded through private initiative, each governed by its own particular definitions or eligibility standards. These services are especially important in areas where some or all of the major federal programs are not present. Effective local service providers therefore have to be adroit in locating those available services, from whatever source, that can best meet the needs of their clientele. Because of the great variety in locally available services of this kind, much of the task of coordination among MSFW service programs necessarily takes place at the local and state level. Many states are finding ways to encourage this process by the creation of a governor's committee or task force, involving service providers, growers, representative government officials, farmworkers, and others.

The federal government should also take steps to improve coordination of services. For example, the intake procedures for each service program (now typically undertaken separately by each of the agencies, despite considerable duplication) should be streamlined. To effectuate such efforts, and to provide better interagency consultations before program changes are introduced, the President should establish by executive order a policy-level Interagency Coordinating Council on MSFW programs. This Council is not intended to replace, and indeed should promote, existing coordination at the program staff, state, and service delivery level.

To facilitate interagency coordination, whether or not such a Council is created, a reliable system for gathering data on the nation's population of MSFWs is needed. Although each agency has its own mechanism for generating program statistics and estimates of the target population, these vary widely in method and scope, and each suffers from specific inadequacies. They produce widely varying pictures of the nation's population of MSFWs, to the continuing frustration of legislators, service providers, researchers, and others. Agricultural labor data have always been left out of the Department of Labor's regular employment data system, and no other adequate permanent data source now fills the gap. The recommendation provides some guidance on the goals of such an information-gathering effort.

Recommendation

I. Coordination at the National Level

An Interagency Coordinating Council on migrant and seasonal farmworker (MSFW) programs should be established to strengthen national coordination of MSFW service programs. The Council would be charged, inter alia, with identifying specific coordination tasks to be accomplished, in most cases under the primary responsibility of a designated lead agency.

A. To ensure an enduring structure and a clear mandate, the President should issue an executive order creating the Council, specifying the policy-level officials from appropriate agencies who would be permanent members and designating a chair. The order should also designate an agency that would initially have primary responsibility for staffing the Council's meetings and other functions. The Council should be specifically charged to coordinate and review MSFW service programs, giving particular attention to gaps in services and unjustified overlap. It should encourage public participation through public meetings, creation of an advisory committee, or other means.

B. The executive order should provide that the Council, in cooperation with the Office of Management and Budget, review proposals for significant changes in any agency's MSFW service program (including proposed legislation, regulations, and grantee performance standards). OMB should consolidate or coordinate its own oversight of all federal MSFW service programs.

The executive order should assign to the Council the initial responsibility to develop, through delegations to the appropriate agencies, a reliable and comprehensive MSFW population census system, independent of any of the specific programs, along the lines described in part II. Other specific coordination tasks that the Council might wish to take up include development of consolidated or streamlined intake processing for MSFW programs, provision of better linkages among existing MSFW information clearinghouses, and encouragement of cooperation among direct service providers.

D. The Council should identify and assign priorities to the coordination tasks to be accomplished, with a strategy and timetable for their achievement. In most instances, it should assign lead responsibility for each specific coordination task to a designated agency. That agency's coordination efforts with other agencies may include suggesting regulations or other implementation measures.

E. The Council should study the differing eligibility standards of MSFW programs and identify, if appropriate, where consistency could be achieved without substantial impact on the beneficiaries of those programs.

F. The Council should also study and make recommendations on the strengthening of state and local coordination of MSFW programs.

II. Information Gathering on Migrant and Seasonal Farmworkers

A. To improve coordination of and service delivery in MSFW programs, the executive order should:

(1) Authorize the Council to develop an integrated, cost-effective system for gathering data on the number, characteristics, and distribution of MSFWs and their dependents;

(2) Authorize the Council to designate an appropriate agency to have responsibility for collecting the data, with the cooperation of federal agencies with MSFW service programs;

(3) Direct appropriate federal agencies with expertise in gathering these kinds of data, such as the Bureau of the Census, the Bureau of Labor Statistics,

the National Center for Education Statistics, or the National Agricultural Statistics Service, to cooperate with the Council's effort; and

(4) Provide opportunities for submission of data and information from the public.

B. This data system should ensure that the information gathered on MSFWs and their dependents sufficiently describes workers employed in a broad spectrum of U.S. agriculture and related industry. This means that the data should include and distinguish among workers employed, for example, in crop and livestock production, the packing and processing of farm products, and fisheries. Data should be collected on workers and their dependents, including such factors as recency and frequency of migration, farm and nonfarm earnings and periods of employment, and health, education, and housing characteristics. These comprehensive data should be collected in a form designed to be useful to service programs with differing definitions of eligible workers and their dependents.

C. This data system should be designed to help the Council identify general trends—including changes in the total number of MSFWs and their dependents and employment patterns—and opportunities for coordination among MSFW programs. To help achieve this goal, the Council should consider whether there are areas in which a consensus on a set of common characteristics of MSFWs should be developed for statistical purposes.

§ 305.92-5 Streamlining attorney's fee litigation under the Equal Access to Justice Act (Recommendation No. 92-5).

Congress first waived the government's immunity from attorney's fee awards in the Equal Access to Justice Act (EAJA), 5 U.S.C. 504, 28 U.S.C. 2412(d), in 1980 and reenacted the Act in 1985. The EAJA authorizes certain private parties that prevail in nontort civil litigation against the United States in both courts and agencies to recover their fees and expenses. No recovery is allowed, however, if the government demonstrates that its position was substantially justified, which has been construed to require the government to show that its position had a reasonable basis in both law and fact. The Act precludes fee awards to parties that exceed a specified net worth or, in the case of businesses and organizations, number of employees. It also sets a maximum hourly rate for attorney's fees of $75 per hour. The rate can be raised if the court "determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee"; in agency proceedings, the agency must make such a determination through rulemaking. With cost-of-living increases, attorneys can, at present, hope to recover a little over $100 per hour under the EAJA for most court litigation, though they remain limited to $75 per hour for most litigation before agencies.

Congress sought to accomplish two interconnected goals in the Act: To provide an incentive for private parties to contest government overreaching and to deter government wrongdoing. Congress feared that parties with limited resources would not be able to defend vigorously against government enforcement actions or to challenge opprobrious regulation. One-way fee shifting under the Act was intended to help rectify the imbalance in resources. Because fee awards must be paid out of the offending agency's budget, Congress hoped that EAJA litigation would also spur agencies to act more prudently, particularly when determining the rights of parties of modest means.

Congress originally estimated that the EAJA would cost the government $100 million a year. In recent years, approximately 2,000 EAJA applications have been resolved each year, of which the vast majority involve social security disability or similar individual benefits disputes. The total payout of fees in these cases has been only $5 to $7 million per year.

Reducing Litigation and Encouraging Settlement

Although the EAJA may not have been used as often as predicted, it has nevertheless generated a significant amount of contentious litigation. Relatively few EAJA applications appear to be settled, and the empirical evidence available indicates that fee litigation often results in more complicated proceedings than are merited. Ambiguous provisions in the Act—such as the substantial justification standard and the provision permitting enhancements to the fee cap—foster additional litigation and minimize the potential for settlement of fee disputes. The Administrative Conference believes that amendments to the EAJA would produce significant savings in litigation costs.

To reduce litigation over the proper amount of fees awardable under the EAJA, the Conference recommends several technical modifications to the Act. First, Congress should strike the provision allowing enhancement of fees when " a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." The enhancement provision breeds uncertainty, costs money to litigate, and makes settlement more difficult to obtain. Second, Congress should amend 28 U.S.C. 2412(d)(2) to specify how courts should calculate cost-of-living increases. Little is gained by litigating over issues such as which price index or subcategory of an index to use in these calculations. Third, Congress should make clear that fees are to be calculated at the adjusted rate applicable on the date the judge or adjudicator issues an order granting the EAJA application. Currently, courts are split as to when the cost-of-living increase in applicable—for instance, whether it should be calculated as of the date the work is performed, or as of some later date. Choosing the date when the application is granted creates a bright-line rule that should simplify the calculation and compensate a private party to a limited extent for the delay in payment, *e.g.*, payment in 1992 for work performed in 1986. Fourth, because the Conference recommends eliminating the enhancement provision and including an offer-of-judgment provision (described below), both of which should tend to reduce the fees payable by the government, it also recommends raising the fee cap to approximate more closely the prevailing market rate for attorneys, to ensure that the level of compensation under the Act remains adequate to serve its purposes.

In addition to these relatively technical modifications to the Act, the Administrative Conference recommends that Congress enact an offer-of-judgment provision to help encourage settlements of fee disputes arising under the EAJA. Upon receiving a private party's fee application, the government could make an offer of judgment as to the fee award. If the private party rejects that offer and ultimately recovers no more than the offer, it could not recover any fees or expenses incurred for services rendered after the offer was rejected. The offer-of-judgment device should encourage settlement, thereby saving both parties the expense of litigating fee disputes; while the government party gains leverage by extending an offer of judgment, the private party benefits from the opportunity to obtain prompt payment of fees.

This offer of judgment recommendation and the four technical recommendations that precede it involve careful balancing of factors that may either increase or reduce the incentives for attorneys to accept EAJA

cases. The Conference presents them as a single package, rather than separate proposals, and emphasizes the interrelationship among the recommendations.

The Conference also recommends that Congress act to resolve problems involving implementation of the EAJA's requirement that parties seeking fees file applications within 30 days after final judgment (or final disposition in agency proceedings). Thirty days does not always provide adequate time for prevailing parties to prepare the necessary materials, and the jurisdictional nature of the requirement forecloses the option of a time extension. Extending the filing deadline to 60 days would reduce the pressure on fee applicants without undue prejudice to the government. More importantly, the Supreme Court's recent decision in *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157 (1991), and *Sullivan* v. *Finkelstein*, 110 S. Ct. 2658 (1990), have spawned significant litigation about the timeliness of EAJA applications when the federal courts remand cases to agencies. Currently, some district court remands to agencies are considered final judgments, thus triggering the 30-day filing limit in the EAJA, even though claimants do not yet know whether they have "prevailed" in the underlying action. The uncertainty created by these cases could be avoided by making clear in the statute that the filing deadline is not triggered in a proceeding on remand until the party has prevailed in the remanded proceeding. Alternatively, Congress could resolve these problems by deleting the 30-day requirement. Most other attorney's fee statutes do not include any such deadline, and attorneys waiting to be paid for their services will have no incentive to delay filing.

Congress should also encourage private parties litigating against the United States to inform the court or administrative adjudicator before judgment if they intend to apply for EAJA fees should they prevail. This would permit such decision makers, in appropriate cases, to make a determination as to the substantial justification of the government's position at the same time they resolve the merits. That simultaneous finding may obviate the need for more extensive briefs at a later time.

Streamlining Fee Disputes in Individual Benefit Cases

Individual benefit claims brought directly under 42 U.S.C. 405(g) or under a provision cross-referencing 42 U.S.C. 405(g), which include social security disability, SSI, Medicare and similar claims, raise some unique issues deserving special consideration. Currently, the substantial justification issue is litigated in a high percentage of all EAJA disputes arising out of such benefit cases; from July 1989 to June 1990, the government prevailed in less than 15% of these disputes. The average EAJA award in such cases is less than $3,500. In light of these facts, the Conference concludes that the substantial justification standard should be eliminated for benefit cases involving individual claimants (but not for class actions). Although automatic fee shifting in these cases would increase the government's exposure to EAJA awards, that increase would be counterbalanced to some extent by the elimination of considerable government expense in litigating the substantial justification issue.

More importantly, elimination of the substantial justification standard should enable benefit claimants to find representation. Currently, parties seeking to press small disability claims and most SSI claims may have difficulty retaining counsel either through hourly rates or through a contingency fee arrangement; eliminating the substantial justification standard should help ensure the availability of counsel in these cases by making certain that a reasonable fee will be available for any successful claim. In addition, in cases—primarily disability cases—in which claimants can obtain counsel through contingency fee arrangements (restricted, in social security cases, to a reasonable fee not to exceed 25% of back benefits, 42 U.S.C. 406(b)), their counsel currently have little incentive to apply for fees under the EAJA. If counsel have a contingency fee arrangement and obtain an EAJA fee award, they must return the lesser award to the claimant. Public Law 96–481, Section 206, as amended by Public Law 99–80, Section 3, 99 Stat. 186 (August 5, 1985). Not surprisingly, many successful benefits claimants do not apply for EAJA fees (fewer than 40 percent did so from July 1989 to June 1990), even though private parties' success rate in EAJA litigation exceeds 80 percent.

Extending the EAJA's Coverage

Finally, the Conference recommends that Congress consider extending the Act's coverage, on a category-by-category basis, to particular agency and court proceedings that have the same characteristics as those adversary proceedings now covered by the Act. The Act covers only "adversarial adjudications" in agencies, which are defined as "adjudications under section 554 of [title 5]." The Supreme Court in *Ardestani* v. *INS*, 112 S. Ct. 515 (1991), construed that provision to exclude agency proceedings—such as deportation cases—which have virtually the identical attributes as proceedings under section 554 but are not technically covered by that provision. Similarly, it is unclear whether EAJA covers all litigation against the United States in Article I courts, even though such proceedings are often directly analogous to those covered by the Act in Article III courts. Congress has dealt explicitly with some of these courts; for example, the EAJA was amended in 1985 to include the United States Claims Court, and a separate statute, with somewhat different standards than the EAJA, provides for fee awards in Tax Court proceedings. 26 U.S.C. 7431. But other Article I bodies remain to be considered. The Court of Veterans Appeals, for example, recently decided that it does not have authority to award attorney's fees under the Act. *Jones* v. *Derwinski*, No. 90–58 (March 13, 1992).

Recommendation

1. Congress should amend the Equal Access to Justice Act, 5 U.S.C. 504, 28 U.S.C. 2412(d), as follows:

a. To reduce litigation over the dollar value of fee awards, (1) the provision in the Act allowing enhancement of fees when "a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee" should be stricken, (2) the Act should specify the precise method to be used in calculating future cost-of-living adjustments to the fee cap, (3) the Act should state that the rate to be used is the one that is applicable when the judge's (or administrative adjudicator's) order awarding EAJA fees is issued, and (4) the $75 per hour fee cap should be raised to approximate more closely the prevailing market rate for attorneys.

b. To encourage settlements, the Act should include an offer-of-judgment procedure: after an EAJA application is filed, the government may make an offer of judgment on the EAJA claim; if the private party rejects the government's offer and as ultimately awarded no more than that offer, that party forfeits the right to seek fees or expenses for the EAJA litigation from the time the offer of judgment is rejected.

c. To eliminate litigation on the question of when prevailing parties must file for fees, either the 30-day filing deadline in 5 U.S.C. 504 and 28 U.S.C. 2412(d) should be extended to 60 days, to run from the date of final disposition of the case,[1] or the filing deadline should be eliminated

[1] "Final disposition" occurs when a party has prevailed in a proceeding and the disposition of the proceeding is final and unappealable; in proceedings involving a remand from a court to an agency, final disposition does not occur until the remanded proceeding is concluded and the resulting administrative order is final and unappealable.

d. To promote judicial economy, the Act should encourage private parties litigating against the United States to notify the court or administrative adjudicator prior to judgment if they intend to file an EAJA application should they prevail, so as to enable the decisionmaker, in appropriate cases, to determine whether the government's position was substantially justified within the meaning of the Act of the same time that judgment is entered against the United States.

2. Congress should modify the provisions of 28 U.S.C. 2412(d) as they apply to individual benefit claims either brought directly under 42 U.S.C. 405(g) or under a provision cross-referencing 42 U.S.C. 405(g) in the federal courts. For those cases, the Act should provide for fee awards to prevailing claimants in individual actions without reference to whether the position of the United States was substantially justified.

3. Congress should consider whether to extend the Act's coverage, on a category-by-category basis, to:

a. Agency proceedings that, although not technically adjudications "under section 554 (of Title 5)," are required by statute to employ procedures equivalent to those of such formal adversary proceedings.

b. Proceedings before Article I courts that have the same attributes as covered proceedings in Article III courts and in agencies.

§ 305.92-6 Implementation of the Noise Control Act (Recommendation No. 92-6).

In 1981, Congress agreed to the Administration's proposal to cease funding for the Office of Noise Abatement and Control (ONAC) in the Environmental Protection Agency (EPA). Congress, however, did not repeal the Noise Control Act [1] when it eliminated ONAC's funding.

Before the elimination of ONAC, EPA engaged in a wide variety of activities to abate noise pollution under authority of the Noise Control Act and, after 1978, the Quiet Communities Act.[2] These included identifying sources of noise for regulation, promulgating noise emission standards, coordinating federal noise research and noise abatement, working with industry and international, state and local regulators to develop consensus standards, disseminating information and educational materials, and sponsoring research concerning the effects of noise and the methods by which it can be abated. The Quiet Communities Act authorized EPA to provide grants to state and local governments for noise abatement.

EPA ceased virtually all noise abatement activities after ONAC's funding was eliminated. However, the federal noise emission and labeling standards it had promulgated have remained in effect, thereby preempting state and local governments from accepting different standards. Thus, the standards remain frozen, as neither the EPA nor the state or local agencies have been in a position to amend or update possibly outmoded standards despite the technological developments of the last decade. Moreover, some private rights to bring tort or other actions may be affected by these EPA emission and labeling standards.

The Conference recognizes that the decision to end funding was substantive rather than procedural, but, in part, the impact has been procedural.[4] No procedure has been available for a decade to reexamine the existing preemptive standards to take into account developments in science and technology that may bear on implementation of the legislative intent. Elimination of funding for the agency's noise control program has had the additional procedural effect of leaving several proposed but unissued standards pending for a decade without final action by EPA.

EPA retains the statutory responsibility for enforcing the Noise Control Act, and has used minimal resources for engaging in limited enforcement and other related activities.[5] Pursuant to this authority, EPA has asked the Conference to assist it in reevaluating the current status of the Noise Control Act by recommending options that relate to procedural considerations. The Conference takes no position concerning what actions, if any, EPA should take regarding enforcement and implement of the Noise Control Act. If EPA wishes to assess the current situation, however, the Conference has identified considerations that should be part of such reassessment.

The Conference is unaware of any other instance where Congress has eliminated the funding for an ongoing program that preempts state and local actions without also ending the statutory authorization for that program or addressing the preemptive effect of existing regulations. If this situation does exist in other contexts, there may be procedural problems similar to those associated with the Noise Control Act.

Recommendation

1. In considering its authority and responsibility under the Noise Control Act, the Environmental Protection Agency (EPA) should analyze the preemptive impact of its existing and pending noise standards for the purpose of eliminating, where possible, any unintended impacts. EPA should then advise the appropriate congressional committees respecting the preemptive effects of EPA's possibly outmoded regulations under the Noise Control Act,[6] or any other implications of the cessation of funding respecting the agency's responsibilities under the Act.

2. In making the determinations called for under this recommendation, EPA should take into account, among other considerations:

(a) The scientific and technological developments that have occurred since 1981;

(b) Whether there is a need to update EPA's past methodology for measuring and assessing the effects of noise;

(c) The appropriate allocation of responsibility among federal agencies, and between the federal government and the states and localities, in accomplishing any goals determined by Congress respecting regulation of noise, educating the public on the dangers posed by noise, and sponsoring research into noise effects and abatement techniques;

(d) Whether there is a need for additional coordination of the noise abatement activities of federal agencies and the states and localities;

(e) The adequacy of current coordination between the United States and foreign government agencies concerning noise abatement standards and regulations impacting U.S. international trade;[7]

(f) Any appropriate federal government participation in the activities of private-sector standard-setting organizations concerning noise;[8] and

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[1] 42 U.S.C. 4901–4918 (1988).

[2] 42 U.S.C. 4913 (1988).

[4] Although Congress eliminated funding for the Noise Control Act after ONAC had adopted some preemptive regulations and proposed others, it did not repeal the Noise Control Act. This situation is different from the more common circumstance where Congress passes legislation but does not fund its implementation.

[5] Since 1981, EPA has engaged only in very limited enforcement of existing noise regulations, disseminating information created during ONAC's existence, and commenting on environmental impact statements issued by the Federal Aviation Administration concerning airport noise. The FAA has independent authority to abate airport noise under the Noise Control Act and the Aviation Noise and Capacity Act, Public Law No. 101-508, sections 9301–09 (1990). Responsibility for the enforcement of EPA's railroad and motor carrier emission standards is located in the Department of Transportation, which has funding for this purpose. The Department, however, does not have authority to promulgate new or amended emission standards different from those adopted by EPA.

[6] See Conference Recommendation 84–5, "Preemption of State Regulation by Federal Agencies," 1 CFR 305.84–5.

[7] See Conference Recommendation 91–1, "Federal Agency Cooperation with Foreign Government Regulators," 1 CFR 305.91-1

[8] See Conference Recommendation 78–4, "Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulations," 1 CFR 305.78–4

[g] The relative advantages and disadvantages of utilizing public education, market incentives, emission standards, or other approaches for any abatement of noise that Congress may wish to pursue.

3. After reviewing whatever advice may be received from EPA under this recommendation, the appropriate congressional committees should review the issues raised by the foregoing recommendations, including whether the continuation of substantive regulatory requirements without funding, or EPA's inability to reexamine, modify, or rescind those requirements, creates undue procedural burdens upon industry, the states, and the public. Congress should then either repeal the Noise Control Act or fund whatever responsibilities under the Act Congress delegates to EPA.

Dated: June 30, 1992

Jeffrey S. Lubbers,

Research Director.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 92-CE-02-AD; Amendment 39-8307; AD 92-15-13]

Airworthiness Directives; Beech 99 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes Airworthiness Directive (AD) 90-04-04, which currently requires inspection of the wing front spar lower cap and associated structure for fatigue cracking on certain Beech 99 series airplanes, and replacement if found cracked. AD 90-04-04 also establishes a service life limit on the wing front spar lower caps that have reinforcing straps installed. This action maintains the requirements of AD 90-04-04, but corrects the compliance times and other incorrect information contained in that AD. The actions specified by this AD are intended to prevent fatigue failure of the wing front spar lower cap and associated structure.

DATES: Effective August 24, 1992.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 24, 1992.

ADDRESSES: Service information that is applicable to this AD may be obtained from the Beech Aircraft Corporation, Commercial Service, Department 52, P.O. Box 85, Wichita, Kansas 67201-0085; Telephone (316) 676-7111; or Western Aircraft Maintenance, 4444 Aeronca Street, Boise, Idaho 83705. This information may also be examined at the Federal Aviation Administration (FAA), Central Region, Office of the Assistant Chief Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106; or at the Office of the Federal Register, 1100 L Street NW., room 8401, Washington DC.

FOR FURTHER INFORMATION CONTACT: Mr. Don Campbell, Aerospace Engineer, Airframe Branch, Wichita Aircraft Certification Office, 1801 Airport Road, room 100, Mid-Continent Airport, Wichita, Kansas 67209; Telephone (316) 946-4128.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to include an AD that is applicable to certain Beech 99 series airplanes was published in the Federal Register on March 4, 1992 (57 FR 7562). The action proposed superseding AD 92-04-04, Amendment 39-8487 (55 FR 3581, February 2, 1990), with a new AD that would (1) retain the inspection and possible replacement requirements of the wing front spar lower cap and associated structure that is required by AD 90-04-04; (2) correct certain compliance times referenced in AD 90-04-04 and delete information included in this AD that is not pertinent; and (3) maintain the inspection intervals established by either superseded AD 77-05-01 R3 or AD 90-04-04, which will be superseded by this action.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received on the proposed rule or the FAA's determination of the cost to the public. After careful review, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial corrections. The FAA has determined that these minor corrections will not change the meaning of the AD nor add any additional burden upon the public than was already proposed.

The FAA estimates that 85 airplanes in the U.S. registry will be affected by this AD, that it will take approximately 4 workhours per airplane to accomplish the required action, and that the average labor rate is approximately $55 an hour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $37,400. Since AD 90-04-04, which would be superseded by this action, required the same actions (except for a change in repetitive compliance times, the deletion of inpertinent information, and the incorporation of established inspection intervals), there is no additional cost impact of this AD on U.S. operators. The $10,200 cost difference between this AD (estimated $37,400) and AD 90-04-04 (estimated $27,200) is a result of inflationary costs used in determining the cost of labor ($55 per hour as opposed to $40 per hour).

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption "**ADDRESSES**".

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by removing AD 90-04-04, Amendment 39-8487 (55 FR 3581, February 2, 1990), and adding the following new AD:

Rules and Regulations

Federal Register
Vol. 57, No. 250
Tuesday, December 29, 1992

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

1 CFR Parts 305 and 310

Recommendations and Statements of the Administrative Conference Regarding Administrative Practice and Procedure

AGENCY: Administrative Conference of the United States.

ACTION: Recommendations and amendments.

SUMMARY: The Administrative Conference of the United States adopted three recommendations at its Forty-Seventh Plenary Session addressing: The Federal administrative judiciary; administration of the Office of Juvenile Justice and Delinquency Prevention's formula grant program; and de minimis settlements under Superfund.

The Administrative Conference of the United States is a Federal agency established to study the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies in carrying out administrative programs, and to make recommendations for improvements.

At this time, the Conference is removing the texts of certain recommendations and statements from the Code of Federal Regulations because they are deemed to be no longer of continuing general interest.

EFFECTIVE DATE: December 29, 1992.

FOR FURTHER INFORMATION CONTACT: Renee Barnow, Information Officer (202–254–7020).

SUPPLEMENTARY INFORMATION: The Administrative Conference of the United States was established by the Administrative Conference Act, 5 U.S.C. 591–596. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies in carrying out administrative programs, and makes recommendations for improvements to the agencies, collectively or individually, and to the President, Congress, and the Judicial Conference of the United States (5 U.S.C. 594(1)).

At its Forty-Seventh Plenary Session, held December 10–11, 1992, the Assembly of the Administrative Conference of the United States adopted three recommendations. These recommendations were issued December 22, 1992.

Recommendation 92–7, The Federal Administrative Judiciary, is the result of a comprehensive study of federal administrative adjudications. It calls upon Congress, when creating new programs, to preserve the uniformity of process and of qualifications of presiding officers contemplated by the Administrative Procedure Act, and it contains guidelines for assigning adjudications to administrative law judges (ALJs). The Recommendation also urges reform of the ALJ selection process administered by the Office of Personnel Management so that agencies can hire from a larger pool of qualified applicants. More specifically, the Conference recommends elimination of the veterans' preference in the ALJ hiring process in order to make it more possible for agencies to hire qualified women candidates as ALJs. Recommendation 92–7 also recommends that a system of review of ALJ performance be developed, and that it be administered by agency Chief ALJs. The system would include a mechanism for investigating ALJ allegations of improper agency infringement of, or interference with, their decisional independence, and it would include procedures for investigating complaints of ALJ misconduct, such as allegations of bias or prejudice.

Recommendation 92–8, Administration of the Office of Juvenile Justice and Delinquency Prevention's Formula Grant Program, contains Conference recommendations for improving administration of the formula grant program, including changes related to OJJDP's communication and consultation with states, coordination and collaboration at various levels of government, consistency and clarity of policy elaboration, staffing, and training.

Recommendation 92–9, De Minimis Settlements Under Superfund, urges the Environmental Protection Agency to expand its efforts to negotiate settlements with "potentially responsible parties" that have contributed relatively small amounts of hazardous waste at sites covered by the Superfund program. A more active agency role is recommended and suggestions are made for additional guidance from EPA headquarters to regional offices. The recommendation also calls for establishing a central, publicly accessible repository of de minimis settlement documents.

The full texts of the recommendations are set out below. The recommendations will be transmitted to the affected agencies and, if so directed, to the Congress of the United States. The Administrative Conference has advisory powers only, and the decision on whether to implement the recommendations must be made by each body to which the various recommendations are directed.

The transcript of the Plenary Session is available for public inspection at the Conference's offices at suite 500, 2120 L Street NW., Washington, DC. Recommendations and statements of the Administrative Conference are published in full text in the Federal Register. Complete lists of recommendations and statements, together with the texts of those deemed to be of continuing interest, are published in the Code of Federal Regulations (1 CFR part 305). Copies of all past Conference recommendations and statements, and the research reports on which they are based, may be obtained from the Office of the Chairman of the Administrative Conference.

The authority citation for parts 305 and 310 is being revised to conform to renumbering of the Administrative Conference Act in Pub. L. 102–354.

List of Subjects in 1 CFR Parts 305 and 310

Administrative practice and procedure, Administrative adjudication, Administrative law judges, Juvenile justice, and Superfund.

Parts 305 and 310 of title 1 of the Code of Federal Regulations are amended as follows:

PART 305—RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

1. The authority citation for part 305 is revised to read as follows:

Authority: 5 U.S.C. 591–596.

2. New §§ 305.92–7 through 305.92–9 are added to read as follows:

§ 305.92–7 The Federal Administrative Judiciary (Recommendation No. 92–7).

At the request of the Office of Personnel Management, the Administrative Conference undertook a study of a series of issues relating to the roles of Federal administrative law judges (ALJs) and non-ALJ adjudicators, or administrative judges (AJs),[1] as they have evolved over the last several decades. The study addressed a number of different issues, including those relating to selection and evaluation of ALJs and AJs, the relationship of ALJs and AJs to their employing agencies, including the appropriate level of "independence" of such decisionmakers, and under what circumstances each type of decisionmaker should be used. Many of these issues are controversial, and the Conference has heard strong arguments from those with differing views.

The Administrative Conference takes as its starting point in considering the role of the Federal administrative judiciary the role created for "hearing examiners," now redesignated as "administrative law judges," in the Administrative Procedure Act in 1946.[2] That Act contemplated the existance of impartial factfinders, with substantive expertise in the subjects relevant to the adjudications over which they preside, who would be insuleted from the investigatory and prosecutorial efforts of employing agencies through protections concerning hiring, salary, and tenure, as well as separation-of-functions requirements. The decisions of such impartial factfinders were made subject to broad review by agency heads to ensure that the accountable appointee at the top of each agency has control over the policymaking for which the agency has responsibility.

The need for impartial factfinders in administrative adjudications is evident to ensure the acceptability of the process, some degree of adjudicator independance is necessary in those adjudications involving some kind of hearing.[3] The legitimacy of an adjudicatory process also depends on the consistency of its results and its efficiency.

ALJs possess a degree of independance that dates back to the enactment of the APA and is governed by the APA and related statutes. The APA provides that certain separations of functions must be observed to protect the ALJ from improper pressures from agency investigators and prosecutors. ALJs are selected through a special process overseen by OPM. Their pay is set by statute and OPM regulations. Any attempt by an agency to discipline or remove an ALJ requires a formal hearing at the Merit Systems Protection Board. ALJs are also exempt from the performance appraisal requirements applicable to almost all other Federal employees under the Civil Service Reform Act.

While the number of ALJs in the Federal government has leveled off in the last decade, and has actually decreased outside of the Social Security Administration, some agencies have been making increased use of AJs. The amount of functional independence accorded to AJs varies with the particular agency and type of adjudication; however, AJs generally lack the statutory protections guaranteed to ALJs. AJs are not statutorily exempt from performance appraisals, and several major groups of AJs regulatory undergo such appraisals by the agencies for which they work. In general, however, AJs presiding in agency adjudications in which a hearing is provided are accorded de facto protection from pressure from agency investigators and prosecutors, and, according to the Conference's survey, do not perceive themselves as significantly more subject to agency pressure than do ALJs.

The Conference's general view is that the movement away from the uniformity of qualifications, procedures, and protections of independence that derives from using ALJs in appropriate adjudications is unfortunate. The Conference believes that, to some extent, this movement away from ALJs toward AJs has been fueled by perceptions among agency management of difficulties in selecting and managing ALJs. These recommendations attempt to address these perceived problems. It should be noted that these recommendations are interdependent. For example, recommendations concerning the conversion of AJ positions to ALJ positions, and creation of new ALJ positions in new programs, are premised on the implementation of improvements in the selection and evaluation processes.

Use of ALJs and AJs

There is no apparent rationale undergirding current congressional or agency decisions on the use of ALJs or non-ALJs in particular types of cases. Congress seems to make such choices on an ad hoc basis. Moreover, it is quite clear that similar types of determinations made in different agencies are being made by different types of decisionmakers. For example, disability benefits adjudications at the Social Security Administration are handled by ALJs; at the Department of Veterans Affairs, AJs adjudicate similar types of cases. Moreover, in some contexts, non-ALJ adjudicators preside over cases in which extremely important issues of personal liberty are potentially at stake, such as deportation proceedings and security clearance cases.

The uniform structure established by the APA for on-the-record hearings and for qualifications of presiding officers serves to provide a consistency that helps furnish legitimacy and acceptance of agency adjudication. A rationalized system of determining when ALJs should be used would encourage uniformity not only in procedure, and in the qualifications of the initial decider, but in adjudication of similar interests. The Conference, therefore, recommends that Congress consider the conversion of AJ positions to ALJ positions in certain contexts. While the Conference does not identify specific types of cases for which such conversion should be made, it proposes a series of factors for Congress to consider in making such determinations; these same factors should also apply when Congress creates new programs involving evidentiary hearings.

One critical factor is the nature of the interest being adjudicated. The separation of functions mandated by the APA, as well as the selection criteria designed to ensure the highest quality adjudicators, are of particular value in situations where the most important interests are at stake. Generally speaking, a hearing that is likely to involve a substantial impact on personal liberties or freedom, for example, is one where use of an ALJ likely would be

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[1] The term "administrative judge," as used here includes non-ALJ hearing officers, whatever their title, who preside at adjudicatory hearings.

[2] In 1969, the Conference addressed some of these issues in the context of hearing examiners. See Conference Recommendation 69–9, 1 CFR 305.69–9 (part A) (1988). Many of the recommendations set forth here pertaining to selection and training of ALJs are broadly consistent with the earlier recommendation, but to the extent that they differ, this recommendation is intended to supersede part A of Recommendation 69–9.

[3] The study underlying this recommendation limited its consideration to adjudicators who preside over some kind of hearing. More informal adjudication processes are outside the scope of the study.

appropriate. Similarly, cases that could result in an order carrying with it a criminal-like finding of culpability, imposition of sanctions with a substantial economic effect (such as large monetary penalties or some license revocations),[4] or a determination of discrimination under civil rights laws (unless there is an opportunity for a de novo hearing in court) represent categories of proceedings that may call for ALJ use. This characterization should be done for types of cases rather than for particular cases.

Another factor to consider is whether the procedures established by statute or by rule for cases heard and decided are, or would be, substantially equivalent to APA formal hearings. In such cases, the additional uniformity that would derive from making the cases formally subject to 5 U.S.C. 554, 556, and 557 would argue in favor of ALJs.

ALJs are required to be lawyers. Some AJs who decide cases are not lawyers, but have other needed specialized expertise. For example, certain adjudicators at the Nuclear Regulatory Commission are physicists or engineers who participate on multi-member boards. In determining whether it is appropriate to use ALJs in particular types of cases, Congress should consider whether the benefits of using ALJs are outweighed by the benefits of having other expertise brought to bear. It should also consider whether lawyers serving with nonlawyers on decision panels should be ALJs.

A final consideration, particularly in the context of considering conversion of existing AJ positions to ALJ positions, is the extent to which the current adjudicators closely approximate ALJs in their decisional independence, the criteria for their selection, or their compensation and experience levels. If existing AJs are functioning well and do not approach parity with ALJs on these criteria, there may be no need to make the conversion. On the other hand, if they closely match ALJs on these factors, uniformity interests may weigh in favor of conversion.

Although none of these factors is necessarily intended to be determinative, the more that these factors weigh in favor of ALJ status for the decisionmaker, the more appropriate it is for Congress to mandate such status. It should be noted, however, that these recommendations are not intended to be seen as encouraging increased formalization of administrative adjudicatory processes.

[4] Grant or contract disputes would not fall within this category, unless a monetary penalty was involved.

In situations where Congress does convert AJ positions to ALJ positions, those AJs who can satisfy OPM eligibility qualifications should be eligible for immediate appointment as ALJs. Thus, only those existing AJs meeting the standards for ALJ appointment would become ALJs, but they would not be required to go through the competitive selection process.

Historically, OPM has had responsibility to review and rule on agency requests for additional ALJ positions. In the past, when there were government-wide limits on "supergrade" positions, which included ALJs, this oversight role served a purpose. Those limits no longer exist, and it is no longer necessary for OPM to participate in this process. Agencies should be free, within their normal resource allocation constraints, to determine for themselves whether they need more or fewer ALJs.

ALJ Selection

The selection process for ALJs has been administered by OPM (and its predecessor agency) since 1946. OPM develops the criteria for selection, accepts applications for the register of eligibles, and rates the applicants on the basis of their experience as described in a lengthy statement prepared by the applicant, a personal reference inquiry, a written demonstration of decision-writing ability, and a panel interview. The scores from this process determine an applicant's rank on the register of eligibles. Because OPM has historically considered ALJs as being in the competitive service, OPM follows the statutory requirements for filling vacancies. Thus, OPM rates and ranks eligibles on a scale from 70 to 100, and when an agency seeks to fill a vacancy, OPM certifies the top three names on the register to that agency. In practice, only applicants with scores from 85 to 100 have been certified.

The Veterans' Preference Act, which has historically applied to most civil service hiring, is applicable to selection of administrative law judges. As applied, veterans deemed qualified for the preference are awarded an extra 5 points, and disabled veterans are awarded an extra 10 points in their scores. These extra points have had an extremely large impact, given the small range in unadjusted scores. In addition, under current law, agencies may not pass over a veteran to hire a nonveteran with the same or lower score on the certificate. As a consequence, application of the veterans' preference has almost always been determinative in the ALJ selection system.

There has been concern about the ALJ selection process, arising from the determinative impact of veterans' preference and the very limited selection options available to agencies. In fact, most agencies in recent years have found ways to circumvent this process somewhat, primarily by hiring laterally from other agency ALJ offices, or (in those few agencies that hire substantial numbers of ALJs) by waiting until there are numerous slots to fill at one time, thus entitling them to a larger certificate of eligibles from OPM.

Despite this circumvention, the application of veterans' preference to the ALJ selection process has had a materially negative effect on the potential quality of the federal administrative judiciary primarily because it has effectively prevented agencies from being able to hire representative numbers of qualified women candidates as ALJs. There is also some evidence that application of the veterans' preference may have adversely affected the hiring of racial minorities. Thus, agencies are prevented from being able to select the best qualified ALJs for specific positions from a pool of representative applicants. The Conference recognizes that the general policy of veterans' preference in Federal hiring reflects a valid social concern, particularly as it helps those who leave military service enter the Federal civilian workforce. But, in view of the conflict between this policy and the valid need of Federal agencies to have an opportunity to select the best qualified ALJs from among representative applicants, the Conference recommends that Congress abolish veterans' preference in the particular and limited context of ALJ selection.[5] In that connection, it should be noted that in 1978, Congress created a similar narrow exemption for members of the Senior Executive Service. Moreover, there is no veterans' preference in the selection for any other Federal judicial position.

The Conference's recommendation on the selection of ALJs would leave with OPM the responsibility for preparing the register of eligibles (i.e., for determining the basic qualifications for the position and rating the applicants). OPM is urged to ensure that all applicants placed on the register are in fact qualified to fulfill the responsibilities of being an ALJ.

In conjunction with this, however, the recommendation would also expand the choices that agencies would have in

[5] The Conference has recommended a similar modification to the veterans' preference in this context before. See Conference Recommendation 69-9, 1 CFR 305.69-9 ¶ A(4) (1988).

selecting from among those qualified applicants. Under this recommendation, after OPM rated the applicants, it would compile a register of all applicants deemed qualified following the final rating process. An agency could request a certificate with the names of all applicants whose numerical ratings placed them in the highest-ranked 50 percent of the register. Agencies could also request a certificate containing a smaller number of names or applicants in a higher percentile. The agency would have the authority to hire anyone on the certificate.[6]

In addition, if, following review of the highest-ranked 50 percent, an agency needed to review additional names to find a suitable candidate, it could request an additional certificate from OPM. Such an exception should be invoked rarely, and only upon a showing of exceptional circumstances

The Conference recognizes that any limitation on the number of qualified candidates on the certificate, including the "top three" limitation now in place, might be criticized as arbitrary. By recommending the highest-ranked 50 percent of the applicants OPM has determined to be qualified, the Conference is attempting to balance two factors. The Conference recognizes the agencies' strong interest in having a substantially larger pool of qualified candidates from which to select ALJs who meet their varying criteria and needs. It also recognizes the importance of ensuring that such a pool is highly qualified, as measured by a uniform objective rating system. The Conference believes that its recommendation provides a reasonable balance of these factors. It provides a pool large enough that agencies should be able to find candidates for ALJ positions who satisfy their varying and specific needs. At the same time, OPM estimates that the top 50 percent of the register corresponds to those applicants with scores of 85 or better out of 100.

Agencies would also have access to a computerized database that would contain the complete application files of individual applicants on their certificate, including numerical ratings, geographical or agency preferences, particular kinds of experience, and veterans status. This database would allow agencies the option to narrow the list of qualified applicants and focus on those whom they would like to consider further. For example, an agency could search for all candidates willing to relocate to New York City, who spoke Spanish, and had ratings in the top 20 percent.

To ensure that the register contains a broad range of qualified applicants, the Conference also recommends that OPM and hiring agencies expand recruitment of women and minority applicants for ALJ positions. In addition, because questions have been raised about OPM's current method of assessing litigation experience for the purposes of scoring applicants for ALJ positions, the Conference recommends that OPM review its rating criteria to determine whether they are appropriate.

For much of the last decade, the register has been closed, thus precluding newly interested applicants from being considered for ALJ positions Although OPM deferred reopening the register pending the outcome of the Conference's consideration and recommendations, it has announced that the register will be reopened in the spring of 1993. While the Conference's recommendations would significantly affect the ALJ selection process, the impact would come mostly at the end of the process, after OPM has evaluated and rated the new applicants. This procedure is likely to be a time-consuming one, given the expected large influx of applicants. Therefore, the Conference supports reopening the application process, so that OPM can begin rating the candidates now, even though the recommended changes in the later stages have not yet been implemented. This way, when and if those changes are in place, the updated register will be readily available. It should be noted, however, that the Conference is also recommending that OPM review some of its rating criteria, which would need to be done before it begins rating new applicants

OPM has indicated that it has a planned program to expand recruitment of women and minority applicants for the register. The Conference both encourages OPM to give such a program a high priority, and recommends that OPM and the hiring agencies take steps in particular to recruit among minority bar associations and other institutions with large numbers of minorities or women.

The Conference's view is that implementing these recommendations will provide agencies the opportunity to select ALJs from a broad range of highly qualified candidates and to hire the best applicants from a representative register.

ALJ Evaluation and Discipline

At present, ALJs, virtually alone among Federal employees, are statutorily exempt from any performance appraisal. Although agencies may seek removal or discipline of ALJs "for good cause" by initiating a formal proceeding at the MSPB, the Board has applied standards that have strictly limited the contexts in which such actions may successfully be taken against an ALJ. For example, agency actions premised on low productivity have never been successful before the Board.

The Conference recognizes the importance of independence for ALJs Their role under the APA as independent factfinders requires that they be protected from pressure in making their decisions. There can be a tension, however, between this independence and the agency's role as final policymaker, including the need for consistency of result and political accountability. Moreover, agencies have a legitimate interest in being able to manage their employees, including ALJs, in order to ensure that the adjudicatory system is an efficient and fair one.

The Conference, therefore, recommends that a system of review of ALJ performance be developed. Chief ALJs would be given the responsibility to coordinate development of case processing guidelines, with the participation of other agency ALJs, agency managers and others. These guidelines, which would address issues such as ALJ productivity and step-by-step time goals,[7] would be one of the bases upon which Chief ALJs would conduct regular (e.g., annual) performance reviews. Judicial comportment and demeanor would be another basis for review. Another factor on the list of bases for performance review, which list is not intended to be exclusive, would be the existence of a clear disregard of, or pattern of nonadherence to, properly articulated and disseminated rules, procedures, precedents and other agency policy. Such performance review systems need not involve quantitative measures or specific performance levels, but they should provide meaningful and useful feedback on performance.[8]

[6] In order to implement this recommendation, Congress would need at a minimum to modify the veterans' preference to eliminate the provision restricting the passing over of veterans, so that agencies would have the ability to hire any qualified applicant on the certificate

[7] See Conference Recommendation 86–7, "Case Management as a Tool for Improving Agency Adjudication," 1 CFR 305.86–7 (1992), at ¶2

[8] Many states now use performance reviews for their state court judges and ALJs. The performance of Federal magistrate-judges is evaluated as a condition of reappointment. Even some Federal courts are beginning to experiment with evaluation of judges' performance

Conversely, ALJs should also have a mechanism for dealing with legitimate concerns about improper agency infringement of, or interference with, their decisional independence. Under the Conference's recommendation, each agency employing ALJs should set up a system for receiving and investigating allegations of such activity by agency management officials and, where warranted, referring them to the appropriate authorities for action.[9] OPM would have oversight responsibility, and could, upon request by an ALJ or at its own discretion, review an agency's response to such allegations, and recommend appropriate further action.

Under the Conference recommendation, the Chief ALJs' responsibilities would also include developing ALJ training and counseling programs designed to enhance professional capabilities and to remedy individual performance deficiencies, and, in appropriate cases, issuing reprimands or recommending disciplinary action.[10]

Recently, attention has been focused on allegations of prejudice against certain classes of litigants by some ALJs.[11] While there is no known evidence that such a problem is widespread, the Conference's view is that it is important to have a mechanism for handling complaints or allegations relating to ALJ misconduct, including allegations of bias or prejudice. The Conference, therefore, recommends that Chief ALJs, either individually or through an ALJ peer review group, receive and investigate such complaints or allegations, and recommend appropriate corrective or disciplinary actions. To the extent practicable, such investigation and the processing of any corrective or disciplinary recommendation should be expedited to protect affected interests and create public confidence in the process. Where appropriate, consensual resolutions are encouraged. The Conference also recommends that agencies publicize the existence of their complaint procedures, in published rules and procedures or in some other appropriate fashion, and inform complainants in a timely manner of the disposition of their complaints.

The Conference is also recommending that OPM assign the various responsibilities relating to ALJs to a specific unit within that agency. Such a unit would, among other things, have responsibility for overseeing personnel, hiring and performance matters involving Chief ALJs, thus providing them additional insulation from agency pressures. Because of the increased importance of the position of Chief ALJ under this proposal, Congress also should consider making the position subject to a term appointment, as it has done for Chief Judges of United States District Courts.

The Conference also recommends that proceedings before the Merit Systems Protection Board involving charges against ALJs be heard by a three-judge panel. Judging administrative law judges is a sensitive process, and the benefit of collegial decisionmaking in this context seems worth the added cost. The panel should be selected from a pool of ALJs. Currently, MSPB has only on ALJ. So long as this is the case, the pool should consist of ALJs from other agencies, but the panel in a particular case should not involve ALJs from the same agency as the respondent ALJ.

Policy Articulation

As discussed, the APA model of agency decisionmaking is based on the use of independent ALJs to find facts and to apply agency policy to those facts. This system requires that ALJs be granted independence as factfinders, but it also must ensure that agency policymakers are able to establish policies in an efficient manner for application by ALJs in individual cases. The methods available to agencies include promulgation of rules of general applicability, the use of a system of precedential decision,[12] or other appropriate practices, such as proper use of policy statements.[13] Such policy statements must be properly disseminated.

Where the agency has made its policies known in an appropriate fashion, ALJs and AJs are bound to apply them in individual cases. Policymaking is the realm of the agency, and the ALJ's (or AJ's) role is to apply such policies to the facts that the judge finds in an individual case.

The Concept of an ALJ Corps

There has been over the last decade considerable discussion of the concept of an ALJ corps. Although there have been differences among the specific proposals, the concept in general includes separating ALJs from individual agencies, and placing them in a new, separate agency. Recent legislative proposals provided, among other things, that new ALJs would be selected by a chief judge of the corps, and that ALJs would be divided into several general subject matter divisions (such as health and benefits; safety and environment; and communications, public utility and transportation regulation).[14]

The Conference discussed these recent legislative proposals to establish a centralized ALJ corps as a means of handling some of the issues addressed in this recommendation. Some of these recommendations are independent of such proposals; others are inconsistent with them. The Conference concluded that there is no basis at this time for structural changes more extensive than those proposed here.

Recommendation

1. Congressionally Mandated Use of ALJs and AJs[15]

A. When Congress considers new or existing programs that involve agency on-the-record adjudications, it should seek to preserve the uniformity of process and of qualifications of presiding officers contemplated by the APA, by providing for the use of administrative law judges (ALJs) in all appropriate circumstances.[16] In order to further this goal, Congress should consider converting certain existing administrative judge (AJ) positions[17] to ALJ positions. In determining the appropriateness of converting existing AJ positions to ALJ status and of requiring the use of ALJs in particular types of new adjudications, Congress should consider the following factors, if present, as indicia to weigh in favor of requiring ALJ status:

1. The cases to be heard and decided are likely to involve:

a. Substantial impact on personal liberties or freedom;

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[9] Such authorities might include OPM for certain lesser sanctions, and the Office of Special Counsel or MSPB in more serious cases.

[10] See 43 Op. Att'y Gen. 1 (1977) (discussing certain limitations on agency's authority to reprimand ALJs).

[11] See, e.g., U.S. GAO, Social Security: Racial Difference in Disability Decisions Warrants Further Investigation, GAO/HRD-92-56 (April 1992); Cf. Ninth Circuit Gender Bias Task Force, Preliminary Report (Discussion Draft) (July 1992) at 93-103 (discussing gender bias issues relating to disability determinations).

[12] See Conference Recommendation 89-8, "Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions," 1 CFR 305.89-8 (1992) ¶1 at p. 2.

[13] See Conference Recommendation 92-2, "Agency Policy Statements," 57 FR 30101, 30103 (1992), to be codified at 1 CFR 305.92-2.

[14] See S. 826 and H.R. 3910, 102d Cong.

[15] The recommendations in this Part I are interdependent with those of Parts II and III urging improvements in the selection and evaluation processes for ALJs.

[16] This recommendation is not intended to be seen as encouraging increased formalization of administrative adjudicatory processes.

[17] The term "administrative judge," as used here, includes non-ALJ hearing officers, whatever their title, who preside at adjudicatory hearings.

b. Orders that carry with them a finding of criminal-like culpability;

c. Imposition of sanctions with substantial economic effect; or

d. Determination of discrimination under civil rights or other analogous laws.

2. The procedures established by statute or regulation for the cases heard and decided are, or would be, the functional equivalent of APA formal hearings.

3. The deciders in such cases are, or ought to be, lawyers—taking into consideration the possibility that some programs might require other types of specialized expertise on the part of adjudicators or on panels of adjudicators.

4. Those incumbent ALJs in such cases who are required to be lawyers already meet standards for independence, selection, experience, and compensation that approximate those accorded to ALJs.

B. When Congress determines that it should require ALJs to preside over hearings in specific classes of existing federal agency adjudications at which ALJs do not now preside, it should [illegible] specify that those AJs presiding over such proceedings at that time who can satisfy the Office of Personnel Management's eligibility qualifications for ALJs be eligible for immediate appointments as ALJs.

C. Congress should provide that OPM should no longer be responsible for reviewing and ruling on agency requests for additional ALJ positions. Decisions relating to an agency's need for more or fewer ALJ positions should be made by the individual agencies through the normal resource allocation process.

II. ALJ Selection

A. Congress should authorize where required, and OPM should establish, a process for the selection of qualified ALJs by federal agencies that contains the following elements.

1. OPM should continue to administer the process for determining whether applicants are qualified to be on the register of eligibles for ALJ positions and for rating such applicants. OPM should ensure that all applicants appearing on the register are in fact qualified to fulfill the duties of an ALJ under applicable law, including that they have the capability and willingness to provide impartial, independent factfinding and decisionmaking. To the extent that this may require revising the examination process, OPM should make the appropriate changes.

2. Those applicants determined by OPM to be qualified should be listed on the register with their numerical scores noted. Agencies seeking to fill ALJ positions should be allowed to request a certificate containing the names of those applicants whose numerical ratings place them in the highest-ranking 50 percent of the register of eligible applicants. Agencies should have the discretion to request a certificate with a smaller number of percentage of the register. Agencies should also be given access to a computerized database containing the complete application files of those applicants on the certificate.

3. A hiring agency should be permitted to select any applicant from the certificate who, in the agency's opinion, possesses the qualifications for the particular position to be filled. An agency may request that OPM provide an additional number of names upon a showing of exceptional circumstances.

B. OPM and the hiring agencies should give a high priority to expanding recruitment of women and minority applicants for ALJ positions. OPM also should review its ALJ application criteria to determine whether its current method of assessing litigation experience is appropriate.

C. OPM immediately should implement Parts II (A)(1) and (B), which may involve revisions to the examination or scoring process. Pending implementation of the other recommendations in this Part, OPM should open the register application process as soon as possible, and keep it open continuously.

D. In order to implement the proposals in paragraphs II (A) and (B) above, Congress should abolish the veterans' preference in ALJ selection.

III. ALJ Evaluation and Discipline

Congress should authorize, where necessary, and OPM and the agencies that employ ALJs should establish, the following processes for assisting ALJs and the agencies that employ them to carry out their responsibilities to the public and to individual parties.

A. Organization

1. OPM should assign a specific unit the responsibility for (a) overseeing those matters concerning the selection of ALJs, (b) overseeing all personnel, hiring and performance matters that involve Chief ALJs, (c) acting on allegations of improper interference with decisional independence of ALJs, (d) conducting regular performance reviews of Chief ALJs, and (e) periodically publishing reports on the effectiveness with which OPM's responsibilities are performed and seeking recommendations as to how the program may be improved.

2. Each agency that employs more than one ALJ should designate a Chief ALJ, who is given the responsibility within the agency to do the tasks assigned to the Chief ALJ under this Part III.[18]

3. OPM should provide guidance and assistance to aid Chief ALJs fulfilling the responsibilities given to them under this Part III.

4. OPM and the agencies should ensure that Chief ALJs are insulated from improper agency influence when carrying out the responsibilities described in this Part III.[19]

B. Evaluation and Training

Chief ALJs should be given the authority to:

1. Develop and oversee a training and counseling program for ALJs designed to enhance professional capabilities and to remedy individual performance deficiencies.

2. Coordinate the development of case processing guidelines, with the participation of other agency ALJs, agency managers and, where available, competent advisory groups.

3. Conduct regular ALJ performance reviews based on relevant factors, including case processing guidelines, judicial comportment and demeanor, and the existence, if any, of a clear disregard of or pattern of nonadherence to properly articulated and disseminated rules, procedures, precedents, and other agency policy.

4. Individually, or through involvement of an ALJ peer review group established for this purpose, provide appropriate professional guidance, including oral or written reprimands, and, where good cause appears to exist, recommend that disciplinary action against ALJs be brought by the employing agency or the Merit Systems Protection Board (MSPB), based on such performance reviews.

C. Complaints About ALJs

Each agency that employs ALJs should set up a system for receiving and evaluating complaints or allegations of misconduct by an ALJ, including bias or prejudice.

1. The Chief ALJ in each agency, individually or through involvement of

[18] In agencies with large numbers of ALJs the Chief ALJ might appropriately delegate some or all such responsibility to deputy or regional chief ALJs.

[19] Congress also should consider making the position of Chief ALJ subject to a term appointment. This suggestion does not result from a finding by the Conference that any number of current Chief ALJs are not functioning effectively. The Conference notes, however, that Chief Judges of United States District Courts are subject to term appointments and believes it is appropriate to consider whether a similar limitation should apply to Chief ALJs.

an ALJ peer review group established for this purpose, should be given responsibility for receiving and investigating such complaints.

2. If a Chief ALJ determines that ALJ misconduct occurred, the Chief ALJ should recommend that the agency take appropriate corrective action, or, in appropriate cases, recommend that disciplinary action against the ALJ be brought by the agency at the MSPB.

3. If a Chief ALJ determines that further investigation by another authority is warranted, he or she should refer the case to that authority.

4. Each agency should make known to interested persons in an appropriate fashion the existence of such complaint procedure.

5. Where allegations of misconduct implicate a Chief ALJ, they should be referred to OPM for such investigation and recommended action.

6. Complainants should be given notice of the disposition of their complaints.

D. Complaints by ALJs

Each agency that employs ALJs should set up a system for receiving and investigating allegations of unlawful agency infringement on ALJ decisional independence or other improper interference in the fulfillment of ALJ responsibilities. Such a system should be subject to OPM oversight. Where investigation reveals the probable occurrence of such an impropriety, the matter should be referred to the appropriate authority for review and recommended action designed to remedy the situation and prevent recurrence, including the issuance of oral or written reprimands and other appropriate sanctions.

E. MSPB Panels

MSPB should assign cases involving charges against ALJs to a three-judge panel of ALJs drawn from a pool. No judge on the panel should be from the same agency as the respondent ALJ.

IV. Policy Articulatioo

To ensure that ALJs and affected persons are aware of their responsibilities, agencies should articulate their policies through rules of general applicability, a system of precedential decisions, or other appropriate practices.[30] Congress, the President, and the courts should encourage such policy articulation.

V. The Concept of an ALJ Corps

Congress should not at this time make structural changes more extensive than those proposed here, such as those in recent legislative proposals to establish a centralized corps of ALJs.

§ 305.92–8 Administration of the Office of Juvenile Justice and Delinquency Prevention's Formula Grant Program (Recommendation No. 92–8).

In 1974 Congress enacted the Juvenile Justice and Delinquency Prevention ("JJDP") Act, which created the Office of Juvenile Justice and Delinquency Prevention ("OJJDP" or "the Office") within the U.S. Department of Justice. Among OJJDP's responsibilities, then and now, is that of administering a program of formula grants to states and local governments. While the overall purposes of the formula grant program were broadly framed,[1] the statute also required states to achieve several very specific substantive outcomes. Compliance with those mandates,[2] as well as with a variety of other administrative and procedural requirements, continues to determine eligibility for formula grant funds from OJJDP.

Monitoring for levels of state compliance, determining grant eligibility status, reviewing submitted plans and reports, and responding to technical assistance requests all fall to OJJDP's State Relations and Assistance Division (SRAD). Its administration of the formula grant program is guided by a substantial body of regulations, rules, policies and interpretations that OJJDP has developed over the years. Mechanisms such as waivers; exceptions, and de minimis criteria—characteristic features of many regulatory and grant programs—have been adopted by either Congress or the agency over the years.

The Conference, in response to a request from OJJDP, studied OJJDP's administration of the formula grant program, including its efforts to monitor and assist state compliance with the statutory mandates and requirements. As part of this study, the Conference examined issues of communication and consultation with states, coordination and collaboration at various levels of government, consistency and clarity of policy elaboration, staffing, and training.

Recommendation

I. Policymaking

(a) The Department of Justice should ensure that overall policy, priorities, and objectives for all Federal juvenile delinquency programs and activities are coordinated so that related activities and programs advance efforts by OJJDP and the states to achieve and maintain compliance with the substantive mandates of the JJDP Act.

(b) OJJDP should (1) create, and ensure adherence to, internal operating guidelines and (2) assign formula grant staff responsibilities, so that important issues of policy or interpretation are identified and dealt with promptly. Once such an issue has been finally resolved, the Office's policy or interpretation should be made available promptly by appropriate means—whether the Federal Register or otherwise—to all state juvenile justice specialists,[3] the National Coalition of State Juvenile Justice Advisory Groups,[4] and other groups and entities, that may have a substantial interest in the policy or interpretation.

(c) In all instances where issues of policy or interpretation may substantially affect interested persons or organizations or the interests of one or more states, the Office should engage in pre-decisional consultation with the affected persons or entities. OJJDP, in selecting a mode of consultation, should take into account the scope and impact of the policy or interpretation and other matters relevant to effective communication of views and efficient decisionmaking.

(d) The Office should ensure that the reasons underlying its policies and

[30] See generally Conference Recommendation 71–2, "Articulation of Agency Policies," 1 CFR 305.71–2 (1992); Conference Recommendation 87–7, "A New Role for the Social Security Appeals Council," 1 CFR 305.87–7 (1992); Conference Recommendation 89–8, "Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions," 1 CFR 305.89–8 (1992); Conference Recommendation 92–2, "Agency Policy Statements," 57 FR 30101, 30103 (1992), to be codified at 1 CFR 305.92–2.

[1] Funds may be used for a broad variety of programs and services related to juvenile justice and the treatment and prevention of juvenile delinquency. State participation in the formula grant program is strictly voluntary, with state funding levels determined on the basis of relative population under age 18.

[2] The three substantive mandates are as follows:

1. Juveniles who are accused or convicted of status offenses (conduct not considered criminal if committed by an adult, such as running away or truancy) and nonoffenders (such as abused, dependent, or neglected children) must not be placed in secure detention or secure correctional facilities.

2. Juveniles who are accused or adjudicated of delinquency or status offenses must not have regular contact with incarcerated adults where both juveniles and adults are confined in the same institution.

3. No juvenile may be detained or confined in any adult jail or lockup.

[3] State juvenile justice specialists serve as the states' primary staff liaison with OJJDP.

[4] The Coalition consists of the members of the state advisory groups that are appointed by the governors of all states participating in the formula grant program. The JJDP Act provides for the Coalition to play an advisory role to Congress and the Administrator of OJJDP on program operations and related matters.

interpretations, including changes and clarifications, are clearly explained in documents announcing them.

(a) The Office should develop adequate internal procedures to ensure that consistent advice regarding the requirements applicable to the formula grant program is afforded to affected states by the OJJDP state representatives.

2. OJJDP Staffing

(a) The Office should have a general attorney assigned primarily to advising OJJDP state representatives,[8] the SRAD Director, and OJJDP's Administrator concerning general legal issues arising in OJJDP's grant administration.

(b) The Office should take steps to ensure that the evaluation of monitoring data and other information relevant to determining compliance and waiver of grant termination is even-handed and takes into full account Office policies and interpretations. In so doing, the Office should consider reestablishing the position of "monitoring coordinator."

(c) The Office should refrain from so frequently shifting the state assignments of the OJJDP state representatives that the value of familiarity with state programs is lost.

3. Background and Training of OJJDP and State Formula Grant Personnel

(a) The Office should accord due weight to prior general training or experience in the area of juvenile justice and grants management in hiring applicants for the position of state representative.

(b) The Office should train both new and experienced state representatives to ensure that they:

(i) Are fully informed with regard to their roles and responsibilities;

(ii) Have adequate knowledge regarding the Office's procedures and practices for the conduct of their work;

(iii) Have a firm working knowledge of the relevant state and Federal statutes, regulations, and guidelines applicable to the formula grant program; and

(iv) Are kept apprised of recent developments in relevant Office policy and in the area of juvenile justice generally that may affect their work as state representatives.

(c) The Office should ensure that adequate training is provided to states' juvenile justice specialists for their role in the implementation of the formula grant program. This should include regularly scheduled training programs for new and experienced state juvenile justice specialists. The programs should (i) be timed so that necessary training is provided soon after new specialists take their positions, and (ii) make sure that training materials are updated expeditiously to reflect new developments in Office policy and interpretation, juvenile justice generally, and state compliance efforts.

4. Information Dissemination to States

(a) As part of its research and program development functions, the Office should collect information that may be helpful to the states in complying with the statutory mandates; the Office should disseminate this information to state juvenile justice specialists in a timely fashion and accessible format.

(b) The Office should create procedures to ensure that states will be (i) fully consulted in a timely manner regarding applications for special emphasis grants awarded to projects in their respective jurisdictions and (ii) regularly informed about the progress, results, and lessons of those projects.

(c) The Office should advise all states in a timely fashion concerning promising approaches to achieving and maintaining compliance with the substantive mandates of the JJDP Act.

(d) The Office should ensure that state-submitted monitoring data and other information by which it determines compliance and waiver are widely available both to the states and the public generally.

(e) A study should be undertaken to determine whether restructuring of, or improving communications between, the four divisions that have responsibilities for establishing juvenile delinquency and prevention programs, evaluating effective strategies, fostering promising approaches, and disseminating information would help the Office achieve its goals.

5. Enforcement and Administration

To enhance administration of the program, Congress should repeal the existing provision of the JJDP Act that authorizes waiver of the requirement that states submit annual monitoring reports to OJJDP. It should also retain the current requirement that the Office periodically audit state monitoring systems to ensure their reliability.

§ 305.82–9 De Minimis Settlements Under Superfund (Recommendation No. 92–9).

In the last decade, following the passage in 1980 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[1] commonly referred to as Superfund, the nation has begun focusing its attention on the cleanup of hazardous waste sites. The task is a daunting one. There currently are approximately 1200 sites on the National Priorities List (NPL), the list of most hazardous sites, and it is likely that many more will be added to this list in the coming decades. The average cleanup cost at each of these sites is about $25 million. The aggregate cost of remedying the hazardous waste problem has been placed at several hundred billion dollars.

Joint and several liability for these cleanup costs has been imposed on a very broad set of parties—practically any party that had any connection with hazardous substances placed at a site in need of a cleanup, as well as owners and operators of contaminated facilities. Potentially responsible parties, known as PRPs, at typical Superfund sites include not only large industrial firms, but an array of small entities. Under the governing contribution rule, responsibility does not depend on the size of the firm, but rather depends generally on the firm's hazardous waste contribution at the site. Some PRPs therefore bear a large share of the liability at a site because they generated a large proportion of the hazardous substances. Other PRPs, which generated a relatively small proportion, may be responsible for only a few thousand dollars in cleanup costs. The process for apportioning the cleanup costs at a site gives rise to substantial transaction costs, principally legal fees and technical consulting costs. Parties that are responsible for only a small share of the cleanup costs might have to disburse several times this amount in transaction costs.

Congress expressed concern about this situation in 1986 when it reauthorized the program and substantially amended the statute. The Superfund Amendments and Reauthorization Act of 1986 (SARA),[2] included provisions designed to make it easier for such "de minimis parties" to enter into early settlements with EPA, thereby limiting their transaction costs.

SARA set forth a far-reaching scheme for imposing liability for the cleanup of hazardous waste sites. The liability provisions are triggered by the release or threat of release of hazardous substances into the environment. For each site, the

[8] OJJDP state representatives serve in a liaison role between OJJDP and the states, communicating and interpreting federal policy, reviewing state plans and performance, and providing technical assistance to state agencies.

[1] Pub. L. No. 96–510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601–9675)

[2] Pub. L. No. 99–499, 100 Stat. 1613 (1986). This law generally reflects the pre-negotiation approach urged by the Conference in Recommendation 84–4, "Negotiated Cleanup of Hazardous Waste Sites under CERCLA" (1984).

statute establishes four categories of liable parties: The generators of the hazardous substances present at the site, the transporters of these substances to the site, the current owner of the site, and prior owners during whose period of ownership there was disposal of hazardous substances at the site.[3] These parties are liable for the costs of cleanup of the site, as well as for damage to natural resources under the control of the Federal or state governments, or Indian tribes.[4]

The language of the statute has the effect of imposing a strict liability rather than a negligence standard. Moreover, current law holds parties jointly and severally liable if the harm at the site is indivisible. Under the statute, PRPs held jointly and severally liable can seek contribution from other PRPs. The existence of joint and several liability is significant in the Superfund context because, given the significant periods of time—often several decades—between the disposal of hazardous substances and the cleanup, it is particularly likely that some liable parties will not be found, or will be insolvent. The remaining PRPs will then have to bear a disproportionate share of the costs.

The statute provides a limited set of defenses. Generally, a party can escape liability only if it can show by a preponderance of the evidence that the release or threat of release was caused solely by an act of God, an act of war, an act or omission of a third party, or a combination of these causes. Only the third-party defense has been of practical significance. In addition to showing causation by a third party, a PRP seeking to escape liability must show that (i) it took due care with respect to the hazardous substances, (ii) it took precautions against foreseeable acts or omissions of the third party, and (iii) such acts or omissions did not occur in connection with a contractual relationship with the PRP. So, for example, a generator cannot escape liability simply by showing that the problem was caused by the transporter with which it contracted for the disposal of the wastes.

To understand the context for de minimis settlements, it is important to review both the process of cleanup of hazardous waste sites and the allocation of responsibility for this cleanup among EPA and the PRPs. One of the most compelling reasons for offering early settlements to parties who bear only a small share of the liability is the very long time (averaging 12 years) that elapses between the discovery of a site and its ultimate cleanup. Settling with de minimis parties relatively early in this process can save them substantial legal and consulting costs.

The allocation of responsibility between EPA and the major PRPs at a particular site is also of critical importance. Many of the issues raised by a de minimis settlement concern its effect on subsequent settlements pursuant to which the major parties agree to undertake the cleanup of the site.

The early stages in the Superfund process involve the screening of sites to determine which pose the most serious health problems, and should therefore become the focus of EPA's attention. The later stages involve the cleanup of these sites. Obviously, the call for de minimis settlements during the early steges of the process is more compelling because the process is a slow one.

Congress translated these concerns into statutory provisions encouraging settlements in general[5] and de minimis settlements in particular.[6] With regard to de minimis settlements, the statute provides that "whenever practicable and in the public interest," the Administrator "shall as promptly as possible reach a final settlement with a potentially responsible party * * * if such settlement involves only a minor portion of the response costs at the facility." In addition, to qualify for de minimis status, generators and transporters must show that the amount and the effect of their hazardous waste contribution are both minimal in comparison to other hazardous substances at the facility.

Landowners constitute a unique class of PRPs. They may invoke an "innocent landowner" third-party defense to escape liability if they can establish that they (i) "did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility," (ii) "did not contribute to the release or threat of release of a hazardous substance at the facility through any act or omission," and (iii) purchased the property without "actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substances." If they elect, instead of pursuing this defense, to limit their liability by a settlement, they may do so. Since such settlements are entered into under the statutory provisions applicable to do minimis settlements, these landowners are customarily referred to as "de minimis landowner" PRPs.

This recommendation identifies several procedural steps that can be taken by the Environmental Protection Agency to improve the functioning of the de minimis settlement program.

As a general principle, EPA should establish procedures and incentives to negotiate de minimis settlements as a standard practice at all multi-party Superfund sites involving de minimis parties. The Conference's study indicates that the vast majority of de minimis settlements have been entered relatively late in the process, and that the majority of the regional offices have shown little interest in undertaking earlier settlements. They frequently have favored resolving the liability of de minimis parties as part of global settlements pursuant to which the major parties undertake cleanups by requiring de minimis parties to negotiate directly with the major parties to determine their contribution to the cleanup cost. Paragraph 1 expresses the Conference's belief that transaction costs can be reduced significantly by settling with de minimis parties rather than seeking de minimis settlements as part of a global settlement.

The predominant approach to de minimis settlements taken by EPA regional offices has been to wait for groups of de minimis parties to form and take the first step in proposing settlements. However, the formation of such groups requires the expenditure of transaction costs by private parties and can take considerable time, and such group might not represent the smaller de minimis parties that have the greatest interest in settlement. Paragraph 2 recommends that EPA's regional offices take a more active role in seeking such settlements. The Conference also recognizes, however, that reasonable limitations on the negotiation process may be appropriate to avoid unduly protracted negotiations.

The study found significant differences in the approaches of the regional offices, and even across sites in the same region, due to the lack of concrete guidance on several important issues. Perhaps the most significant example is the variation in the volumetric determinant used to determine de minimis status. This lack of uniformity increases the incentives for parties to protest the terms of individual settlements, and increases the probability that such settlements

[3] 42 U.S.C. 9607(a). Under a limited set of circumstances a prior owner can be liable even if there was no disposal during its period of ownership. Liability will attach if the prior owner had actual knowledge of the release or threatened release when it owned the property, and transferred it without disclosing such knowledge. 42 U.S.C. 9607(35)(C).

[4] 42 U.S.C. 9607(a), (f)(1).

[5] 42 U.S.C. § 9622.

[6] 42 U.S.C. § 9622(g).

could be successfully challenged in court. Paragraph 3(a) addresses this concern.

Paragraph 3(b) recognizes that, while current policy guidelines on de minimis landowner settlements contemplate some payment, they do not specify either how to compute this payment or its relationship to estimated costs of cleanup. Such guidelines are necessary because the current "innocent landowner" guidance does not provide any assistance to the regional offices in determining an appropriate settlement figure for such landowners.

Currently, settlement documents are dispersed throughout the regions, making it difficult to determine both the extent to which de minimis settlements are used and the content of the settlements reached. Assurance that similarly situated parties are treated similarly requires knowledge of what actual practice has been, and any efforts to standardize the practice would benefit from knowledge of the variants already employed. Paragraph 3(c) urges creation of a central repository of such documents to address this need.

The explanation given most frequently by the regional offices as to the impracticality of early de minimis settlements is the lack of sufficiently reliable information on cleanup costs. EPA's recent guidance document has attempted to deal with this question on a regional level. Paragraph 4(a) suggests that this task is better accomplished on the national level. In general, there is no reason for a regional office to confine itself to its own sites in determining the costs of similar cleanups, as the inventory of comparable sites that have progressed sufficiently in the cleanup process may be small or nonexistent. Furthermore, there is no central repository for de minimis settlement documents, which might contain relevant data, and no EPA database contains their full terms. While this information can generally be obtained from the individual regional offices, this process is cumbersome and time-consuming.

An element over which there is substantial conflict among EPA and the de minimis and major parties is the premium to be charged in exchange for a waiver of any cost overrun and the risk that future events may trigger the possibility of further action by EPA against a party that has already settled ("reopeners"). The study found wide variation, ranging from approximately 50% to 250%, not readily explained merely by the different stages at which the settlements were entered. Moreover, there does not appear to be a standardized method for calculating premiums. Paragraph 4(b), like paragraph 3(a), intended to reduce the potential for conflict by standardizing the approach.

In general, earlier settlements will be based on less accurate estimates of ultimate cleanup costs than settlement reached at later stages of the process. Paragraph 4(c) suggests that settlements, at the time they are reached, should represent a fair allocation of expected burdens.

The study found some evidence of confusion as to whether EPA can set up an account to finance a cleanup in cases in which it will not perform the cleanup itself and negotiations with the major parties are not sufficiently advanced. In these cases, the funds are generally placed in the Superfund and are not made available to finance a later cleanup by the major parties. These parties, understandably, object to this outcome, and the resulting friction is one of the reasons why several of the regional offices favor global settlements. Paragraph 5 suggests that EPA headquarters seek mechanisms to provide that an appropriate portion of the proceeds from de minimis settlements benefit the parties that take responsibility for the cleanup. Appropriate benefits might include amounts paid for future cleanup costs and premium payments.

Recommendation

1. EPA should make further efforts to establish procedures and incentives to negotiate de minimis settlements as a standard practice at all multi-party Superfund sites involving de minimis parties. EPA should not rely on global settlements as the preferred mechanism for resolving the liability of de minimis parties.

2. EPA's regional offices should actively seek de minimis settlements by informing potentially responsible parties (PRPs) of their potential eligibility and circulating a draft settlement agreement as soon as the required statutory findings can be made.[7] These steps should be taken as soon as is practicable, but in any event no later than the time EPA completes the "waste-in list," which identifies the type and quantity of waste contributed to a site by each PRP. In undertaking settlement negotiations with de minimis parties, EPA regional office should be permitted to impose reasonable limitations on the negotiation process.

3. EPA headquarters should:

(a) Make further efforts to standardize the general terms of de minimis settlements and should establish a procedure to determine site-specific terms,

(b) Provide guidelines for the determination of appropriate payments and terms in de minimis landowner settlements, and

(c) Create and maintain a central repository of de minimis settlement documents, readily accessible to the public.

4. To facilitate de minimis settlements, EPA headquarters should:

(a) Establish a database and methodology to assist and guide the regional offices in estimating site cleanup costs,

(b) Establish principles for determining premiums (additional fees charged to settling parties in exchange for immunity against reopening of their cases) applicable at different stages in the process, and

(c) Make clear that regional offices should seek settlements that, at the time of settlement, represent a fair allocation of expected burdens.

5. To enhance the acceptability of de minimis settlements, EPA headquarters should, to the extent permitted by law, establish mechanisms to ensure that the parties that take responsibility for the cleanup receive appropriate benefits from the proceeds of de minimis settlements.

3. The editorial note preceding Conference recommendations is revised to read as follows:

Note: For an explanation of the publication policy regarding these recommendations, see § 304.2[a] of this chapter. Copies of the texts of Recommendations not published in part 305 may be obtained from the Office of the Chairman, Administrative Conference of the United States, 2120 L Street, NW., suite 500, Washington, DC 20037; telephone: (202) 254–7020.

4. Part 305 is amended by removing the texts (but not the titles or Federal Register citations) of the following sections and, in some cases, inserting explanatory notes:

§ 305.79–4 Appropriate Restrictions on Participation by a Former Agency Official in Matters Involving the Agency (Recommendation No. 79–7).

Note: This recommendation has become moot as a result of the Ethics Reform Act of 1989, Pub. L. 101–194, 103 Stat. 1716.

§ 305.83–1 The Certification Requirement in the Contract Disputes Act (Recommendation No. 83–1).

Note: Congress corrected the problem identified by this recommendation in the Court of Federal Claims Technical and Procedural Improvement Act of 1992, Pub. L. 102–572, Title IX.

[7] See 42 U.S.C. 9622(g).

APPENDIX D

February 1993

SUMMARY STATUS – IMPLEMENTATION OF ACUS RECOMMENDATIONS 1968-1993

– 68-1 Adequate Hearing Facilities

Substantially implemented. Call for inventory of federal hearing facilities has been fully implemented by ACUS with its *Directory of Administrative Hearing Facilities*. GSA has not implemented call for centralized scheduling facilities for multi-agency hearing sites.

– 68-2 U.S. Government Organization Manual

Fully implemented. Call to rewrite the Manual to describe better agencies' programs and functions has been implemented across-the-board, as has recommendation to clarify the Manual and include contacts for further information.

– 68-3 Parallel Table of Statutory Authority and Rules

Fully implemented by the Office of the Federal Register and agencies, leading to improved accuracy of CFR.

– 68-4 Consumer Bulletin

Fully implemented. Executive Office of the President responded to 68-4 by initiating publication of a bi-weekly *Consumer News and Consumer Register*. Publication was subsequently transferred to HHS, and Office of Consumer Affairs was established in the White House.

– 68-5 Representation of the Poor in Agency Rulemaking

Partially implemented. FTC, FERC, SBA and USPS responded to 68-5 by making special, continuing efforts to provide better notice to poor persons of rulemakings affecting them. Legislative portions not implemented.

– 68-6 Delegation of Final Decisional Authority

Substantially implemented. Call for establishing appeals boards or according increased finality to hearing examiners' decisions was substantially implemented by nearly all agencies conducting significant numbers of formal adjudications. In 1990, the Office of the Chairman commented on a FCC proposed to revise its review procedure.

– 68-7 Eliminating Jurisdictional Amount Requirement

Fully implemented. ACUS' call to amend 28 U.S.C. § 1331(a) was fully implemented in 1976 by Pub. L. No. 94-574 which eliminated minimum amount for suits against the U.S.

– 68-8 Review of ICC Orders

Fully implemented. Fully implemented by enactment in 1975 of Pub. L. No. 93-584, eliminating three-judge court in cases involving ICC orders.

- **69-1 Reform of Sovereign Immunity Doctrine**

Fully implemented by Congress in 1976 (Pub. L. No. 94-574) which amended 5 U.S.C. §§ 702 and 703 to eliminate this, and other, longstanding technical barriers, after ACUS helped persuade the Department of Justice to end its opposition.

- **69-2 Enforcement of NLRB Orders**

Not implemented, though bills that would have been regularly introduced in Congress to make NLRB orders enforceable automatically unless challenged in court, like the orders of other major agencies. Have brought this to attention of GAO team studying NLRB.

- **69-3 Publishing a Guide to Federal Reporting Requirements**

Not implemented.

- **69-4 Subject Indexes to the Code of Federal Regulations**

Partially implemented. The Office of the Federal Register has taken a major role in responding to the recommendation, and has prepared subject indexes and a thesaurus of indexing terms.

- **69-5 Elimination of Duplicative Hearings in FAA Safety Decertification Cases**

Fully implemented by FAA in May 1970 when it adopted new regulations eliminating its formal hearing procedures. Decertification hearings are now held only before the NTSB, as recommended.

- **69-6 Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies**

Partially implemented. The Administrative Conference implemented 69-6's call for compilation of better statistics on agency adjudications by compiling and publishing its *Uniform Caseload Accounting System* volumes for four years (1975-78). The effort was discontinued in 1979 due to inadequate funds. In 1990, the Conference undertook a survey of agency case tracking capabilities to determine the feasibility of resuming compilation of statistics. It was concluded that additional resources were needed to resume compilations. The Conference continues to seek authorization to resume this activity.

- **69-7 Consideration of Alternatives for Licensing Procedures**

Partially implemented by agencies; 69-7 has been largely mooted by subsequent events, such as enactment of NEPA, which go much further than 69-7 in prescribing consideration of alternatives.

- **69-8 Elimination of Certain Exemptions from the APA Rulemaking Requirements**

Substantially implemented. Almost all major grantmaking and contracting agencies have carried out the Conference's call to waive voluntarily the APA's "proprietary" rulemaking exemption. The "regulatory reform" legislation of the early 1980's would have implemented 69-8 in full, but was not enacted. Recent legislation (Pub. L. No. 100-687) cited ACUS in subjecting Department of Veterans Affairs' rules to APA requirements.

- **69-9 Recruitment and Selection of Hearing Examiners; Continuing Training for Government Attorneys and Hearing Examiners; Creation of a Center for Continuing Legal Education in Government**

Partially implemented. The Civil Service Commission responded completely to 69-9's call for revising qualifications for the post of hearing examiner. The call for eliminating veterans preference for hearing examiners was not implemented. 69-9's call for increased training of government attorneys was met by 1974 creation of the CSC's Legal Education Institute, now part of Department of Justice.

- **70-1 Parties Defendant**

Fully implemented in 1976 by Pub. L. No. 94-574 which amended 5 U.S.C. § 703.

- **70-2 SEC No-Action Letters Under Section 4 of the Securities Act of 1933**

Fully implemented. The SEC responded positively to all parts of 70-2; included were new SEC rules affecting use of no-action letters and internal directives on use and content of such letters and handling requests for them.

- **70-3 Summary Decision in Agency Adjudication**

Substantially implemented. Approximately one dozen agencies have taken steps to comply with the Conference's call for the use of summary decisions, many of them by adopting in almost verbatim form the model rule developed by ACUS. Only two agencies are in nonconformity.

- **70-4 Discovery in Agency Adjudication**

Substantially implemented. 70-4's call for minimum standards for discovery is now followed substantially by all but a small number of agencies.

- **70-5 Practices and Procedures Under the Renegotiation Act of 1951**

Fully implemented. This call for greater guidance to contractors as to Board interpretations and for improved "proposed opinions" was fully implemented by the Renegotiation Board prior to that body's demise.

- **71-1 Interlocutory Appeal Procedures**

Fully implemented. This recommendation, calling for limits on interlocutory rulings, has been substantially complied with by every agency except one.

- **71-2 Principles and Guidelines for Implementation of the Freedom of Information Act**

Fully implemented. Congress implemented nearly all of the Conference's recommended improvements to the FOIA in the 1974 FOIA Amendments. The Conference was a leading force in the development and passage of this legislation.

- **71-3 Articulation of Agency Policies**

Provides general guidance to agencies. 71-3 calls on agencies to articulate and make known to the public the standards that will guide their regulatory decisions. The Conference has subsequently expanded on this recommendation in a number of more specific recommendations, and conducted a major follow-up study in 1983.

- **71-4 Minimum Procedures for Agencies Administering Discretionary Grant Programs**

Partially implemented. Several of the larger grant-making agencies have enthusiastically carried out 71-4's call for improved public notice of the availability of grant funds, better notification to applicants, and avoidance of conflicts of interest by advisory panels. These include HHS, Education, and EPA. The Conference has a new study under way of peer review procedures in this area.

- **71-5 Procedure of the Immigration and Naturalization Service in Respect to Change-of-Status Applications**

Partially implemented. INS responded to 71-5 by issuing instructions to its employees giving greater guidance on preparation of decisions, increasing access to operations manuals and instructions, and giving greater information to persons with cases before INS.

- **71-6 Public Participation in Administrative Hearings**

Fully implemented. When adopted in 1971, this recommendation was at the vanguard of then-current practice. Subsequently, 71-6's notions have been fully embraced and implemented by Congress, courts and virtually all agencies. The part urging availability of transcripts, at cost, to parties was implemented by the Federal Advisory Committee Act (§ 11) in 1972.

- **71-7 Rulemaking on a Record by the Food and Drug Administration**

Fully implemented. FDA has carried out all parts of 71-7 by adopting procedures in 1975 that improve its hearing process and enhance citizen participation.

- **71-8 Modification and Dissolution of Orders and Injunctions**

Substantially implemented. Nearly all regulatory agencies now have procedures available for modifying obsolete orders or injunctions as recommended.

- **71-9 Enforcement of Standards in Federal Grant-in-Aid Programs**

Partially implemented. Most of this recommendation's major provisions would have been implemented by an OMB circular that was drafted in 1980 and later shelved after the change in Administration in 1981. Several agencies have taken 71-9's advice on their own.

- **72-1 Broadcast of Agency Proceedings**

Partially implemented. 72-1 calls on agencies to encourage broadcast coverage of proceedings having a broad public interest, and has met a spotty reception. Several agencies, like the FCC and CPSC, have largely complied, but some others expressed considerable opposition.

- **72-2 Conflict-of-Interest Problems in Dealing with Natural Resources of Indian Tribes**

Substantially implemented. Conflicts of interest have been ameliorated by a written understanding between Justice and Interior, as well as creation of an Indian Resources Section at Justice.

- **72-3 Procedures for the United States Board of Parole**

Fully implemented. 1976 legislation implemented 72-3's call for a right to counsel and other improvements. The Parole Commission voluntarily undertook to comply with nearly all other sections.

- **72-4 Suspension and Negotiation of Rate Proposals by Federal Regulatory Agencies**

Substantially implemented. The call for legislation to authorize temporary rate increases was implemented for the FCC. The sections calling for ratemaking agencies to encourage settlements and make other improvements were complied with by most agencies.

- **72-5 Procedures for the Adoption of Rules of General Applicability**

Partially implemented. This recommendation cautioning against imposition of complex, "hybrid" rulemaking procedures has been followed except in a limited number of statutes.

- **72-6 Civil Money Penalties as a Sanction**

Substantially implemented. The Conference's encouragement (in 72-6 and 79-3) of granting agencies' authority to use civil money penalty power has had a major impact on federal administrative enforcement policy. Our model statute has served as a basis for dozens of pieces of legislation, and the Conference has participated in the development of these kinds of legislation, most recently the Program Fraud Civil Remedies Act, Pub. L. No. 99-509, 100 Stat 1934 (1986), and the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 1987 (1989), Financial Institutions Reform Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (August 9, 1989), the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 951 (1990).

- **72-7 Pre-induction Review of Selective Service Classification Orders and Related Procedural Matters**

Moot. The military draft's termination in 1973 mooted this proposal.

- **72-8 Adverse Actions Against Federal Employees**

Moot. 72-8's call for regularizing part of adverse actions was partly implemented by E.O. 11787 in 1974 as well as related CSC regulations. Passage of Civil Service Reform Act in 1978 mooted the recommendation.

- **73-1 Adverse Agency Publicity**

Substantially implemented. Most agencies that engage in publicity as a regulatory tool have adopted conforming procedures to protect against unfair publicity that could harm a private party.

- **73-2 Labor Certification of Immigrant Aliens**

Substantially implemented. A 1974 field memorandum by the Department of Labor fully implemented almost all of 73-2, thus improving the fairness of the process for issuing labor certificates to aliens.

- **73-3 Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation**

Partially implemented. HHS' component agencies -- the major targets of 73-3 -- have taken significant steps to carry out 73-3.

- **73-4 Administration of the Anti-Dumping Law by the Department of the Treasury**

Substantially implemented. Treasury agreed to carry out most of 73-4's provisions calling for increased access to customs representatives, greater disclosure, and written findings. 1974 legislation carried out the suggested improvements in coordination between Customs and other relevant agencies. The Conference is currently studying the program as administered by the Department of Commerce and the USITC.

- **73-5 Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements**

Substantially implemented. Most affected agencies have issued rules or given notice of their intent to comply with 73-1, though no implementing legislation has been passed.

- **73-6 Procedures for Resolution of Environmental Issues in Licensing Proceedings**

Substantially implemented. Five of the six affected agencies have adopted rules to meet this recommendation for using "generic" proceedings and increasing disclosures of basic studies and reports.

- **74-1 Subpena Power in Formal Rulemaking and Formal Adjudication**

Not implemented. Legislation to make agency subpenas available in all APA adjudications and to classify agency power to delegate the issuance of subpenas to presiding officers was introduced as part of APA reform bill in 1970's, but was not enacted.

- **74-2 Procedures for Discretionary Distribution of Federal Assistance**

Partially implemented. Most major grantor agencies (e.g., HHS, EPA, Education) now follow procedures to hear complaints and take specified steps to ensure the most effective allocation and use of grant funds.

- **74-3 Procedures of the Department of the Interior with Respect to Mining Claims**

Partially implemented by Interior.

- **74-4 Preenforcement Judicial Review of Rules of General Applicability**

Partially implemented. Congress has followed the Conference's formulation of the apt standard of review in numerous statutes. The remainder of 74-4, addressed to the courts, has been cited favorably by several court opinions that have looked to it for guidance.

- **75-1 Licensing Decisions of the Federal Banking Agencies**

Partially implemented. The affected agencies have fully implemented most significant parts of 75-1 (e.g., adoption of statements on chartering policies, explanations of charter denials, written opinions). In October 1990 the Office of the Comptroller of the Currency announced that it would make publicly available key documents in Adjudications from 1977 to the present [See entry for 87-12].

- **75-2 Affirmative Action for Equal Opportunity in Nonconstruction Employment**

Labor and HHS have *partially implemented* this recommendation's call for greater use of graduated sanctions, industry-specific affirmative action formats, and improved coordination in administrative matters.

- **75-3 The Choice of Forum for Judicial Review of Administrative Action**

Substantially implemented. Many agency and Congressional drafters have taken into account 75-3 in preparing legislation, although a thorough study of its impact has not been conducted. The study has been extraordinarily influential in administrative law scholarship and practice. Most recently cited by Senator Packwood in introducing S. 1436, 101st Congress, concerning appeals of certain Forest Service determinations.

- **75-4 Procedures to Ensure Compliance by Federal Facilities with Environmental Quality Standards**

Not implemented. This topic continues to be very controversial today due to EPA-DOD disputes.

- **75-5 Internal Revenue Service Procedures: The Audit and Settlement Processes**

Partially implemented. This call for safeguards to avert abuses of the audit process was accepted by IRS in part.

- **75-6 Internal Revenue Service Procedures: Collection of Delinquent Taxes**

Substantially implemented. 75-6 sought to curb some harsh consequences of IRS liens, levies and seizures. Many parts were fully implemented by IRS and by subsequent legislation.

- **75-7 Internal Revenue Service Procedures: Civil Penalties**

Not implemented. IRS has refused to take action on the recommendation. However, in the 101st Congress, a House Ways and Means Committee Task Force has reviewed this recommendation in preparing a reform package.

- **75-8 Internal Revenue Service Procedures: Tax Return Confidentiality**

Substantially implemented. The Tax Reform Act of 1976 incorporated most major parts of 75-8 on protecting confidentiality of returns.

- **75-9 Internal Revenue Service Procedures: Taxpayer Services and Complaints**

Substantially implemented. In response to 75-9, IRS instituted a number of initiatives to ensure effective performance of taxpayer services and complaint handling.

- **75-10 Internal Revenue Service Procedures: The IRS Summons Power**

Substantially implemented. Save for the portions on the content of IRS summons forms, IRS and Congress have acted to implement 75-10.

- **76-1 Exception from Mandatory Retirement for Certain Presidential Appointees**

Moot. Elimination of mandatory retirement by age discrimination prohibitions has mooted this recommendation.

- 76-2 Strengthening the Informational and Notice-Giving Functions of the "Federal Register"

Partially implemented. The Office of the Federal Register has developed rules intended to effectuate much of 76-2, but agencies have been less responsive to its call for publishing some interpretations and adjudicative notices.

- 76-3 Procedures in Addition to Notice and Opportunity for Comment in Informal Rulemaking

Provides general guidance for agencies. Recommendation 76-3, even if fully implemented, leaves considerable discretion with agencies as to appropriate rulemaking procedures. While some agencies have had reservations about 76-3's encouragement of additional procedures in certain types of rulemaking, many are in substantial compliance. A thorough study would be needed for precise evaluation of implementation.

- 76-4 Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act

Not implemented. Congress has not taken the action recommended to rationalize the judicial review provisions under these two major environmental statutes.

- 76-5 Interpretive Rules of General Applicability and Statements of General Policy

Provides general guidance to agencies. We have invoked 76-5 frequently in offering comments on proposed agency actions, and they have generally been receptive.

- 77-1 Legislative Veto of Administrative Regulations

Moot. Chadha decision by Supreme Court outlawing legislative vetoes has rendered 77-1, which cautioned against general use of such vetoes: inoperative.

- 77-2 Judicial Review of Customs Service Actions

Fully implemented. ACUS' recommended restructuring of the powers of the Customs Court and changes in many other aspects of judicial review in such cases were enacted by Congress in three laws implementing almost all of 77-2; Pub. Law Nos. 95-410, 96-39 and 96-417.

- 77-3 Ex Parte Communications in Informal Rulemaking Proceedings

Substantially implemented. These related recommendations suggest procedures for agencies in dealing with communications concerning agency rulemaking proceedings. Suggested procedures, calling for placement of ex parte communications in the rulemaking file and making them publicly available in most cases, are generally followed by agencies and have been influential in court decisions and scholarship.

- 78-1 Reduction of Delay in Ratemaking

Substantially implemented. The Conference recommended use of rulemaking for generic policy issues arising in ratemaking, design of better systems of data collection, and greater use of negotiations to settle disputed cases. These concepts have generally been accepted by the major ratemaking agencies.

- **78-2 Procedures for Determining Social Security Disability Claims**

Partially implemented. Important aspects of the recommendation have been implemented, including the closing of the record after the administrative law judge stage, continuation of an aggressive quality assurance program and articulation of appropriate productivity norms for ALJs. Other aspects were revived in a Recommendation 90-4.

- **78-3 Time Limits on Agency Actions**

Partially implemented. Recommended that reasonable time limits for agency action can be effective in reducing delay, but that, in general, it is better for agencies to set the deadlines rather than Congress. Numerous agencies have reported effective use of this technique.

- **78-4 Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation**

Partially implemented. The Conference urged agencies to coordinate with and participate in the deliberations of privately established organizations that write voluntary consensus standards and to use such standards where appropriate. Parts of the recommendation are incorporated in OMB Circular A-119. Many federal agencies regulating in areas where such organizations exist make an effort to benefit from these activities in ways consonant with the recommendation.

- **79-1 and 80-1 Hybrid Rulemaking Procedures of the Federal Trade Commission**

Partially implemented. These recommendations constitute the report of the Conference to the Congress, as mandated under the Magnuson-Moss Warranty-FTC Improvement Act of 1975. The Conference found that the procedures in the Act did not prove to be effective in controlling agency discretion in the exercise of a broad delegation of legislative power. Therefore, the Conference urged that Congress not rely on a similar scheme in the future. In general, we believe that the Congress has followed this advice. The recommendations also contained specific advice to the FTC, which has, in general, followed the recommendations.

- **79-2 Disputes Respecting Federal-State Agreements for Administration of the Supplemental Security Income Program**

Not implemented. This recommendation urged action by the Department of Health, Education and Welfare. Follow-up required.

- **79-3 Agency Assessment and Mitigation of Civil Money Penalties**

Substantially implemented. Reaffirmed 72-6's call for greater use of civil money penalties, but urges agencies to publish standards for assessment and mitigation. Many agencies have complied, although follow-up work would be useful.

- **79-4 Public Disclosure Concerning the Use of Cost-Benefit and Similar Analyses in Regulation**

Partially implemented. Recommended that agencies adopt the practice of addressing publicly the techniques used and the assumptions made in using cost-benefit or similar analyses. The Regulatory Impact Analyses required under Executive Order 12,291, as amplified by OMB guidance documents, include much of the information identified in the Conference recommendation. To the extent that the analyses are made public, the goals of the recommendation would be achieved

- **79-5 Hybrid Rulemaking Procedures of the FTC—Administration of the Program to Reimburse Participants' Expenses**

Moot. Funding for the reimbursement program was withdrawn by Congress, thus mooting this recommendation.

- **79-6 and 81-2 Elimination of the Presumption of Validity of Agency Rules and Regulations in Judicial Review, as Exemplified by the Bumpers Amendment**

Substantially implemented. Recommended that Congress not adopt various proposals to alter or reverse any presumption of validity that attaches to agency rules or regulations. Congress has not enacted any of those proposals. Indeed, Supreme Court caselaw has since reaffirmed the, appropriateness of such deference. The recommendation also offered alternative language that has not been enacted.

- **79-7 Appropriate Restrictions on Participation by a Former Agency Official in Matters Involving the Agency**

Partially implemented. Recommended that the problem of post-employment activities of former federal officials be addressed primarily through administrative remedies, with criminal penalties reserved for the most serious cases. Legislation enacted prior to final Conference action contained one of the recommended changes, and the Ethics Reform Act of 1989 broadened further the remedies for violating post-employment restrictions. The 1989 Act, however, contains more stringent restrictions than recommended in 79-7.

- **80-1 See 79-1.**

- **80-2 Enforcement of Petroleum Price Regulations**

Moot. This recommendation is not of current interest because the program was terminated.

- **80-3 Interpretation and Implementation of the Federal Advisory Committee Act**

Partially implemented. Recommended that GSA issue revised guidelines to assist agencies in following the provisions of FACA, and to clarify the applicability of the Act to groups convened on an ad hoc basis without formal structure and to existing privately established groups. GSA adopted interim guidelines in 1983 that were in substantial accord with the recommendation and a final rule in 1987 that withdrew somewhat from the Conference's recommendation. ACUS submitted comments in the 101st Congress on S. 444, the Federal Advisory Committee Act Amendments of 1989, which was marked up on March 29, 1990, but was not sent to the Senate floor for a vote. It is expected to be reintroduced.

- **80-4 Decisional Officials' Participation in Rulemaking Proceedings**

Provides general guidance to agencies. (Follow-up study would be needed to determine agency responsiveness to recommendation.) Proposed minimum standards of propriety for agency officials who make rulemaking decisions and urged agencies to adopt procedures for challenges. The recommendation is conveyed in the Conference's Guide to Federal Agency Rulemaking, first published in 1983 and revised in 1991.

- 80-5 Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action

Fully implemented. Pub. L. No. 100-236 fully implements this recommendation to eliminate "races to the courthouse" to obtain judicial review of agency orders in a preferred forum. The new procedure replaces the first-to-file rule with a system of random selection in any case where petitions for review of the same order are received by two or more circuit courts of appeal within ten days after the agency order is issued. ACUS followed up with comments on implementing regulations issued by the Judicial Panel on Multidistrict Litigation.

- 80-6 Intragovernmental Communications in Informal Rulemaking Proceedings

Substantially implemented. Opposes blanket prohibition on Presidential and executive branch contacts so long as any material facts are placed in the record and comments serving as a "conduit" for outside sources are identified. Recommendation was cited by leading case of Sierra Club v. Costle, 657 F.2d 298, 401 (D.C. Cir. 1981) and has been generally followed by OMB.

- 81-1 Procedures for Assessing and Collecting Freedom of Information Act Fees

Substantially implemented. Recommended revisions to FOIA fees and agency fee collection practices so as to recover costs that are properly charged to requesters. This recommendation was largely implemented by the Freedom of Information Reform Act of 1986, Pub. L. No. 99-570. Most importantly, requesters of information for a private, profit-making purpose are required to pay fees that capture the agencies' costs of reviewing records to determine whether they contain exempt information.

- 81-2 See 79-6

- 82-1 Exemption (b)(4) of the Freedom of Information Act

Substantially implemented. Urged that agencies be required to follow uniform procedures when FOIA requesters seek information that may fall within the Act's exemption for confidential business information. The recommendation also urged an expansion of the scope of the exemption and de novo judicial review. Legislation to implement the recommendation was introduced but did not pass in Congress. However, the President in 1987 issued Executive Order 12600, which requires agencies to follow procedures recommended by the Conference.

- 82-2 Resolving Disputes Under Federal Grant Programs

Partially implemented. Several large agencies (HHS, Labor, Education) now follow the recommended procedures. A draft OMB circular, that ultimately was not adopted, would have fully implemented 82-2. Recent legislation affecting the Department of Education implements 82-2's call for greater emphasis on mediating grant disputes. A recently published ACUS guide to drafting federal grant statutes also should increase awareness and implementation of this recommendation.

- 82-3 Federal Venue Provisions Applicable to Suits Against the Government

Partially implemented. Urges Congress not to pass sweeping changes to "localize" venue laws. Such bills received serious consideration in the 97th Congress but were defeated and have not been revived. Portion of the recommendation that urges refinements to venue laws not implemented.

- 82-4 and 85-5 Procedures for Negotiating Proposed Regulations

Substantially implemented. Set forth criteria for choosing rulemaking proceedings suitable for negotiation of proposed rules, together with procedures for agencies to follow. The procedures have been followed in approximately 30 rulemaking proceedings by EPA, Transportation, FAA, OSHA, Interior, NRC, FTC, Agriculture, Education, Farm Credit Administration, and FCC. Several "reg-negs" have been completed, with final rules in place. In four instances, acts of Congress requiring agencies to use the process in particular programs referred to these recommendations (Pub. Law Nos. 100-297, 101-392, and 102-325 affected the Department of Education; Pub. L. No. 100-408 affected NRC). Legislation to facilitate the process, the Negotiated Rulemaking Act, recommended by the Conference, was enacted in 1990 (Pub. L. No. 101-648), setting forth a framework for negotiated rulemaking based on these recommendations. Also in 1990, the Conference published the Negotiated Rulemaking Sourcebook, a comprehensive guide for agencies considering or conducting negotiated rulemaking proceedings. Several major reg-negs were concluded successfully in 1991. Three agencies (Coast Guard, Farm Credit Administration, and FCC) undertook reg-negs for the first time in 1992. ACUS staff have presented a roundtable program on the process for agency officials and have worked closely with individual agencies that are considering its use.

- 82-5 Federal Regulation of Cancer-Causing Chemicals

Degree of implementation unknown. The Conference's recommendation broadly addressed agency procedures for identifying, evaluating, and regulating carcinogens. Various provisions address priority setting, interagency coordination, testing and evaluation, use of advisory panels, generic rulemaking, quantitative assessment of risk, and public participation. The Administration has subsequently adopted a cancer policy, and new agency procedures have evolved. A follow-up study would be needed to determine the degree of implementation of the Conference recommendation.

- 82-6 Federal Officials' Liability for Constitutional Violations

Implementation in progress. Congress has repeatedly considered implemental legislation to substitute the U.S. government for individual employees in constitutional tort actions, and ACUS has offered its support. Analogous legislation concerning non-constitutional torts was enacted in the 100th Congress.

- 82-7 Judicial Review of Rules in Enforcement Proceedings

Provides general guidance to Congress. Provides standards for Congress to follow when drafting statutes that limit the judicial reviewability of rules at the enforcement stage. Follow-up study needed to determine responsiveness of Congress.

- 83-1 The Certification Requirement in the Contract Disputes Act

Not implemented. Led to introduction of H.R. 3618, Contract Disputes Improvement Act of 1983. ACUS testified in support of bill at hearing. Not passed due to opposition from White House and DOJ. Recent Claims Court opinion cites ACUS Recommendation with approval, Clark Mechanical Contractors v. U.S., No. 511-86C (May 13, 1987). Legislation introduced in Congress in 1992 (S. 2521) would substantially implement this recommendation. The Conference offered written comments on the bill.

- **83-2 The "Good Cause" Exemption from APA Rulemaking Requirements**

Provides general guidance to agencies. Provides standards for agency invocation of good cause exemption in rulemaking. Invoked by ACUS to good effect in State Department rulemaking proceeding. Recent follow-up study shows heavy, largely appropriate, use of exemption by agencies.

- **83-3 Agency Structures for Review of Decisions of Presiding Officers under the Administrative Procedure Act**

Provides general guidance to Congress and agencies. Provides standard for statutes and regulations governing agency review of ALJ decisions. Follow-up study needed to determine responsiveness of Congress and agencies.

- **83-4 The Use of the Freedom of Information Act for Discovery Purposes**

Not implemented. Recommends amending FOIA to require a person in litigation with the government to notify government counsel of any FOIA requests relating to the litigation. Sanctions are proposed for failure to comply. Legislation was introduced in the 99th Congress that would have substantially implemented the recommendation.

- **84-1 Public Regulation of Siting of Industrial Development Projects**

Provides general guidance to federal, state, regional and local agencies. Provides guidance on interagency coordination, public participation, environmental review, permit approvals, and decision schedules. Follow-up study needed to determine responsiveness of agencies.

- **84-2 Procedures for Product Recalls**

Not implemented. Recommended establishment of an interagency liaison group to share information; also suggested ways to make recall notices more effective and better ways to handle consumer inquiries. Follow-up needed.

- **84-3 Improvements in the Administration of the Government in the Sunshine Act**

Not implemented. Urges Congress to reconsider the Act's exemptions and allow broad policy matters to be considered in closed meetings. Also urges agencies to make open meetings more comprehensible. ACUS successfully encouraged ABA to take similar official position in 1987. So far Congress has not shown interest in the subject. Office of Chairman has continued to comment on proposed agency rules.

- **84-4 Negotiated Cleanup of Hazardous Waste Sites Under CERCLA**

Substantially implemented. In 1985 EPA issued a memorandum on settlement procedures that followed the key points of the recommendation. (See Chairman Smith's congratulatory letter to EPA Administrator, April 15, 1985.) Subsequently, the Superfund Amendments and Reauthorization Act of 1986 enacted new settlement procedures consistent with our recommendation.

- **84-5 Preemption of State Regulation by Federal Agencies**

Provides general guidance to Congress and agencies. Provides considerations for Congress and agencies when confronting issues involving preemption of state and local laws. Follow up study needed to determine responsiveness of Congress and agencies.

- **84-6 Disclosure of Confidential Information Under Protective Order in International Trade Commission Proceedings**

Not implemented. In 1984, Chairwoman of ITC responded to recommendation by promising to appoint a committee to consider how to implement the recommendation. However, subsequent Commission leadership disagreed with the thrust of the recommendation and the committee was never formed.

- **84-7 Administrative Settlement of Tort and Other Monetary Claims Against the Government**

Partially implemented. The Administrative Dispute Resolution Act (Pub. L. 101-552), implements the legislative portions of 84-7. Justice Department opposition has hindered the influence of the remainder.

- **85-1 Legislative Preclusion of Cost/Benefit Analysis**

Provides general guidance to Congress. One sentence recommendation urges Congress to explicitly so state if it intends to preclude agency cost/benefit analysis. Follow-up study needed to determine responsiveness of Congress.

- **85-2 Agency Procedures for Performing Regulatory Analysis of Rules**

Substantially implemented. Provides guidance to agencies as to how to conduct "regulatory analysis" in rulemaking under Executive Orders. Letters sent to all major agencies requesting description of agency implementation efforts. Most agencies' responses show careful consideration of guidance.

- **85-3 Coordination of Public and Private Enforcement of Environmental Laws**

Partially implemented. Recommended administrative steps to achieve better coordination of agency enforcement with suits brought by private citizens to enforce environmental laws. These steps included clearer articulation of EPA enforcement policy and improvements in agency information systems.

- **85-4 Administrative Review in Immigration Proceedings**

Implementation in progress. INS responded by letter that a "review of appellate jurisdiction in immigration matters is in progress," and that the recommendation was being taken account of (August 13, 1987). In addition, INS responded to a specific ACUS query on reviewability of applications under the Immigration Reform and Control Act of 1986. However, no changes in agency procedure consistent with the recommendation have resulted.

- **85-5 See 82-4**

- **86-1 Nonlawyer Assistance and Representation**

Partially implemented. The VA, one of the targeted agencies, has proposed revised regulations which would broaden representation by paralegals, law clerks and law students. Other agencies (SSA, INS, IRS) must be surveyed.

- 86-2 Use of Federal Rules of Evidence in Federal Agency Adjudications

Implementation in progress. Recommendation urged Congress not to *require* that agencies use the Federal Rules of Evidence. Congress has nonetheless done so on occasion (e.g., Fair Housing, enforcement cases). Urged agencies to adopt rules giving ALJ flexibility and guidance. ACUS sent recommendation to all adjudicatory agencies and has commented on OSHRC's proposed rules and on the model rules for the Program Fraud Civil Remedies Act. OSHRC declined to follow ACUS, but the model rules did follow ACUS. Bar Associations have been favoring use of modified FRE.

- 86-3 Agencies' Use of Alternative Means of Dispute Resolution

Implementation in progress. The Conference has undertaken an extensive program of seminars, lectures, consultations, and training with specific agencies to encourage agencies to comply with this recommendation. Enactment in November, 1990 of the Administrative Dispute Resolution Act, Pub. L. No. 101-552, carries out fully the legislative portions of 86-3 and gives added impetus to agencies to use ADR. Extensive, multi-faceted efforts to implement the new law are underway. ACUS also sponsored a series of roundtable discussions for high-ranking agency personnel to make them aware of potential uses of ADR and is hosting interagency working groups to implement the legislation.

- 86-4 The Split-Enforcement Model for Agency Adjudication

Provides general guidance to Congress. Recommendation urges Congress to clarify enforcement responsibilities whenever it creates a split-enforcement scheme. Congress has not taken such action since the recommendation was issued. The Supreme court cited the ACUS-sponsored study in *Martin* v. *OSHRC*, 111 S. Ct. 1171 (1991). The Solicitor General cited the recommendation in its brief to the Supreme Court.

- 86-5 Medicare Appeals

Implementation in progress. The agency (Health Care Financing Administration -- HCFA) is taking steps to publish policies that were heretofore not published. Congress has mandated, then stayed, implementation of a new Part B Medicare hearing office in HCFA. Congress has also followed the recommendation by requiring Medicare policy changes to be promulgated by regulation before taking effect, 101 Stat. 1330-78 (1987). In 1987, ACUS co-sponsored with ABA a symposium on Medicare procedures that followed up on this recommendation.

- 86-6 Petitions for Rulemaking

Partially implemented. Recommendation urges agencies to establish rules governing handling of rulemaking petitions. ABA has supported adoption of ACUS position. Recommendation highlighted in widely-distributed 1991 Guide to Federal Agency Rulemaking.

- 86-7 Case Management as a Tool for Improving Agency Adjudication

Implementation in progress. Copies of the recommendation and consultant's report have been distributed and made a focal point of several ACUS seminars and work groups. Several training sessions with administrative law judges have focused on the case management recommendations. Executive Order 12278 (October, 1991) calls on agencies to comply with this recommendation in administrative adjudications.

- 86-8 Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution

Implementation in progress. 86-8 calls on ACUS to develop a roster of ADR neutrals, which has now been established, 54 Fed. Reg. 39,721 (Sept. 28, 1989). Other aspects were implemented by Pub. L. No. 101-552, the Administrative Dispute Resolution Act.

- 87-1 and 87-10 Regulation by the Occupational Safety and Health Administration

Partially Implemented. In June 1988, OSHA proposed a generic revision of its "Z-table" as advocated by the recommendation. Preamble to the proposed rule relies on ACUS study and recommendation. OSHA adopted a final rule in January 1989, again relying on the ACUS recommendation (54 Fed. Reg. 2332, 2370). OSHA also is reviewing its rulemaking process in response to ACUS' study (which was requested by OSHA). The ABA adopted these recommendations as well.

- 87-2 Federal Protection of Private Sector Health and Safety Whistleblowers

Implementation in progress. S. 2095, introduced in the 100th Congress and S. 436, introduced in the 101st Congress, would fully implement this recommendation. ACUS Chairman Breger testified on S. 2095, H.R. 3812, 4023 and 4113, bills designed to protect aviation industry employees who disclose safety information. The aviation bills, renumbered H.R. 5073, passed the House in the 101st Congress.

- 87-3 Agency Hiring of Private Attorneys

Implementation in progress. Based on a survey of federal agency use of private attorneys, a practice costing millions of dollars annually, the Conference set forth guidelines. The guidelines emphasize use of appropriate competitive procedures, agency retention of control over counsel's performance, and the importance of following applicable conflict-of-interest restrictions. Congressional hearings on the banking agencies' hiring of private attorneys were scheduled in 1988 with the aid of the ACUS study, but they have not taken place. Legislation introduced in 1989 (S. 90) was in accord with the recommendation for agencies to use legal experts available in other agencies for special short-term needs. At the request of Congress, ACUS has advised GAO on survey instruments for a 1991 study of current practices..

- 87-4 User Fees

Implemented. The principles set forth in this recommendation were generally followed in OMB's proposed revision of OMB Circular A-25 on User Charges. ACUS, in 1988, sponsored a Symposium on User Fees attended by over 100 agency officials.

- 87-5 Arbitration in Federal Programs

Implementation in progress. Pub. L. No. 101-552 implemented the procedures prescribed in 87-5 to avoid fairness and legal concerns that might otherwise stem from agency arbitration processes. ACUS testified in favor of this legislation and helped negotiate a compromise enabling final passage.

- 87-6 State-level Determinations in Social Security Disability Cases

Implementation in progress. ACUS provided guidance to the Social Security Administration regarding the progress and evaluation of still-pending demonstration projects to improve the disability determination process.

- 87-7 A New Role for the Social Security Appeals Council

Partially implementated. The Social Security Administration reviewed its Appeals Council procedures in view of the ACUS study, and in a comprehensive letter, dated April 3, 1990, described its progress in implementating the recommendation.

- 87-8 National Coverage Determinations Under the Medicare Program

Implementation in progress. In early 1989, the Health Care Financing Administration issued a revised proposed rule concerning its procedures for issuing national coverage determinations, crediting the ACUS study (54 Fed. Reg. 4302). ACUS commented on the proposal, but final rule is still pending. The ACUS study attracted much interest in the medical/legal community and provided information and background for an ABA-ACUS symposium on Medicare procedures.

- 87-9 Dispute Procedures in Federal Debt Collection

Awaiting implementation. The Conference recommends "fine-tuning" of the standards promulgated to implement the Debt Collection Act of 1982. On the one hand, it calls for reducing the formality of procedures for handling certain routine adjustments of pay and travel allowances. On the other hand, the recommendation urges agencies to consider the need for additional procedures in administrative offset cases to protect the debtor's due process rights.

- 87-10 Regulation by the Occupational Safety and Health Administration (See 87-1.)

- 87-11 Alternatives for Resolving Government Contract Disputes

Implementation in progress. Pub. L. No. 101-552 implemented legislative portions. Office of the Chairman is working on training for contracting officers, administrative judges and others at contracting agencies and has caused implemental changes in the FAR by GSA. ACUS-sponsored training has been provided to the judges of the Armed Services Board of Contract Appeals and contracting officers in the U.S. Forest Service.

- 87-12 Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies

Substantially implemented. The Financial Institutions Reform, Recovery and Enforcement Act of 1989 (Pub. L. No. 101-73, 101 Stat. 183) implemented the ACUS recommendation that the banking agencies establish a pool of administrative law judges; adopt uniform rules of procedure for administrative hearings, and make redacted decisions available to the public. It also encouraged agencies to use voluntary alternative dispute resolution procedures, consistent with ACUS positions *(see* 86-3). See also the Comptroller of the Currency's announcement in October 1989 that it would make publicly available key documents in adjudications from 1977 to the present, and the final rule of the Office of the Comptroller of the Currency, Department of the Treasury, "Uniform Rules of Practice and Procedure, 56 Fed. Reg. 38024 (August 9, 1991)..In addition, the FDIC, the Federal Resevre, the OTS, and the OCC issued joint guidelines in September, 1991 to enhance the coordination of significant interpretations of statutes commonly applied by the four agencies. The guidelines specify the criteria for identifying interpretations of law that are appropriate for coordination, describe the procedures to be followed by the agencies, and list examples of the types of interpretive issues that the agencies anticipate will be coordinated.

- **88-1 Presidential Transition Workers' Code of Ethical Conduct**

Fully implemented. One of President-elect Bush's first actions was to issue a code-of-conduct directive to his transition workers that tracked ACUS' recommendation. On November 18, 1988, President Reagan issued a Memorandum to Heads of Departments and Agencies, which implemented the recommendation.

- **88-2 Federal Government Indemnification of Government Contractors**

Implementation in progress. Liability for injuries or damage to a third party resulting from products or services of government contractors has been ignored by many government agencies. This recommendation identifies factors agencies should consider when determining whether to indemnify a contractor. It urges interagency cooperation in assessing risk and calls for compilation of existing indemnity clauses and claims.

- **88-3 The Federal Reserve Board's Handling of Applications under the Bank Holding Company Act**

Substantially implemented. The Conference recommends that the Federal Reserve Board of Governors should avoid delays in action on applications by preventing the reopening of an applicant's file unless pertinent information of a highly significant nature is received. Also urged the Fed to clarify conditions established with regard to applications under the Bank Holding Company Act and to publicize voluntary commitments, which should be made part of final Fed orders.

- **88-4 Deferred Taxation for Conflict of Interest Divestitures**

Fully implemented. The Conference calls for an amendment to the Internal Revenue Code to permit deferred taxation of gains when appointees to high-level government positions are required to divest property to satisfy conflict of interest requirements. The recommendation was endorsed by the President's Commission on Federal Ethics Law Reform and the National Commission on the Public Service (the Volcker Commission). The ACUS proposal was incorporated in the Ethics Reform Act of 1989, Pub. L. No. 101-194. The Office of Government Ethics has proposed regulations to implement this law.

- **88-5 Agency Use of Settlement Judges**

Implementation in progress. Another ADR initiative, this recommendation calls for the use of a settlement judge (not the presiding judge) who can conduct negotiations with parties to a proceeding in an attempt to settle cases. ACUS has conducted training sessions for several dozen judges from over a dozen agencies, including a three-day session in conjunction with the National Judicial College. The DOT Board of Contract Appeals, among others, has issued a settlement judge rule and has made it available for consideration and use by other agencies. FCC, HUD, FERC and OSHRC all have such procedures in place. ACUS sponsored a study of OSHRC's use, issued in 1990.

- **88-6 Judicial Review of Preliminary Challenges to Agency Action**

Substantially implemented. The D.C. Circuit has responded to this recommendation by amending its rules to adopt a new expedited procedure for the handling of claims of unreasonable agency delay (amendment to General Rule 7(j), issued Dec. 27, 1989)).

- 88-7 Valuation of Human Life in Regulatory Decisionmaking

Implementation in progress. The recommendation urges that agencies make full disclosure of their human life valuations in regulatory actions, and that OMB serve as the central clearinghouse for research and information on life valuation issues. The recommendation received wide publicity, and it has been sent to agencies and OMB for their consideration.

- 88-8 Resolution of Claims Against Savings Receiverships

Substantially implemented. The Supreme Court cited the ACUS report approvingly in Coit Independence Joint Venture v. FSLIC, 109 S. Ct. 1361 (1989). The Financial Institutions Reform, Recovery and Enforcement Act of 1989 (Pub. L. No. 101-73, 101 Stat. 183) subsequently resolved the issues addressed by this recommendation in a way that was generally consistent with the Conference's advice. The final bill (§ 212) gave claimants the choice of pursuing their claims in the courts or through formal agency adjudication followed by judicial review under the Administrative Procedure Act.

- 88-9 Presidential Review of Agency Rulemaking

Substantially implemented. The recommendation endorses continuation of Presidential review of agency rulemaking subject to certain guidelines for its implementation. The ACUS procedural guidelines are similar to special procedures announced by the Office of Information and Regulatory Affairs (OIRA) for EPA and other agencies in 1985 and 1986. OIRA's head endorsed the ACUS recommendation to the American Bar Association, which considered it in 1989 and adopted it in 1990.

- 88-10 Federal Agency Use of Computers in Acquiring and Releasing Information

Implementation in progress. This recommendation, designed to bring agency information handling efforts into the computer age, contains general guidance to agencies that acquire or release information in electronic form, including guidance on compliance with the Freedom of Information Act. The recommendation is being reviewed by the Office of Management and Budget, agencies, and several Congressional committees. A proposed revision of OMB Circular A-130 is generally consistent with the recommendation. A resolution based on this recommendation was adopted by the American Bar Association.

- 88-11 Encouraging Settlements by Protecting Mediator Confidentiality

Substantially implemented. The recommendation urges agencies to establish procedures and policies to ensure appropriate confidentiality for information divulged to mediators and other neutrals in the course of settlement negotiations involving a statute, rule or policy administered by a federal agency. Pub. L. No. 101-552 substantially implemented this recommendation. ACUS has also prepared a model Notice of Proposed Rulemaking.

- **89-1 Peer Review and Sanctions in the Medicare Program**

Implementation in progress. The recommendation suggests changes to the procedures used by the Medicare program's peer review organizations (PROs) and related procedures of the Department of Health and Human Services. The changes are designed to improve the accessibility of PRO-related policies, the fairness and firmness of PRO-recommended sanctions imposed on providers and practitioners, and the effectiveness of PRO safeguards for beneficiary rights. The recommendation was sent to the Health Care Financing Administration, the HHS Inspector General and to relevant Congressional subcommittees. ACUS staff has met with Senate Finance Committee staff on the enforcement portion of the recommendation. Congress, in Pub. L. No. 101-508, enacted changes which improve the sanctions process, although not going so far as the ACUS recommendation.

- **89-2 Contracting Officers' Management of Disputes**

Implementation in progress. Recommends steps to increase the ability and authority of contracting officers to resolve contract disputes. Steps include agency encouragement of and training in the use of alternative dispute resolution (ADR) techniques by contracting officers. OMB Office of Federal Procurement Policy has indicated willingness to help with implementation. Pub. L. No. 101-552 offered agency CO's encourgement and new authority to employ ADR.

- **89-3 Conflict-of-Interest Requirements for Federal Advisory Committees**

Implementation in progress. Urges Congress to establish special conflict-of-interest disclosure rules for members of federal advisory committees. Some financial interest disclosure would be required of all committee members, regardless of their classification as special government employees or representatives of particular interests. Chairman Breger presented the ACUS position in comments on S. 444, the Federal Advisory Committee Act Amendments of 1989 (101st Congress), and the ACUS staff has consulted with the Senate Committee on Governmental Affairs staff on this issue. It is noted that the Ethics Reform Act of 1989 (Pub. L. No. 101-194) established a special exemption in 18 U.S.C. § 208 for advisory committee members; this action partially addresses the concerns addressed in the ACUS recommendation.

- **89-4 Reforming Asylum Adjudication**

Substantially implemented. Endorses creation of a new Asylum Board, located within the Executive Office of Immigration Review (DOJ), which would consist of an adjudication division, an appellate division, and a documentation center. These changes to the process for deciding asylum claims are intended to increase the expertise and independence of the adjudicators and to assure expeditious and fair adjudications. The recommendation was welcomed by the Attorney General and sent to relevant committees of the Congress. The attorney general subequently issued final requlations on asylum procedures that are consistent with the recommendation in so far as they establish a corps of asylum officers who will receive specialized training and preside at non-adversarial interviews. The regulations also provide for a documentation center.

- 89-5 Achieving Judicial Acceptance of Agency Statutory Interpretations

Implementation in progress. Recommends that agencies use certain procedures when they adopt interpretations of statutes that are intended to be definitive on judicial review under the deference test set forth by the United States Supreme Court in Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837. The recommendation has been sent to the Department of Justice and to agencies. In addition, separate panels of the Seventh Circuit referred favorably to the ACUS consultant's report in reaching their decisions; see Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir., 1990) and Continental Training Services, Inc. v. Cavazos, 893 F.2d 877 (7th Cir., 1990).

- 89-6 Public Financial Disclosure by Executive Branch Officials

Not implemented. Would amend the Ethics in Government Act's executive branch public financial disclosure requirements, consistent with an appropriate balance of costs and benefits of such disclosure. Includes recommendations to lower the threshold for reporting liabilities, reducing the number of categories of value for the reporting of assets and liabilities, and requiring the reporting of gifts in categories of value instead of actual amount. Although the President's Commission on Federal Ethics Law Reform adopted the recommendation's general approach to reducing unnecessary detail in financial reports, the Conference's proposals were not included in the President's proposed legislation nor in the Ethics Reform Act of 1989, Pub. L. No. 101-194.

- 89-7 Federal Regulation of Biotechnology

Implementation in progress. Recommends steps to improve interagency coordination of federal biotechnology regulation, including enlarging the membership of the Office of Science and Technology's Biotechnology Science Coordinating Committee (BSCC) and opening its proceedings to the public unless they involve confidential information. Also advises Congress and the President to monitor interagency coordination and biotechnology developments. The staff has formally presented the recommendation to the BSCC, which has it under consideration.

- 89-8 Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions

Implementation in progress. Calls upon agencies to compile a subject-matter index of their adjudicatory decisions to afford citizens information useful in dealing with agencies and to assist the development of agency standards and policies on general issues and recurring questions. This recommendation has been transmitted to selected agencies.

- 89-9 Processing and Review of Visa Denials

Implementation in progress. Recommends that the Department of State implement changes in its procedures for review of visa applications at United States consulates abroad. The recommended changes include permitting the assistance of attorneys, increased explanation of the basis for denials, making public advisory opinions of the Visa Office, and studying the development of an administrative appeals process for visa denials. The Recommendation has been transmitted to the Secretary of State and to relevant Congressional committees. The Legal Adviser of the State Department indicated, in a letter to Chairman Breger, that the Department was considering implementing parts (not specified) of the Recommendation but would likely not study the implementation of administrative appeals.

- **89-10 Improved Use of Medical Personnel in Social Security Disability Determinations**

Implementation in progress. Recommends steps that SSA should take to increase the role of medical personnel at the initial decision stage of disability claims, including giving the medical member of the team primary responsibility for developing medical evidence in the record.

- **90-1 Civil Money Penalties for Federal Aviation Violations**

Substantially implemented. Recommends making FAA civil money penalty program permanent and eliminating $50,000 cap on administrative cases. Recommends changes in FAA's rules of practice for these cases. FAA issued final rules substantially incorporating recommended changes. Pub. L. No. 101-370 extends the program for two years. The new law directed ACUS to conduct additional study to determine if adjudication of enforcement cases should be in the FAA or the NTSB. The Conference completed a second recommendation on civil penalties under the Federal Aviation Act, Recommendation 91-8.

- **90-2 The Ombudsman in Federal Agencies**

Implementation in progress. Recommends greater use of ombudsmen by agencies that have contact with the public. Copies of the recommendation were transmitted to heads of nearly three dozen agencies. Roundtable held in fall 1990 for over 100 attendees sought to increase awareness of benefits of using ombudsmen. OFPP has sent recommendation to senior procurement officials at 40 agencies with encourgement to comply. GSA's newly appointed procurement ombudsman attributes his office's existence to this recommendation.

- **90-3 Use of Risk Communication by Regulatory Agencies**

Implementation in progress. Suggests some specific improvements in existing EPA and OSHA programs and urges agencies with authority to regulate risks to health, safety or the environment to evaluate the possibility of utilizing a risk-communication approach. Also suggests that insignificant or unlikely risks should be excluded from coverage, where permitted by law, to avoid "information overload." These issues are under consideration by EPA and OSHA.

- **90-4 Social Security Disability Program Appeals Process: Supplementary Recommendations**

Implementation in progress. Recommends changes in SSA appeals process, including increased use of prehearing conferences and subpoenas, closing the administrative record at a set time after the ALJ hearing, and permitting reopening of the record within a year by the ALJ rather than the Appeals Council. The Recommendation has been forwarded to the SSA Commissioner. The commissioner in her response letter of October 9, 1990 indicated that many of the recommendations have been adopted, and that several others are being considered.

- **90-5 Federal Agency Electronic Records Management and Archives**

Implementation in progress. This recommendation, a complement to Recommendation 88-10, states general principles for internal agency records management affecting long-term accessibility of public records through the National Archives. The recommended guiding principle is that the content of agency records, and not the format of its storage, should control the rules governing its retention and accessibility. Creation of new records in electronic formats, or transfer of records from paper to electronic formats, should not alter the criteria for retention, availability to the public, or judicial review of agency compliance with records law. The recommendation also highlights the problem that technological obsolescence might render archival records inaccessible to the public. The National Archives and Records Administration is urged to promote development and implementation of appropriate technical standards.

- **90-6 Use of Simplified Proceedings in Enforcement Actions Before the Occupational Safety and Health Review Commission**

Implementation in Progress. The recommendation calls on OSHA and OSHRC to take several steps to enhance use of simplified proceedings and to make these proceedings operate more effectively. The Recommendation has been forwarded to the two relevant agencies.

- **90-7 Administrative Responses to Congressional Demands for Information**

Implementation in Progress. Recommends reestablishing new operational arrangement for resolution of disputes over sensitive information between Congress and the executive. The recommendation has been forwarded to the White House Legal Counsel, Office of Legal Counsel in the Department of Justice, and Senate and House Legal Counsel.

- **90-8 Rulemaking and Policymaking in the Medicaid Program**

Implementation in Progress. Recommends prompt promulgation of regulations implementing statutory program changes and reappraisal of program's daunting complexity. The Recommendation has been forwarded to the general counsel of Department of Health and Human Services, and to the Health Care Financing Administration and relevant congressional committees.

- **91-1 Federal Agency Cooperation with Foreign Government Regulators.**

Implementation in Progress. The recommendation calls for greater efforts at coordination with regulators in foreign countries in rulemaking and related activities. Copies were sent to top officials in all federal agencies with programs likely to have international impact. A seminar is being planned to familiarize agency personnel with these issues.

- **91-2 Fair Administrative Procedure and Judicial Review in Commerce Department Export Controls Proceedings**

Implementation in Progress. Recommends passage of legislation to make Commerce Department export controls proceedings subject to the Administrative Procedure Act's administrative process and judicial review provisions and proposes procedural changes at the Commerce Department to increase access to information about export controls proceedings. The Recommendation has been forwarded to the General Counsel of the Commerce Department and relevant congressional committees.

- **91-3 The Social Security Representative Payee Program.**

Implementation in Progress. Recommends that SSA issue regulations on several substantive topics; that certain procedural changes be made; and that certain issues be studied. The Recommendation has been forwarded to SSA and to relevant congressional committees.

- **91-4 The National Vaccine Injury Compensation Program**

Partially Implemented. Recommends steps to alleviate problems in the administration of the National Vaccine Injury Compensation Program, including better articulation of standards for eligibility, guidelines for compensation, and solutions to the temporary backlog of claims by people claiming pre-Act injuries. Public Law 102-168 enacted most of the legislative portion of the recommendation. In October 1991, HHS issued it long-pending final rule incorporating various vaccine information maetrials.

- **91-5 Facilitating the Use of Rulemaking by the National Labor Relations Board.**

Implementation in Progress. Recommends that the NLRB supplement its practice of policymaking through adjudication by continuing to use its general rulemaking authority in appropriate situations, taking into account particular factors enumerated. The Recommendation has been forwarded to the Board. The recently Board cited the recommendation with approval in a September 1992 *Notice of Proposed Rulemaking* (see 57 Fed. Reg. 43635 (1992)).

- **91-6 Improving the Safety and Soundness of Government-Sponsored Enterprises**

Implementation in Progress. Recommends that each government-sponsored enterprise (GSE) be supervised for safety and soundness by a federal agency that is sufficiently funded; that the agency be given adequate administrative authority and enforcement powers; that the federal agency obtain prompt and timely information and develop and maintain risk ratings of each GSE it supervises; and that the federal agency develop guidelines for involving supervisory and enforcement powers through notice-and-comment rulemaking. The House and Senate in the second session of the 102d Congress passed bills that embody the essence of Recommendation 91-6. These bills are awaiting action by a congressional conference committee.

- **91-7 Implementation of Farmer-Lender Mediation by the Farmers Home Administration**

Implementation in Progress. Recommends that FmHA foster a better understanding of the mediation model in certified state mediation programs and FmHA contract programs and that FmHA consider modifying its rules for processing delinquent loans to give FmHA representatives at farmer-lender mediations greater discretion with respect to loan restructuring and providing new loans. Also recommends that FmHA and the Department of Agriculture continue to encourage (1) development of farmer-lender mediation programs that can qualify to receive matching funds in more states and (2) participation in farmer-lender mediation by other federal agencies such as the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, and the Small Business Administration. The recommendation has been forwarded to the affected agencies.

- 91-8 Adjudication of Civil Penalties Under the Federal Aviation Act

Substantially Implemented. Recommends that Congress make permanent the civil money penalty program for violations of the Federal Aviation Act (the Act) and eliminate the $50,000 ceiling on administratively-imposed penalties. (Reiterates Conference Recommendation 90-1). Further recommends that NTSB and FAA convene a conference to achieve consensus on how adjudicative authority should be allocated. Congress should transfer authority for adjudicating civil money penalties against pilots and flight engineers from the Federal Aviation Administration (FAA) to the National Transportation Safety Board (NTSB). Public Law 102-345 made the program permanent, transferred flight engineers and pilot cases to the NTSB, but did not eliminate the $50,000 ceiling.

- 91-9 Specialized Review of Administrative Action

Implementation in Progress. Recommends that Congress should take into account the differences in volume, complexity, and level of technical content of federal agency programs when considering proposals for creation of a specialized court or courts to review administrative action. Also urges Congress to recognize that it is appropriate to create specialized courts for particular administrative programs only if those programs (1) generate a consistently large volume of cases and (2) contain a predominance of factual issues specific to particular cases or a predominance of scientific or other technical issues requiring special expertise of decisionmakers. Recommends that legislation providing for specialized review of particular administrative programs should (1) avoid *de novo* review of factual issues already subject to formal adjudication at the agency and (2) make the decisions of Article I specialized courts final on review of questions of fact. This recommendation provides general guidance to Congress.

- 91-10 Administrative Procedures Used in Antidumping and Countervailing Duty Cases

Implementation in Progress. Recommends that the International Trade Administration in the Department of Commerce and the International Trade Commission should develop factfinding procedures that permit a more coherent development of the administrative record, with increased opportunities for the parties and decisionmakers to test the factual submissions made in antidumping and countervailing proceedings. Also urges that the ITA take several enumerated steps to improve the efficiency of its case processing and that the ITC encourage collegial decisionmaking and consider the possibility that informal meetings to discuss the disposition of antidumping/countervailing duty cases constitute meetings exempt from the Sunshine Act under exemption 10. Further recommends that Congress consider whether the usual procedure for judicial review of agency adjudications should be followed for antidumping/countervailing duty cases or whether the additional level of specialized court review at the Court of International Trade is required in these cases.

- **92-1 The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements**

Implementation in Progress. This recommendation encourages agencies to voluntarily use notice-and-comment procedures in promulgating rules of procedure and practice except in situations in which the costs of such procedures will outweigh the benefits of having public input. The recommendation also proposes that a rule should be found to fall within the statutory exception only when it both (a) relates solely to agency methods of internal operations or of interacting with regulated parties or the public, and (b) does not (i) significantly affect conduct, activity, or a substantive interest that is the subject of agency jurisdiction, or (ii) affect the standards for eligibility for a government program. To assist agencies in implementing this recommendation, the Conference urges OMB to refrain from exercising jurisdiction under Executive Order 12,291 with respect to rules relating to procedure and practice that an agency voluntarily publishes for comment. This recommendation has been distributed among the agencies.

- **92-2 Agency Policy Statements**

Implementation in Progress. This recommendation seeks to ensure that before an agency promulgates substantive policies which bind affected persons it provide appropriate notice and opportunity for comment on such policies, and makes sure that policy statements are not treated as binding. In particular, this recommendation urges agencies not to issue statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using legislative rulemaking procedures (normally including notice-and-comment). This recommendation has been distributed among the agencies.

- **92-3 Enforcement Procedures Under the Fair Housing Act**

Implementation in Progress. Recommends that Congress amend the Fair Housing Act so each aggrieved person on whose behalf a complaint has been filed is automatically deemed a party to a lawsuit or administrative proceeding. Urges the Department of Housing and Urban Development (HUD) to notify each complainant of his or her option to select private counsel when a reasonable cause finding is made and to study why parties in cases under the Fair Housing Act use the judicial process rather than the administrative adjudication process. Also recommends that HUD should increase its efforts to process complaints within the 100-day statutory period and encourage the use of alternative dispute resolution in all stages of Fair Housing Act cases. This recommendation was forwarded to the appropriate congressional committees and to HUD.

- **92-4 Coordination of Migrant and Seasonal Farmworker Service Programs**

Implementation in Progress. Recommends that the President establish by executive order an Interagency Coordinating Council on migrant and seasonal farmworker programs that authorizes the Council to (1) develop an integrated, cost-effective system for gathering data on migrant and seasonal farmworkers and their dependents and (2) designate an appropriate agency to collect the data.

- **92-5 Streamlining Attorney's Fee Litigation Under the Equal Access to Justice Act**

Implementation in Progress. Recommends that Congress amend the Equal Access to Justice Act to reduce litigation over the dollar value of fee awards, to encourage settlements, to eliminate litigation on the question of when prevailing parties must file for fees, and to encourage judicial economy. Also urges Congress to amend the law to provide fee awards in individual social security benefit claims cases without regard to the substantial justification text and to consider whether to extend the Act's coverage to categories of agency or Article I court adjudications that are similar to those types of cases now covered by the Act. This recommendation has been forwarded to the appropriate congressional committees.

- **92-6 Implementation of the Noise Control Act**

Implementation in Progress. Recommends that the Environmental Protection Agency (EPA) should analyze the preemptive effects of its existing and pending noise standards to eliminate, where possible, any unintended effects. Also urges Congress to review the issues raised by the analysis, including whether the continuation of substantive regulatory requirements without funding, or EPA's inability to reexamine, modify, or rescind those requirements, creates undue procedural burdens upon industry, the states, and the public. This recommendation has been forwarded to EPA.

- **92-7 The Federal Administrative Judiciary**

Implementation in Progress. Recommends that Congress, when creating new programs, to preserve the uniformity of process and of qualifications of presiding officers contemplated by the Administrative Procedure Act, and it contains guidelines for assigning adjudications to administrative law judges. The recommendation also urges reform of the ALJ selection process, including elimination of the veterans' preference, administered by the Office of Personnel Management so that agencies can hire from a larger pool of qualified applicants and hire more qualified women. The recommendation also suggests that a system of review of ALJ performance be developed, and that it be administered by Chief ALJs. The system would include a mechanism for investigating ALJ allegations of improper agency infringement of, or interference with, their decisional independence, and it would include procedures for investigating complaints of ALJ misconduct, such as allegations of bias or prejudice. This recommendation has been forwarded to OPM.

- **92-8 Administration of the Office of Juvenile Justice and Delinquency Prevention's Formula Grant Program**

Implementation in Progress. Recommends changes for improving administration of the formula grant program, including OJJDP's communication and consultation with states, coordination and collaboration at various levels of government, consistency and clarity of policy elaboration, staffing, and training. This recommendation has been forwarded to the Department of Justice.

- **92-9 *De Minimis* Settlements Under Superfund**

Implementation in Progress. Recommends that EPA expand its efforts to negotiate settlements with potentially responsible parties that have contributed relatively small amounts of hazardous waste at sites covered by the Superfund program. A more active agency role is recommended and suggestions are made for additional guidance from EPA headquarters to regional offices. The recommendation also calls for establishing a central, publicly accessible repository of *de minimis* settlement documents. This recommendation has been forwarded to EPA.

APPENDIX E

The Administrative Conference of the United States was established by statute as an independent agency of the federal government in 1964. Its purpose is to promote improvements in the efficiency, adequacy, and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions. Conference work is assisted by outside experts with whom staff cooperatively study mutual problems and exchange information.

To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished by direct action on the part of the affected agencies or through legislative changes. The Conference sponsors colloquia to allow for interchange among administrative agencies of current information on timely topics. By assembling noted experts to lead a discussion, the Conference intends the colloquia to stimulate thinking in the agencies concerning potential improvements in administrative procedure in the relevant area.

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Arthur B. Culvahouse, Jr., Partner, O'Melveny & Myers
Norman Ornstein, Resident Scholar, American Enterprise Institute
Are They More Virtuous Today? A Focus on Government Ethics, 37 FEDERAL BAR NEWS & J. 414 (1990)

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The Federal Courts Study Committee and Administrative Law: A Forum
Harold Bruff, Professor, University of Texas Law School
Peter Strauss, Professor, Columbia University Law School
Stephen F. Williams, Judge, U.S. Court of Appeals for the DC Circuit

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E. Donald Elliott, General Counsel, Environmental Protection Agency
David G. Hawkins, Natural Resources Defense Council
Richard B. Stewart, Assistant Attorney General, Land and Natural Resources Division, U. S. Department of Justice
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British Approaches to Administrative Law
David G.T. Williams, President, Wolfson College, Cambridge, Vice Chancellor, Cambridge University

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Globalization of Securities and Financial Market Regulation in the 1990s
Richard C. Breeden, Chairman, Securities and Exchange Commission
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Sidney S. Rosdeitcher, Partner, Paul, Weiss, Rifkind, Wharton & Garrison
Harris Weinstein, Chief Counsel, Office of Thrift Supervision
Charles W. Wolfram, Professor, Cornell Law School

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William F. Funk, Professor, Lewis & Clark Northwestern School of Law
Theodore B. Olson, Partner, Gibson, Dunn & Crutcher
Thomas O. Sargentich, Professor, American University, Washington College of Law

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An Administrative Alternative to Tort Litigation: The Asbestos Claims Crisis

Andrew Berry, Partner, McCarter & English
Lester Brickman, Professor, Cardozo School of Law, Yeshiva University
Dr. Deborah Hensler, Senior Social Scientist, The Institute for Civil Justice, The Rand Corporation
Ronald L. Motley, Partner, Ness Motley Loadholt Richardson & Poole
Howard Samuel, President, Industrial Union Department, AFL-CIO
Jack Weinstein, Judge, U.S. District Court, Eastern District of New York

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Regulatory Takings: When Does the Government Have to Pay?

John Echeverria, Counsel, National Audubon Society
Barry M. Hartman, Acting Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice
Paul D. Kamenar, Executive Legal Director, Washington Legal Foundation

September 24

The Supreme Court's Administrative Law Docket

Marshall J. Breger, Solicitor of Labor
Thomas O. Sargentich, Professor, American University, Washington College of Law
Patricia M. Wald, Judge, Court of Appeals of the DC Circuit

October 30

EPA Rulemaking and the President's Council on Competitiveness

David B. Rivkin, Jr., Special Assistant to the Vice President for Domestic Policy
Cass R. Sunstein, Professor, University of Chicago Department of Political Science and Law School

Appendix F

PROJECTS APPROVED BY THE COUNCIL OF THE ADMINISTRATIVE CONFERENCE

1. *Agency implementation of the Program Fraud Civil Remedies Act* Enacted in 1986, the Act calls upon most large departments and agencies to set up procedures for investigating and administratively adjudicating program fraud allegations. Model rules of practice were promulgated by HHS. How well have they been implemented? Have the Act's procedures been fair and effective?

2. *Employee sanction and anti-discrimination adjudications under IRCA* Under the 1986 Immigration Reform and Control Act, the DOJ was required to set up new adjudication programs to enforce key provisions of the Act. The program requires administrative law judges or decision-makers, but there are numerous special provisions raising procedural issues. For example, in anti-discrimination cases, ALJ decisions are directly reviewable in the courts of appeals. The role of the special counsel (and the EEOC) in such case also raises interesting procedural issues. The GAO is charged with review of the implementation of these provisions, but the Conference should contribute its review of the procedures.

3. *FTC/DOJ premerger review process under the Hart-Scott-Rodino Act* Under the Act, both agencies must approve mergers over a certain size threshold and therefore each requests information on the effects of the proposed mergers. These informational requests have involved voluminous paperwork and lengthy review time. Moreover few mergers have been disapproved in recent years. A study would assess the effectiveness of the Act and the agency's practices and procedures.

4. *Foreign Trade Zone Procedures* The 1934 Foreign Trade Zones Act was designed to create duty-free areas in the U.S. within which foreign goods may be assembled, repackaged, joined with domestic goods, etc. In recent years applications have zoomed upwards for various reasons, and so have objections from domestic industries and unions. The Act gives little guidance concerning procedures to be used by the Board, (located within the Department of Commerce) but the Board has issued regulations for its informal hearing procedures. The Conference should examine the procedure of this little-known but increasingly important Board.

5. *Clarification of Jurisdiction over Money Claims Against the U.S.: Claims Court vs. District Court.* The former (Thomas S. Susman) and current (Peter L. Strauss) chairmen of our Committee on Judicial Review have agreed that the jurisdictional confusion in the area needs to be fixed. The problem is caused by the overlapping of the Tucker Act's assigning claims over $10,000 to the Claims Court, the Little Tucker Act's assigning claims under $10,000 to either district courts or the Claims Court, and district courts allowing monetary relief in varying amounts, pursuant to the APA.

6. *Implementation of the Americans with Disabilities Act.* This 1990 law is one of the most far-reaching regulatory statutes ever enacted. It seeks to protect over 43 million people and covers most employers and public accommodations. A half dozen federal agencies are charged with issuing regulations concerning terms like "undue burden" and "reasonable accommodations." Anticipating the development of enforcement disputes under the Act, there is a section encouraging use of ADR, (Section 513). The Conference ought to begin developing expertise in this area.

7. *Review of FOIA's Exemption 8 – Relating to Regulation of Financial Institutions.* Exemption (b)(8) of FOIA exempts from disclosure, records "contained in or relating

to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." Its viability has come into question, given the new openness and importance of bank and thrift regulation. A study of the operation and impact of this exemption (and perhaps the even littler known exemption 9, relating to oil wells) would be timely.

8. ***FOIA and Settlement Documents.*** A persistent difficulty in the crafting and passage of the 1990 Administrative Dispute Resolution Act was caused by the uncertainty concerning the need for confidentiality of some documents generated by ADR proceedings (e.g., mediator's notes) and their availability under FOIA. Legislators indicated that this issue deserved more study. The Conference should describe the state of the law, review the implications for the success of ADR as well as for openness goals and evaluate the need for changes in either FOIA or the ADR Act.

9. ***Multi-member agencies — Need for Improved Collegiality or Other Operational Improvements.*** The Office of the Chairman's recent descriptive monograph on the organization of such agencies showed a wide variety among them concerning their membership structure, powers of the chair, requirements for agency action, OMB bypass provisions, and litigating authority. Moreover, reviewed questions about the lack of collegiality (and the effect of the Sunshine Act) make a comprehensive look at this organizational model timely.

10. ***Regulatory Takings.*** Under the 1988 Executive Order, executive agencies must perform a "takings implications assessment" when writing new regulations. Legislation has been introduced to broaden this requirement so as to require agencies to determine whether their activities deprive property owners of the reasonable use of land, to explore less intrusive alternatives, and if unavoidable, to compensate owners. Moreover, the federal courts have become more hospitable to regulatory takings claims. The study would describe developments and suggest appropriate ways of dealing with these concerns.

11. ***Use of u Negotiated Model State Act Approach to Federal Regulation of Medigap Insurers, and Judicial Review of the Early Intervention and Seizure Decisions of Federal Banking Regulators.*** The 1990 Medigap Improvements Act uses a novel approach to regulation of medigap insurance providers (i.e., private health insurance companies providing coverage supplemental to Medicare). The Act requires private insurance companies to meet state laws that meet federal standards. It mandates that the National Association of Insurance Commissioners (NAIC) develop a model statute though a participatory, negotiating process. States must then adopt the NAIC model statute or else HHS regulations would apply to the companies. This model has been suggested for other aspects of health care regulation and deserve study.

Projects approved by the Council that the Conference can undertake with support from other agencies under the Economy in Government Act include:

1. ***Adjudication Procedures in Industrial Security Clearance Review Cases.*** The Directorates for Industrial Security Clearance Review (DISCR) in the Department of Defense has expressed some interest in having ACUS review its non-APA adjudication procedures and those of other similar boards in the government.

2. ***Resolving Disputes over Scientific Fraud.*** Controversies have developed over the federal government's procedure for investigating and adjudicating allegations of fraud or misconduct in federally funded research. The NIH is currently in the middle of a dispute concerning the procedures of its Office of Scientific Integrity and has expressed some interest in a Conference study of the matter.

3. ***ALJ Subpoena Power.*** The Department of Labor's Office of ALJs is interested in supporting a Conference examination of the limitations on the ability of administrative law judges to issue and seek enforcement of subpoenas. Even within the Department there are variations among the many statutes giving rise to ALJ hearings.

APPENDIX G

1992 VISITS TO CONFERENCE OFFICES

BY FOREIGN DIGNITARIES

In January 1992, Conference staff met with Erik Harremoes, Director of Legal Affairs, Council of Europe. The Council of Europe is an international organization based in Strasbourg, France, established in 1949 to protect human rights and advance the rule of law. Discussion focused primarily on the organization, purpose and work of the Administrative Conference and the Council of Europe's activities aimed at furthering the rule of law in the formerly communist countries of Eastern Europe.

In April 1992 Conference staff met with Judge Uzi Savan, Comptroller and Ombudsman for the City of Jerusalem, to discuss ombudsmen and alternative dispute resolution.

In June 1992 Conference staff presented an overview of U.S. administrative law to a group of seven lawyers from North Cyprus, Gambia, Taiwan and Tanzania. In particular, staff focused on American adjudication and rulemaking procedures and on the role of administrative agencies within our constitutional system of government.

Senior Conference staff met in June with representatives of the People's Republic of China as part of a two-phase exchange program on administrative law.

Conference staff also met in 1992 with Professor Jacek Mazur, Legal Advisor to the President of the Supreme Chamber of Control of Poland (a Polish constitutional entity created to audit and investigate the performance of government agencies).

ADMINISTRATIVE CONFERENCE
OF THE UNITED STATES,
Washington, DC, June 2, 1992.

Steven B. Harris, Esquire,
Staff Director, Senate Committee on Banking, Housing, and Urban Affairs, Washington, DC.

DEAR MR. HARRIS: As you requested, this Office has reviewed the provisions of S. 2733, as reported out of the Senate Committee on Banking, Housing and Urban Affairs. *See* Federal Housing Enterprises Regulatory Reform Act of 1992, S. Rep. 102-282 (102nd Cong., 2d Sess. 1992).

As you know, the Administrative Conference of the United States is an independent agency of the U.S. Government established for the purpose of promoting improvements in the efficiency, adequacy and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related government functions. In light of its statutory mandate, the Conference examined the various procedural aspects of the workings of government-sponsored enterprises (GSEs). Based on that examination, it issued Recommendations 91-6, which I enclose.

The recommendation had four primary elements. First, the Conference believed that each GSE should be supervised by a federal agency for safety and soundness. Second, such agency should have the necessary powers to perform its supervisory tasks, including the ability to examine a GSE's financial condition and set and enforce appropriate risk-related and minimum capital requirement. Third, the supervising agency should develop and maintain risk ratings of each GSE. However, the Conference concluded that the agency should involve itself in GSE management only if an institution's risk profile warrants such involvement. Finally, the Conference recommended that any federal agency responsible for supervising GSE safety and soundness should develop through notice-and-comment rulemaking, suitable guidelines for invoking its supervisory and enforcement powers. In our judgment, the provisions of S. 2733, if enacted, would implement ACUS Recommendation 91-6, Improving the Supervision of the Safety and Soundness of Government-Sponsored Enterprises, (1 CFR §305.91-6 copy attached), insofar as the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation are concerned.

I must mention that the Conference did not address a range of structural and substantive issues that have been resolved by S. 2733, such as the placement of the regulator (the Office of Federal Housing Enterprise Oversight) within the executive branch, the relationship to the Secretary of the Department of Housing and Urban Development, the agency's litigation authority, or the elements of effective risk-related and minimum capital requirements. As you are aware, the Department of Justice has raised concerns regarding a number of these matters and would recommend that the President veto the bill if passed in its current form. The Conference's recommendations regarding procedure and process issues did not address the matters of concern to the Department, on which the Conference takes no position.

Sincerely,

GARY J. EDLES,
General Counsel.

Mr. RIEGLE. Yes; the expected aggregate returns, over time, on such activities should be positive, but should not be expected to be as great as the overall rates of return on equity that the enterprises have experienced in recent years.

Mr. President, I ask unanimous consent to insert into the RECORD a letter from the Administrative Conference of the United States stating that the bill currently under consideration if fully consistent with the conference's recommendation for GSE regulatory reform.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

APPENDIX I

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037-1568
(202) 254-7020

June 30, 1992

OFFICE OF
THE CHAIRMAN

Honorable Barbara H. Franklin
Secretary
Department of Commerce
14th & Constitution Avenue, N.W.
Washington, D.C. 20230

Dear Madam Secretary:

Pursuant to "Guidelines for Submission of Metric Reports Required by Executive Order 12770 of July 25, 1991, Metric Usage in Federal Government Programs," the Administrative Conference of the United States submits its progress report.

The Administrative Conference is a permanent, independent agency of the Federal Government with an appropriation of $2,227,000 and an FTE of 24 for fiscal year 1992. Its purpose is to improve the administrative procedure of Federal agencies so that they may fairly and expeditiously carry out their responsibilities to protect private rights and the public interest. The agency conducts studies in the area of administrative law and provides advice in this regard to the President, the Congress, the courts and executive branch agencies. While the agency does not direct any metric-sensitive programs, it will, where economically feasible, employ metric usuage in its procurement and business-related activities in compliance with the requirements of the Metric Conversion Act. The agency's Director of Administration has attend the Metric Orientation seminar. Additionally, we have undertaken a measurement-sensitive review of agency policies, procedures, standards and procurement regulations; there are no impediments to this agency's converting to the metric system.

The Administrative Conference will cooperate fully in implementing the metric system as the preferred system of weights and measures for United States trade and commerce.

Sincerely,

Robert S. Ross, Jr.
Acting Chairman

WJO/DFM:lcs

1994 BUDGET REQUEST

Mr. HOYER. Can you tell me again what your budget request for 1994 will be?

Mr. GRIFFIN. $2,314,000.

Mr. HOYER. And your statement was that you expect the President's budget to include the same figure?

Mr. GRIFFIN. Yes.

PERSONNEL REQUIREMENT

Mr. HOYER. Do you have any reason to believe one way or the other that you will be affected by the reduction of 100,000? How many employees do you have?

Mr. GRIFFIN. We have 24 FTEs.

Mr. HOYER. How many do you have actually on board?

Mr. GRIFFIN. Twenty-two full time permanent, two permanent half time, and one permanent temporary—full time temporary—24 FTEs.

Mr. HOYER. Considering the proposed reduction in employees across the Federal civilian sector, do you have any reason to believe that you will not be included in that?

Mr. GRIFFIN. We have had no attrition in recent years. We have been firm at the 24 FTEs. At this point, I am not sure that we can predict whether there will be any attrition. In our budget submission—under the category of personnel and benefits, we have a 2 percent increase in personnel compensation and benefits, but we have combined that with decreases in other areas.

The increases in personnel compensation and benefits came about essentially through the need under the FERS system to fund additional amounts and the thrift savings plan. That is where we have seen our increases.

Mr. HOYER. I don't know whether the administration may have a threshold number of employees that an agency would have to have before they are impacted by the reduction. It may be reasonable to consider that.

Mr. LUBBERS. One hundred, I believe.

REDUCTION IN ADMINISTRATIVE COSTS

Mr. HOYER. Also, do you know if the 3 percent reduction in administrative costs that the President has indicated he is to apply to the executive agencies, which deals with items other than personnel and rent, whether or not you will be affected by that?

Mr. OLMSTEAD. This budget is more than that.

Mr. HOYER. Because you figure on a 3.1 percent inflation increase and then the 3 percent reduction. So it puts you at a freeze.

Mr. OLMSTEAD. It requires us to cut more than that from the general administration categories in order to cover the increases in benefits that we expect.

SAVINGS TO THE GOVERNMENT

Mr. HOYER. You indicated in your statement that savings in the operation of Federal agencies is one of your objectives. You also

say, I quote, "that our studies often result in considerable savings to the government." Do you have examples of that?

Mr. GRIFFIN. Well, I think we could point to certain things we have done.

Certainly this ADR initiative. I think everyone recognizes it has been very effective in reducing what are becoming extraordinary costs of contentious litigation. So I think ADR, under which we have been, by statute, given a leading role in implementing, we have been, I think, very effective there. And on any given day it is common to see training teams in our offices—or our people training groups of government executives in ADR techniques.

Right now, in fact, probably 25 to 33 percent of our resources are allocated to this ADR initiative. That includes training, the publication of ADR manuals and the actual hands-on training and working on systems design.

I would like to point out, too, for example, when I mentioned our clearinghouse function, this is one of the examples of the types of books that we put together and publish that go out to all the different departments and agencies in the government. This is called the Federal Administrative Procedure Sourcebook.

By us being the central clearinghouse to put these manuals and books together and then distribute them, we have been able to do that much more cost effectively than it would be done by each department or agency, and also it saves countless dollars in terms of legal personnel costs at the various agencies. They have one source now they can turn to that contains all the important materials dealing with administrative procedure, and then if, in fact, they may have further questions, they can call one of our people, and we field hundreds of calls.

Mr. HOYER. Have you quantified that?

Mr. OLMSTEAD. Yes, sir. This book costs us $8.50 each to publish. The agencies were able to provide the GPO rider at $2 a copy, and if you figure it out over the government what the savings was, it was $580,000 on this one book, if every agency had reproduced these materials and separately printed them.

Mr. HOYER. If they did.

Mr. OLMSTEAD. If.

Mr. HOYER. I understand.

The public, however, as I have said before, gets cynical when we say, "we would have spent X, but by doing this, we only spent Y." They perceive that as an increase over A; and they are right.

This is the issue: Is this $580,000 a savings over what would have been expended individually if the agencies had produced information like that?

Mr. OLMSTEAD. Every attorney in the Federal Government has to have access to these statutes at their desk. So if we didn't have this book, somehow, either by Xeroxing or some kind of photo reproduction, they would have to reproduce these acts. In addition to which, they would want to write memos interpreting the acts, legislative and that sort of thing.

So, while I can't tell you that, in fact, they would have done every single piece of work that is in here, the fact is that within our government—somebody would have reproduced the effort and

work that we put in this book in each agency that had an administrative procedure, and that is 130 agencies.

CONFERENCE RECEIVES VOLUNTEER SERVICES

Mr. HOYER. Are there other examples?

Mr. GRIFFIN. Well, I think one that is really central to our whole mission of studying the administrative process and trying to make recommendations that benefit the whole government in the operation of the administrative process, and one of the things that I think makes the Administrative Conference so valuable to the government in saving money, is the fact that, because of our prestige known throughout the academic world and professional world and within government as being an independent, very scholarly repository of expertise on the administrative process, we are able to attract some of the best and brightest minds in academia and in the private bar to devote literally thousands of hours free to the government. If we were to go out and pay for that kind of effort, it would cost millions of dollars.

So we are given the value of these experts devoting their time—every member of the Conference—and there are 101 members that form the Administrative Conference appointed for two-year terms. Each of those members serves on one or more of our six standing committees, and they do a tremendous amount of work, and that is all free. It is all voluntary work. Typically, these are either the top legal officers within a various agency or department, general counsels of the Cabinet departments or commissioners of independent regulatory agencies, as well as the top academics in the field of administrative law. And, as I said, they devote hundreds and hundreds of hours free.

Also, where we do go out and commission studies to be done, typically by an academic who is the leading authority in his or her given area, because of the prestige of the Conference, we are able to recruit these experts to do studies, typically $8,000 to work for anywhere from six months to a year on a comprehensive study that may result in a 200-page detailed study on a given area or problem within administrative law and procedure.

And if we were to go out and use a typical type of Washington "Beltway bandit" consulting firm, we would be talking hundreds of thousands of dollars for a similar work product. It is typically only eight, nine, or ten thousand dollars for a typical ACUS research budget for a new project. And that, in conjunction with literally the hundreds of hours of review and consultation with the members of the Conference on the committee that would be entrusted with that specific research project, results in a unique kind of recommendation, one in which all the different perspectives of the problem have been fully identified, taken into account, discussed, debated and, hopefully, a recommendation then is produced, a formal recommendation, which eventually is codified into the code of Federal regulations, and which all the agencies in the government, as well as the public citizens, will feel is a fair treatment of the problem and which results in a very great improvement in the administrative process.

An example might be the Equal Access to Justice Act, where we have put out a formal recommendation dealing with how attorneys' fees are to be calculated when public citizens deal with the government and are determined to be entitled to receive attorneys' fees. Now, what has happened through the last few years is that it is requiring a tremendous effort to determine just what is the appropriate amount of attorneys' fees, due to all the problems that are inherent in that statute. We put forth a formal recommendation explaining how those fees should be determined in a much more expeditious and efficient manner.

TRACKING CONFERENCE RECOMMENDATIONS

Mr. HOYER. The summary of the implementations of your recommendations indicates that 80 percent of your recommendations have been or are being implemented. Have you tracked each recommendation to verify its implementation?

Mr. GRIFFIN. Yes, Mr. Chairman. We have a tracking mechanism. In fact, our general counsel, Mr. Edles, and Jeff Lubbers, our Research Director, are in charge of maintaining a digest on that. And we devote a substantial amount of our efforts among our staff to following up and making sure that these recommendations are implemented. Jeff, you might want to answer.

Mr. LUBBERS. It is not an exact science to know when a recommendation has been fully implemented, but we do keep track of every one, try to note whether we have achieved—completed a partial or substantial implementation of the recommendation. And this requires regular checking with the agencies to see whether they have followed our advice and to see whether Congress, in the case of a legislative recommendation, has passed the statute based on a recommendation.

Mr. HOYER. Do you have a compilation?

Mr. LUBBERS. Yes; we do.

Mr. HOYER. With an assessment of partially implemented, fully implemented?

Mr. LUBBERS. Yes. We keep that up to date annually.

Mr. HOYER. Do we have that?

Mr. OLMSTEAD. Was that in the materials?

Mr. EDLES. I believe it is in the materials, but if not, we can certainly provide it.

Mr. LUBBERS. Appendix D to the yellow.

Mr. HOYER. When I read this last night I must have missed it.

Mr. OLMSTEAD. They start with the earliest.

Mr. LUBBERS. They are chronological.

Mr. GRIFFIN. Started in 1968.

Mr. OLMSTEAD. I might add to that that we have just finished having each of the committees—we took all of those recommendations and divided them up into areas of jurisdiction for each of the committees. They have reviewed the old ones to determine whether they are out of date, need to be updated, need to be changed, and a couple of them are now in the research file for review to be reconsidered by the office. The best example of that is we have a 1972 recommendation on discovery.

Mr. LUBBERS. 1980.

Mr. OLMSTEAD. And because of all the effort in alternative dispute resolution and improving the process, we think that recommendation ought to be revisited. And so it is now on our proposed list for the council to consider relooking at it.

BUDGET REQUEST

Mr. HOYER. Going back to the budget numbers, what was the level of your request of OMB?

Mr. GRIFFIN. The original request was $2,400,000 and then the pass-back brought it back down to the 1993 level. It froze us at the 1993 level. We are on a four-year reauthorization cycle. In 1990, in our reauthorization request, we had projected increases, and for 1994 it would be $2,400,000, which is what we were requesting, and then OMB passed back the $2,314,000, which is exactly the same as 1993's appropriation.

Mr. OLMSTEAD. Incidentally, if you said no Federal pay raise it would have been $2,359,000.

Mr. HOYER. In other words, the $2.4 million would have been reduced by 41 and the 41 would have been for the pay differential and the cost of living adjustment.

Mr. OLMSTEAD. Cost of living increase.

Mr. HOYER. Again, the 3 percent administrative cost reduction, you say you have already taken that.

Mr. OLMSTEAD. To get to the base——

Mr. HOYER. Assuming that that 3 percent administrative costs would be applied to baseline.

Mr. OLMSTEAD. That is right.

Mr. HOYER. As opposed to last year's figure.

Mr. OLMSTEAD. That is right. That was just taking the pass-backs we got from GSA. They provided a lot of support services for us as well as our facilities, and they gave us—rent increases and the various service charge increases, those increases were assumed to be added to the base before you took the 3 percent reduction.

REIMBURSEMENTS

Mr. HOYER. In last year's testimony you indicated that your 1992 reimbursement was worth $376,000. What will it be for 1993?

Was that the actual figure for 1992—$376,000?

Mr. OLMSTEAD. The reimbursable figure? Yes. The Congress gave us authority to take the interagency money and carry it over. Previously we had obligated money that we got from other agencies in the fiscal year in which we received it, which didn't make a lot of sense if we received it in September and had to have it obligated in September. So, essentially, that number now includes the carryover from the previous year plus projections for the current year which we have not yet received.

So we generally project that, on average, we get about $50,000, but we carry over around $109,000. So the——

Mr. HOYER. I am sorry. I must have lost you. What does the $376,000 relate to?

Mr. OLMSTEAD. For fiscal year 1992?

Mr. HOYER. Yes.

Mr. OLMSTEAD. We had two large interagency transfers that year. One was for the Administrative Law Judge Study we got from OPM, $150,000, which was a very large transfer.

Mr. HOYER. And what, if anything, are you projecting for fiscal 1994?

Mr. OLMSTEAD. At the moment we have no indications. The $50,000 is a projection based on historical averages.

ASSISTANCE TO FOREIGN GOVERNMENTS

Mr. HOYER. Now Do you provide advice or assistance to foreign governments?

Mr. GRIFFIN. Yes, Mr. Chairman. In fact, under a recent statute that has expanded our jurisdiction to actually deal with foreign governments in helping the rule of law program, and especially in the eastern bloc and former Soviet Union. We work under an arrangement, it would be under a reimbursement mechanism with either the State Department, USIA or USAID. So we are in the process of starting to develop that effort.

In fact, a group of Conference members and other experts is going over—a six-member team has been invited to go to the Ukraine in March. They are to lecture for five days in Kiev on the American administrative system and judicial review, environmental regulation, securities regulation and foreign commerce. That will be the first of these informational exchanges.

We have traditionally had delegations from other countries visit the Conference where we provided assistance and some discussions, but this will be the first overseas trip actually handled by the Conference, and it was reimbursed through USIA.

Mr. HOYER. Is that 100 percent reimbursable?

Mr. GRIFFIN. Yes.

Mr. HOYER. So all the costs associated with foreign travel and such personnel as you take over there, is reimbursed?

Mr. GRIFFIN. Yes. In this case, USIA.

Mr. HOYER. And is it your policy generally to pursue 100 percent reimbursement of this kind of activity?

Mr. GRIFFIN. I believe by the statute we are required to be fully reimbursed. We don't have any other trips right at this time on the drawing board. That is the only trip we have. This is the first one. At the moment, the only one.

FERS PAYMENTS

Mr. HOYER. On your FERS payment, your statement indicates that benefit payments are projected to be $100,000 greater than the historical costs because of the FERS contribution.

Mr. GRIFFIN. And Thrift Savings Plan. Actually, I think that number has been revised. Now we are projecting $79,000 as an increase.

Mr. HOYER. The FERS savings plan has been in existence now for some years, but would you now say it is $79,000 greater than the historical cost because of FERS' contribution?

Mr. OLMSTEAD. Right.

Mr. HOYER. What does historical refer to? Because you have been making FERS contributions I take it for some years now.

Mr. OLMSTEAD. At the time we projected the money that we would need for same services when we were reauthorized.

Mr. GRIFFIN. In 1990.

Mr. OLMSTEAD. Which was the 1990 through 1994 authorization. We used the historic Civil Service numbers. We didn't—actually, I think we only had one or two employees who were beginning under the newly created system, and I certainly didn't recognize it if they told me about it in the budget book someplace. It wasn't something that I took note of, that the difference in the percentage of total compensation that FERS and Thrift Savings were going to cost us in our new budget was as high.

Mr. HOYER. What is that percentage?

Mr. OLMSTEAD. For a fully funded employee in the GSA loan category it can be up to 33 percent of our compensation package, if they take out all of the matching.

Mr. GRIFFIN. We say in our materials that traditionally for the Civil Service it runs 8 to 15 percent of salary and for the FERS program it runs anywhere from 21 to 34 percent, a dramatic increase.

Mr. HOYER. And the contingency, that is, the spread, relates to the employees' contribution level to the Thrift Savings Plan?

Mr. OLMSTEAD. Right. There are elections and they can change on you unexpectedly, and three-quarters of our budget is personnel costs. If I had five employees that suddenly changed their TSP contributions, it can affect the annual budget dramatically.

Mr. GRIFFIN. Out of our $2,300,000, $1,756,000 is employee compensation.

REIMBURSEMENT BY OTHER AGENCIES

Mr. HOYER. The question suggested is, could the services that you render to domestic sources be fully reimbursable as it is for Foreign Services?

Mr. GRIFFIN. Well, in fact, as we mention in our advisory section and—well, actually, in our research and recommendations I should say, we did not have the funding this year to initiate new studies.

Traditionally, about 20 percent of the total ACUS budget was earmarked for new crosscutting research studies that would impact the whole scope of the government. What has happened is, especially this year, when we are going to have such reduced funding, we do not have at this time any funding to initiate new studies, but we do have studies in the pipeline that we will continue with.

We can only initiate new studies with funds we receive under the Economy in Government Act. These are grants from the other departments or agencies that have commissioned us to do a study for them. Those studies are very valuable, and we have examples where they prove to be extremely valuable to more than one agency. But we look at this as somewhat of a dangerous trend to see our budget for new research being cut back to where we cannot fulfill what has historically, been our mission to look prospectively at problems that could be in their infancy, that could have implications across the whole scope of the government.

We have to have the funding to initiate new research studies. Historically, that was about 20 percent. Now, all we can do is take

these interagency grants under the Economy in Government Act to initiate new studies.

Mr. OLMSTEAD. I might add to that. The agencies are very reluctant under the Economy in Government Act transfers to underwrite the overhead. If you were going to go to fully reimbursable programs, we would have to charge them to underwrite the overhead, and that sometimes makes the difference as to whether they are willing to fund these studies, because, frequently, the funding comes out of the legal side of the agencies and their budgets are not as discretionary as the program.

CONCLUSION

Mr. HOYER. I appreciate very much you being with us this morning.

[Additional questions submitted for the record by the Committee and the answers thereto follow:]

ESTIMATED SAVINGS

Question 1. **I am very interested in identifying savings in the operations of federal agencies. Therefore, I am very interested in your statement that your work, "often results in considerable savings to the government." Have you been able to quantify these savings.**

Answer. The statement to which the question refers was made in connection with two Conference activities: preparing government-wide administrative law publications and implementation of the Administrative Dispute Resolution Act of 1990 and the Negotiated Rulemaking Act of 1990. Conference work on just these two matters saves the other agencies of government countless hours and considerable expense because they can rely on the Conference's work and do not have to duplicate it themselves.

Publications. The Conference has historically requested funding sufficient to allow it to produce at least one major administrative law publication each year for use by agencies government-wide. These publications include the *Federal Administrative Procedure Sourcebook, A Guide to Federal Agency Rulemaking*, the *Manual for Administrative Law Judges*, the *Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution*, and one other Sourcebook or study guide such as the *Negotiated Rulemaking Sourcebook*, the *Agency Guide to Government in the Sunshine Act*, a collection of materials on *Drafting Federal Grant Statutes*, or another timely and topical series. In recent years the Conference has had sufficient funds to update these publications on a five-year cycle. Last year (FY-92), the Conference published the second edition of the *Federal Administrative Procedure Sourcebook*. We believe that centralized publication saved the government at least $500,000, and perhaps more. The *Sourcebook* contains the text, a short analysis, a legislative history, bibliographic references, and related Code of Federal Regulations citations, for 18 procedural statutes applicable to federal agencies. Attorneys in each agency need to have access to some of these statutes on a continuing basis and many of them on an occasional basis. Before issuance of the first *Sourcebook* in 1985, agencies typically compiled and reproduced the needed copies of the statutes individually.

In 1992, the Conference printed 5000 copies of the *Sourcebook* and federal agencies ordered an additional 5000 copies by attaching a rider to the Conference's printing order with the Government Printing Office. The total research, preparation, and printing cost to the Conference was $55,000 and additional agency orders added $10,000 (marginal cost to the agencies was $2 per copy). If the 60 member agencies of the Conference had assigned a GS-11 paralegal or attorney simply to compile the materials and reproduce an average of 40 copies of the work product per agency at a cost of 2 cents-per-page, each agency would have spent over $15,000 -- or over $900,000 across the government. Not every agency would have needed to collect the materials related to all the statutes. Nevertheless, it is likely that most agencies would have needed to replicate the Conference's effort with respect to at least 12 of the 18 statutes, such as the Administrative Procedure Act, that clearly apply to every agency. Thus, it is reasonable to assume that the Conference's centralized publication resulted in saving the government $500,000 or more.

ADR. The Conference's initiative to encourage and enable federal agencies to use alternative means of dispute resolution (ADR) is beginning to achieve substantial savings and is likely to do so in years to come. Savings accrue primarily from decreasing or eliminating the need to litigate large numbers of disputes either before the agency, in court, or both. The Conference's recommendations on ADR furnished the model and the impetus for Congress' passage in 1990 of the Administrative Dispute Resolution Act (Public Law 101-552). The ADR Act recognizes the Conference's expertise and requires it to use this expertise to assist agencies in implementing ADR. The Conference has conducted an intensive implementation initiative to spur increased use of ADR in federal agencies.

Some agencies have started to compile data on the extent of their savings derived from greater use of ADR. The Federal Deposit Insurance Corporation has reported direct savings of $4.3 million in 1992 from reduced legal fees and expenses resulting from the use of ADR. FDIC staff have informed us that their initial efforts to mediate disputes were aimed at settling litigation between failed financial institutions, but that the ADR Act was in part responsible for their decision to expand their ADR program to "external" disputes, thus achieving increased cost savings.

Use of ADR by the Farmers Home Administration (FmHA) has produced considerable savings in the management of the Farmer-Lender Mediation Program. This program, which was given special attention by the Conference in Recommendation 91-7, has produced savings to the states estimated by FmHA to be between $18 million and $37 million in FY 1989 alone and concomitant savings to the federal government of between $6.6 million and $14.7 million. Obviously, the Conference does not claim credit for all of these savings. But this is just one program that emerged, in 1988, after the Conference had begun its campaign to urge agencies and the Congress to use ADR in government dispute resolution.

The Conference's ongoing efforts to aid agencies in implementing the ADR Act are likely to result in measurable savings at other agencies.

Induced Savings. In a somewhat less direct fashion, the Conference is able to leverage its relatively small appropriation to attract considerable in-kind contribution -- and, even direct, outside financial support -- for its programs. Conference activities draw on Conference members who donate their time and expertise. So-called "public" members of the Conference, i.e., non-government members, make up forty-five percent of the Conference membership. Conference bylaws also establish categories of non-voting, non-government membership. In 1992, non-government members donated over 600 hours of time, attending committee meetings and plenary sessions. The estimated billable hour value of that time exceeds $100,000. Non-government members also spend substantial, additional time reading reports, revising recommendations, and supporting other Conference activities. It is not unreasonable to believe that the federal government receives in excess of $200,000 a year in donated services from its non-government members.

The Conference has statutory authority to receive gifts from the private sector and has attracted funds from the private sector. To facilitate the Conference's work in ADR, two foundations -- the Hewlett Foundation and the Culpeper Foundation -- have contributed over $200,000 to the Conference in recent years.

The Conference also saves agencies money by providing training programs on a cross-government basis without charge to individual agencies. During 1992, over 1000 agency personnel attended 10 Conference programs specifically targeted toward the needs of government agencies. It is not uncommon for agencies to spend $300 per person to send people to seminars and training programs of comparable quality. Because the Conference relies heavily on volunteer speakers, the saving to agencies in training cost could approach $300,000.

Question 2. **What Recommendations in particular have produced the greatest savings?**

Answer. As explained in response to question 1, implementation of the Conference's ADR recommendations is likely to achieve the greatest long-term savings to the government and the private sector by substituting less costly consensual resolution of government disputes for expensive, formal adjudication and court litigation.

But, other recommendations have also produced significant, quantifiable long-term savings. Conference Recommendations 72-6 and 79-3, concerning increased use (and model standards for) administrative civil penalties, have clearly had a major impact on the government's ability to collect civil penalties for regulatory violations. Before 1972, when the Conference issued Recommendation 72-6 and its accompanying model statute, most statutes required the much more cumbersome court-collection model for assessing civil penalties. Since that time over 200 statutes have incorporated the Conference administrative imposition model and civil penalty collections have increased dramatically: In 1977 government-wide collections were $52.2 million; by FY 1990 (according to OMB's report to Congress) the amount had increased to $254 million. It would be unreasonable, of course, to ascribe all of the increase to ACUS' recommendation (or even to the administrative imposition model, since such statutes are not differentiated in the OMB report). But, clearly, the ACUS Recommendations have been influential in this growth.

A similar push by the Conference was given to the concept of initiating user fees for government-provided services or goods to special beneficiaries. Recommendation 87-4 provided the legal and intellectual underpinnings for increased enactments of user fees -- which have been a great boon to fair deficit reduction.

Another Conference recommendation that clearly produced demonstrable savings is Recommendation 81-1, "Procedures For Assessing and Collecting Freedom of Information Act Fees." In 1986, the FOIA was amended to incorporate the Conference's recommendations that document search time, duplication and review costs may be billed if the request is made for commercial uses, that advance payment of fees can be requested in certain circumstances, and that uniform fee schedules be developed. Prior to the change in the law, fees collected by the government were quite low. (Our 1981 study showed that in 1978, the government collected only $1.5 million.) After passage of the 1986 amendments, modeled on the ACUS recommendation, fee collections have risen appreciably. Although government-wide figures are not currently collected, the Food and Drug Administration alone (which has many commercial requesters) reported collecting $781,700 in FY 1992. Moreover, these changes to the Act were accomplished without undermining the robustness of its primary purpose -- to provide the general public with access to government records.

Two Conference recommendations to streamline the litigation process will yield long-term cost savings to the government and the private sector. The Conference, in 1980, recommended a change in the procedure for judicial review of agency decisions in order to eliminate the so-called "race to the courthouse" problem. Under traditional methods of seeking judicial review, the court of appeals in which the first petition for review was filed had jurisdiction over the proceeding. Because of the perceived advantage of being before one court as opposed to another, parties choosing to appeal an agency decision were "racing" to file petitions for review in various federal courts around the country, and the courts had to devote considerable time to determining which petition was filed first. The Conference proposed a statutory change to establish a scheme of random selection where petitions for review of the same agency decision are timely filed in more than one court. Congress passed legislation implementing the proposal in 1988 (28 U.S.C. §2112). The Judicial Panel on Multi-District Litigation, which is responsible for conducting the random selection, has data showing that there have been 19 random selections since the passage of the legislation, including 4 in 1992. The Conference consultant who studied the problem in 1979 estimated that each race resulted in $65,000-$100,000 in needless litigation costs to the government and private sectors. Thus, total savings so far can be estimated at $1.275 million to $1.9 million (in 1979 dollars).

The Conference, in 1983, proposed a change to the contractor certification problem to bring unnecessary litigation over government contract claims to an end. The Conference recommended that the certification provision of the Contract Disputes Act be amended so that it is no longer a jurisdictional barrier to appealing a denial of a contract claim. The Court of Federal Claims had made the following observation about the certification provision: "This court and other judicial bodies spend far too much valuable time hearing motions to dismiss, brought by the government to challenge jurisdiction in government contract cases on the basis of a faulty certification, only to find the very same case refiled, at a later date, following additional administrative procedures to conform with the certification requirements of the statute and the regulations. The result is an inefficient use of the time of the courts, the government and the plaintiffs." *Shirley Construction Corp. v. United States*, 23 Cl. Ct. 686 (1991) (Judge Horn). The Congress adopted the recommendation in the Court of Federal Claims Technical and Procedural Improvements Act of 1992, Title IX of Public Law 102-572.

In addition to the above recommendations that have already produced significant savings, numerous other ACUS recommendations should, when implemented, produce similar savings. Since 1986, these include the following recommendations:

86-7 *Case Management as a Tool for Improving Agency Adjudication* (Suggests ways to obtain more efficient and inexpensive processing of adjudications.)

87-3 *Agency Hiring of Private Attorneys* (Urges less contracting out for legal help, greater sharing of agency counsel and tighter guidelines and reporting requirements for outside hiring.)

88-2 *Federal Government Indemnification of Government Contractors* (Urges tighter controls and reporting of potential costly indemnification agreements.)

88-5 *Agency Use of Settlement Judges* (Promotes use of this increasingly accepted technique for settling cases.)

88-10 *Federal Agency Use of Computers in Acquiring and Releasing Information* (Provides guidance on a government-wide problem -- how to enter the computerized-information age.)

90-4 *Social Security Disability Program Appeals Process* (Advocates closing the administrative hearing record earlier.)

90-5 *Federal Agency Electronic Records Management and Archives* (Urges that the government make maximum use of generally available technology and rely upon widely-accepted private sector standards.)

91-1 *Federal Agency Cooperation With Foreign Government Regulators* (Gives guidance to agencies on dealing with multi-national regulatory procedural issues.)

91-9 *Specialized Review of Administrative Action* (Offers advice to Congress on factors to take into account when evaluating proposals for specialized courts.)

92-3 *Enforcement Procedures Under the Fair Housing Act* (Suggests ways to give litigants incentive to use administrative hearings rather than court trials, in fair housing cases.)

92-5 *Streamlining Attorney's Fee Litigation Under the Equal Access to Justice Act* (Contains specific proposals to amend the Act to reduce high transaction costs.)

92-9 *DeMinimis Settlements Under Superfund* (Suggests ways to reduce high transaction costs for resolving how much small-contribution parties should pay for cleanups.)

IMPLEMENTATION OF RECOMMENDATIONS

Question 1. **The summary of the implementation of your recommendations, indicates that 80 percent of your recommendations have been or are being implemented. That is an impressive record. Have you tracked each recommendation to verify its implementation?**

Answer. Yes. The Office of the Chairman maintains a system for keeping track of the implementation of all Conference recommendations. We keep a public notebook binder on each recommendation that serves as a repository for all actions taken by the Office relating to the recommendation and any responses by the affected agencies and Congress. The Office also maintains an Implementation Summary for all of our recommendations that is updated annually.

Your questions have led us to review closely and to update the February 1993 Implementation Summary that was submitted as Appendix D to the Conference's prepared statement. The enclosed updated March 1993 Implementation Summary shows the following results. Since 1968, our first year of operation, ACUS has issued 177 recommendations. Six of them are now completely "moot" due to changed circumstances and 14 simply "provide general guidance" to agencies and/or Congress and are thus not really susceptible to implementation. Of the 157 "implementable" recommendations, 21 were "fully implemented," 50 were "substantially implemented," 42 were "partially implemented," and 28 are "in progress." Eleven recommendations were "not implemented" and in 5 cases, the degree of implementation was "unknown."

Thus, 141 (80%) of the 177 Recommendations have been at least partially implemented or are in progress. (The figure rises to 90% when only the group of 157 implementable recommendations is the basis for comparison.)

Question 2. **While some of the recommendations indicate "implementation in progress", this may mean that the study has been forwarded to the appropriate agency. Why would you consider the implementation of a recommendation, "in progress", when all you have done is forward it to the appropriate agency?**

Answer. Our updated summary contains 28 "in progress" out of 177 (see answer to question #1, above). We do not consider it adequate simply to forward the recommendation to the appropriate agency or Congressional committee. At a minimum, we normally solicit a response from the affected agency and look for ways to stimulate agency compliance -- through follow up letters, comments in agency rulemaking, or meetings with agency officials. With respect to recommendations made to Congress, we have to be a little more reactive. Once we have forwarded a recommendation to the relevant committees of Congress, we look for opportunities to get a bill introduced, add or amend provisions of pending bills, testify in hearings, work with staff, etc.

The "in progress" designation is primarily reserved for those recommendations that have been issued within the last several years. In fact, 23 of the 28 "in progress" recommendations were issued in 1989-1992. Because implementation can take time, we feel that the designation is appropriate where the agencies and/or Congress are still digesting the recommendation.

Question 3. **What percentage of your recommendations have been implemented in the form of changed policy, regulation, or guidance?**

Answer. As explained in our answer to question #1, 113 (72%) of our 157 implementable recommendations have been fully, substantially or partially implemented. Our assessment of the response to each of these 113 recommendations shows that at least some of the intended agencies have modified their regulations, guidelines or policies in accordance with the recommendation or that Congress has enacted implementing legislation.

FUNDING LEVEL

Question 1. **We received a message from you on Thursday indicating that your 1994 budget will be the same as your 1993 appropriation: $2.314 million. What actions will you take to maintain this funding level?**

Answer. The Conference has been notified of increases in rent and support contracts that would require $494,000 to maintain same services. This is approximately $45,000 more than FY-93. The FY-94 request, however, asks for $15,000 less. A two per cent increase is requested for Personnel Compensation and Benefits for FY-94. In recent years the Conference has had 24 FTE and no attrition. For FY-94, the projected increases in personnel and benefits will be over $34,000 above the costs for the same services in FY-93, assuming the proposed pay freeze for federal employees is maintained. A number of services important to the Conference's mission will be cut in order to maintain the FY-93 funding level. Computerized

legal research will be eliminated during the year, saving $15,000. Funds set aside for space for colloquia have been eliminated saving $2,000. Staff training funds are deleted saving $6,000. Office supplies and library acquisitions are cut $10,000. New equipment purchases have been cut $15,000 and scheduled equipment replacement will be deferred, saving $7,000. Contracts for accounting support and miscellaneous purchase orders are cut $2,000. While ongoing research projects and interagency funded projects will be continued, no new research will be initiated in FY-94 from appropriated funds. New projects have a startup cost of $8-10,000 each. The FY-94 request reduces funds requested for implementation and advisory activities approximately $5,000 for a request of $34,900. Federal Register costs will be reduced due to the fewer number of projects projected for work during the year and some expected savings associated with using electronic text. One issue of the newsletter will be cut to save printing and postage costs. The FY-94 request for Clearinghouse functions is $19,500 reduced from $44,500 two years ago. This reflects an intention to forego publishing a sourcebook type resource during the year or to attempt to raise the printing costs for such a publication through Economy in Government Act transfers.

Question2. **Will you be required to increase your reimbursable program to bring in more revenue?**

Answer. To continue to have an active research program, it will be necessary to fund new projects in FY-94 from interagency transfers. It will not be necessary to increase the reimbursable program in order to maintain the office and staff of the Chairman and our implementation and advisory responsibilities.

Question 3. **What was the level of your request to OMB?**

Answer. The Conference requested $2,400,000 in its September 1, 1992 budget request to OMB for FY-94.

Question 4. **In last years testimony, you estimated your 1992 reimbursable program would total $376,000. What was the actual figure for 1992?**

Answer. The Conference received $109,377 in transfers under the Economy in Government Act in FY-92. $108,675 was disbursed. The Conference is authorized to retain transfers until the project is completed. The total balance for all transfer funds on hand at the end of FY-92 was $301,399. The balance carried over from the previous year was somewhat higher than normal because two large studies funded in FY-91 were still in progress.

Advice and Assistance to Foreign Governments

Question 1. **Are you reimbursed for the assistance you provide to foreign governments? If so, what is the estimated revenue generated with this work?**

Answer. The Administrative Conference Act, 5 USC § 594(5), authorizes the Conference to "provide assistance in response to requests relating to the improvement of administrative procedure in foreign countries," but provides that such assistance "may only be undertaken on a fully reimbursable basis, including all direct and indirect administrative costs." Projects must also be approved by the Department of State, the U.S. Information Agency (USIA) or the Agency for International Development. To date, the Conference has received a single transfer of $50,000 from USIA to make a preliminary, fact-finding trip to destinations of USIA's choosing and thereafter conduct one or more week-long workshops. Two Conference officials in 1991 traveled to Ukraine, Russia and Poland to exchange information with foreign counterparts. Based on information obtained on that trip, USIA has chosen Kiev, Ukraine as the site of an administrative law workshop in March 1993.

Question 2. **Give us an example of the kind of assistance you provide to these foreign governments.**

Answer. The only Conference foreign assistance project to date is a planned workshop in Ukraine scheduled for March 22-26, 1993, in cooperation with the Ukrainian Institute of Public Administration. The workshop will focus on the administrative process and government regulation of a market economy.

A team consisting of four U.S. government experts and two U.S. law professors will participate with Ukrainian experts in the week long seminar. The first four days will be a lecture and discussion series to address (i) government structure, such as the place of administrative agencies within a constitutional system and the institutions that oversee administrative agencies, including Congress and the judiciary; (ii) procedural forms of administrative action, such as rulemaking and adjudication; and (iii) government methods of regulating a free market, encompassing protection of public health, safety and environment, and the regulation of private business. On the fifth day, the U.S. team will divide into smaller groups to visit the national law school, government ministries, and an organization of local government officials. In conjunction with the workshop, the Conference has produced a set of materials containing written descriptions of each subject area. The materials will be translated into Ukrainian and distributed throughout the country. Approximately 125-150 Ukrainian lawyers, judges, law professors, and government officials from throughout Ukraine are expected to attend.

Personnel Compensation and Benefits

Question 1. **Your statement indicates that your personnel costs have increased in part because of the high funding of benefits required for FERS employees. What has been your experience with matching the thrift savings program.**

Answer. TSP matching payments for pay period #3 (January 10-23, 1993) were 12 per cent of total benefits paid or approximately $32,000 annualized.

Question 2. **Your statement indicates that benefit payments are projected to be $100,000 greater than historical costs because of the FERS contribution. What percentage increases does this represent.**

Answer. At the time the Conference submitted its quadrennial reauthorization request in 1989, personnel benefits for FY-90 totaled $146,000 and were projected to be $162,000 in FY-92. In FY-92 actual benefits were $238,000. Thus, in 1992 benefits were 63 per cent higher than they were in 1990 and were 47 per cent greater than projected when accounting for pay increases and inflation. For FY-94, benefits are now projected to be $279,000, or 91 per cent higher than they were in FY-90.

THURSDAY, FEBRUARY 25, 1993.

OFFICE OF GOVERNMENT ETHICS

WITNESSES

STEPHEN D. POTTS, DIRECTOR
DONALD E. CAMPBELL, DEPUTY DIRECTOR
F. GARY DAVIS, GENERAL COUNSEL

Mr. HOYER. We will now go to the Office of Government Ethics, Mr. Davis, Mr. Campbell and Mr. Potts. Gentlemen.

Mr. POTTS. Steve Potts.

Mr. HOYER. Mr. Potts, we welcome you to the committee.

Mr. POTTS. Thank you, sir.

Mr. HOYER. We would be pleased to hear from you at this time. We will include the text of your entire statement in the record at this time, and you can proceed to highlight that statement as you wish and introduce your colleagues.

Mr. POTTS. Very good.

Mr. Chairman, it is a pleasure to appear before you this morning, and we are here, of course, to discuss the U.S. Office of Government Ethics. Before summarizing my statement, let me introduce Donald Campbell, who is the Deputy Director of OGE, and my General Counsel, Gary Davis. And let me also just say that I am very fortunate to have such fine people that work for the Office of Government Ethics, really very fortunate in that regard.

I would like to ask that my full statement be introduced into the record and just allow me a few minutes to summarize those comments.

THE ETHICS COMMUNITY

In my full statement, Mr. Chairman, I discussed how OGE is organized and the responsibilities and the accomplishments of each program component of the agency. Today, however, I feel that it is essential that I focus on the efforts within OGE to create an executive branch ethics community, a cohesive working relationship between our agency and the men and women that implement the ethics program within their own agencies.

By developing a strong ethics community, we feel that greater understanding and adherence to the ethics rules can be achieved. By sharing experiences that have confronted ethics officials and discussing with them appropriate solutions, we foster consistent interpretations of the rules. We avoid needless expenditure of time and energy when an official in another agency faces a similar kind of problem. So they are in a position to, through us as a catalyst, share experiences with problems so that each time a new problem comes up they are not faced with kind of reinventing the wheel.

Also, we are in the process of developing a number of training tools and materials for the entire executive branch, and we think in that way we are able to conserve resources, rather than having each department and agency through their ethics program having to develop those resources and materials. Clearly, OGE is charged with taking the lead in establishing this kind of ethics community.

ETHICS CONFERENCES

In furtherance of that effort, we have sponsored two successful annual conferences and are planning a third this fall. There had been a gap of several years since the time that an ethics conference had been held in which the ethics officials from throughout the executive branch had gotten together in one place. To discuss ethics programs and really think through the common issues we face, what are some of the solutions that one agency has come up with that they could be shared with another agency.

We were also able to listen to them and find out what is it exactly that they are interested in getting from us. In other words, treating them like OGE's clients and customers. How can we help put together your program, to make that program more effective? So we then returned with that information and used it as kind of a road map for the things that we could do that would be the most helpful in making agency programs successful.

LIMITED RESOURCES

Because, as you are aware, our agency is very small. We have now 90 employees, and we have the responsibility for an ethics program for the entire executive branch. Obviously, we cannot ourselves go out and accomplish that. The only way we can do it is by being the catalyst for the ethics programs in all of the various departments and agencies. And so that is our strategy, in effect, to leverage ourselves by working with the ethics officials in each of the departments and agencies, being sensitive to what their needs are and responding in terms of assistance, whether it is people or, to a greater extent, it is in a way of developing resources, videotapes and things of that sort.

So I think that one of the things that has happened is we have been on a real growth line where we have gone from about 40 employees up to about 90 now. And our FTE level approved for this year is 101. And we are at the 90 level and moving toward not the 101, because we understand we are going to have to reduce resources. We have about seven slots that we intend to fill between now and the end of the fiscal year.

The greatest growth in our program during this time was in the Office of Program Assistance and Review. And it stemmed both from a study by GAO and also hearings conducted by Senator Levin on the Senate side pointing out that we had the responsibility to, in effect, conduct GAO-type reviews of the ethics programs throughout the executive branch; When those hearings were held, there were a total of three people employed by OGE to do that and there are 270 departments and agencies.

So it was—we were totally out of kilter in terms of what our statutory mission was, and we didn't have the resources to do that.

We were able to get the increase in our appropriations and FTE level to bring that staffing up so that we could accomplish the appropriate level of reviews on about a three- to three-and-a-half-year cycle to get around to actually take a look at these agency ethics programs.

Mr. HOYER. When was that?

Mr. POTTS. Well, when I came aboard in August of 1990, we had three people to do that job. And so we have substantially ramped up in terms of those people, and by the end of this fiscal year we should have enough people on board to be able to conduct these audits of the ethics programs on a cycle of about every three years.

My final oral part of this statement is that, of course, we are very aware that the substantive mission of each of the departments and agencies is really the priority, but we also recognize that management of an ethics program is one of the many duties assigned to the staff in these agencies operating with limited resources and resources which may become even more scarce because of the current budgetary constraints. So we really strongly believe that OGE's role in supporting and reinforcing agency ethics programs may become even more significant than it has in the past.

So that concludes what I had to say orally, but I am, obviously, very happy to answer any questions you may have.

[The information follows:]

FOR RELEASE ON DELIVERY
Expected at 10 A.M. EST
February 24, 1993

STATEMENT OF

STEPHEN D. POTTS
DIRECTOR
U.S. OFFICE OF GOVERNMENT ETHICS

BEFORE

THE SUBCOMMITTEE ON TREASURY, POSTAL SERVICE,
AND GENERAL GOVERNMENT

OF

THE COMMITTEE ON APPROPRIATIONS
U.S. HOUSE OF REPRESENTATIVES

ON

AN OVERVIEW OF THE U.S. OFFICE OF GOVERNMENT ETHICS

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I appreciate this opportunity to appear before the Subcommittee to provide an overview of the Office of Government Ethics (OGE) and to brief you on some of our accomplishments and initiatives. In testifying today, I want to emphasize at the outset that the Administration is currently formulating the President's FY 1994 Budget. Accordingly, I am not in a position to provide you with the Administration's position on funding for specific programs or activities. As soon as the President's 1994 Budget is released, I would be pleased to provide you with the agency's views.

OVERVIEW

The Office of Government Ethics, a small agency with wide-ranging responsibilities, was established by the Ethics in Government Act in 1978. Originally part of the Office of Personnel Management, OGE was made a separate agency on October 1, 1989 (P.L. 100-598). The statute creating the Office of Government Ethics made it responsible for providing "overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency." Specific responsibilities fall into six general areas:

- regulatory authority -- develop, recommend and review statutes and regulations pertaining to conflicts of interest, post-employment restrictions, standards of conduct, and public and confidential financial disclosure in the executive branch.

- financial disclosure -- review executive branch public financial disclosure reports of certain Presidential appointees for actual or potential violations of applicable laws and regulations and recommend appropriate corrective action; administer executive branch blind trusts and certificates of divestiture program..

- education and training -- implement statutory responsibility of "providing information on and promoting understanding of ethical standards in executive agencies."

- guidance and interpretation -- prepare formal advisory opinions, informal letter opinions and policy memoranda on how to interpret and comply with requirements regarding conflict of interest, post-employment, standards of conduct, and financial disclosure in the executive branch; consult with agency ethics officials in individual cases.

- enforcement -- monitor agency ethics programs and review compliance, including financial disclosure systems; refer possible violations of conflict of interest laws to the Department of Justice, and advise them on prosecutions and appeals; order corrective action or recommend disciplinary action in unique individual cases.

- evaluation -- evaluate the effectiveness of conflict of interest laws and recommend appropriate amendments.

Attached to my statement as Appendix A is a more complete listing of the responsibilities of this Office, indicating the most recent additions by the statute or Executive order which mandates them. I ask that it be included as part of the hearing record.

The Office is organized into three major areas, Office of General Counsel and Legal Policy, Office of Program Assistance and Review and Office of Education. They are supported by a small administrative staff providing normal office functions: personnel, budget, administrative services and information management.

In general, we carry out our work through a network of Designated Agency Ethics Officials (DAEOs) located in Federal departments and agencies. These are employees of the agencies who are conducting the Federal ethics program on site: giving advice and guidance on matters of conflict of interest, financial disclosure, standards of ethical conduct and post-employment restrictions; educating employees about the statutes and standards; assisting in individual employee disciplinary actions and implementing the agencies' public and confidential financial disclosure systems. This group and their deputies make up the substantial majority of the "Federal ethics community" to which we communicate policy and regulatory changes. We send out periodic memoranda to them (DAEOgrams); we meet in conference annually and in small training workshops throughout the year to discuss programs and problems with them. We also have OGE desk officers assigned to work with agencies and DAEOs on a daily basis.

One element of our program that I have emphasized is an increased communications network with agency ethics officials. We have had two successful annual conferences with over 250 agency ethics officials, and in September we expect to host some 400 ethics officials. We also hold informal brown bag luncheons with ethics officials as a forum for discussions. For fast, accurate and inexpensive communications, OGE has recently established an electronic bulletin board so that ethics officials around the country can have easy access to OGE materials through the use of the computer systems already in place in their agencies.

OGE ENFORCEMENT AUTHORITIES

The Office has two distinct enforcement authorities, one for agency ethics programs and one for individuals. The basic enforcement authority is that which allows OGE to order corrective action on the part of an agency which is not conducting its ethics program properly either through its financial disclosure and training systems or through the advice being given. This authority has been used effectively in the past, and in conjunction with our agency review program, we expect that it will continue to be of use in the future. The second authority was clearly established during the last OGE reauthorization process and is intended to be used only in those circumstances where the agency which employs the individual is unable or unwilling to pursue an alleged ethics violation. If OGE feels it necessary to step into that process, we have established a set of procedural rules which include a provision for public hearing. Up to the present time, OGE has not believed it necessary to employ these procedures.

RESPONSIBILITIES AND ACCOMPLISHMENTS

The Office of General Counsel and Legal Policy

The Office of General Counsel and Legal Policy (OGC) at OGE is responsible for reviewing existing ethics statutes and regulations for their sufficiency and appropriateness, recommending changes, drafting proposed legislation and regulations, drafting and clearing all Congressional testimony and communications, providing written and oral guidance on the application of the statutes and regulations to agencies and to the public and serving as OGE's primary office of policy development.

This office is responsible for regulatory , statutory, and legislative coordination with the Department of Justice, the Office of Personnel Management, the White House and OMB. It also works closely with the Criminal Division of the Department of Justice in matters involving criminal conflict of interest prosecutions. In addition, it has primary responsibility within the agency for the review of the financial disclosure reports of Presidential nominees to Senate-confirmed positions, working with agency ethics officials to assist nominees in taking appropriate steps to cure any actual or potential conflicts. In that regard, this office maintains and administers the qualified blind trust program of the Executive branch and administers the certificate of divestiture program for those who are eligible to defer capital gains realized on sales of assets required because of actual or potential conflicts of interest.

Finally, attorneys augment the role of OGE's Office of Education by serving as expert instructors at training seminars and helping develop educational materials and films. They also serve as official speakers and panelists at forums for Government employees and the public on issues arising out of the executive branch ethics programs including those that overlap with the Procurement Integrity Program.

Accomplishments

In 1989, every statute and executive order on which the executive branch ethics program was based was amended, repealed, replaced or augmented. This office, within OGE, was primarily responsible for the agency's response to the dramatic changes.

As a result in the past two years this office has issued draft and final regulations providing for the new executive branch-wide standards of conduct. These regulations replace a system of agency-by-agency regulation established in the mid-1960's. This Office also issued an interim regulation to establish a new confidential financial disclosure system for mid-level executive branch employees and developed the form for agency use.

More recently, OGC has concentrated on providing assistance to then President-elect Clinton's transition and now his Administration's process of clearing nominees. It has also been providing a substantial amount of advice about the rules governing negotiating for employment and post-employment restrictions for use by employees of the last Administration.

The Office of Education

The major goal of the Office of Education (OE) is to insure that quality ethics education programs are provided by agencies to over 3.5 million executive branch employees (civilian and military) and that materials are made available to assist these programs. Regulations require that each DAEO must ensure that an education program for agency employees concerning all ethics and standards of conduct matters, including post-employment matters, is developed and conducted in cooperation with the education program of OGE.

To assist agencies in their programs, especially in light of the new standards of conduct, this office has developed programs to help train agency trainers and has been primarily responsible for coordinating within OGE the development of core training materials to be used by agencies when training employees.

With the standards of conduct becoming effective February 3, 1993 a new emphasis will be on the training aspect of our mission. This includes not only putting together training courses for junior

and senior ethics officials, including a video for ethics officials, but also developing videos, pamphlets and booklets for their use in training the employees of the executive branch.

Accomplishments

This office has approved most agencies' training plans for FY 1993. Through this office, OGE recently completed and released to the agencies two new videotapes they can use to train ethics officials and employees on the new standards of conduct. The Office of Education is already in the last stages of developing an informational booklet to be given to employees, in addition to the regulations themselves, and are in the process of developing a second, shorter, version describing the standards' requirements. As appropriate, materials developed by OGE are then adopted by agencies for their use. Reproduction costs are kept low by many agencies ordering on one requisition.

We have organized Annual Ethics Conferences and one ethics conference on the standards of conduct. We also have conducted a range of ethics training classes for executive branch ethics practitioners.

Office of Program Assistance and Review

The Office of Program Assistance and Review performs oversight of ethics programs in executive branch departments and agencies. This role is carried out in two ways.

First, visiting teams of OGE management analysts perform on-site reviews at agency headquarters, regional offices and military installations to review all elements of the ethics program and make recommendations to strengthen the program. OGE's program review structure is similar to that of the U.S. General Accounting Office. A team of management analysts plan, conduct, and report its findings on the review of an agency program and then conduct follow-up activities until OGE is satisfied that the agency has taken appropriate steps to remedy any program deficiencies found and discussed in the report.

Second, each agency has been assigned an OGE desk officer to answer ethics questions, give advice on ethics issues and handle other technical ethics matters. The desk officer assists in agency ethics training courses and annually reviews the public financial disclosure reports filed by the advice and consent presidential appointees of that agency. With the new standards of conduct and confidential financial disclosure programs OGE has put in place, the desk officer plays a vital role in assisting agencies in implementing the regulations.

Desk officers are easy points of access for agencies to OGE for any assistance they need: handling of unusual situations,

providing training instructors, and reviewing SF 278 financial disclosure forms for nominees being appointed by the President and being confirmed by the Senate. They also review the annual forms filed by covered employees as well as the termination forms filed by employees as they leave government employment.

Accomplishments

In FY 92 PRD staff conducted ethics program reviews in 47 Federal agencies in Washington, DC; 17 regional offices and 28 military bases in 15 regions. Interviews were conducted on all 27 agencies due for follow-up. Formal procedures were established to streamline the processing and issuance of OGE reports to department and agency ethics officials.

Our reviews have concentrated on the ethics program structure and staffing. This is to ensure that agencies are providing the necessary commitment and resources to the program for it to be administered effectively. A sound structure needs to be in place for agencies to adapt to the new standards of conduct, training requirements, and confidential financial disclosure rules coming into effect. We will be evaluating how effectively agencies are implementing the new regulations for OGE's use in fine-tuning the regulations.

PRESIDENTIAL TRANSITION YEAR

A presidential transition year presents special responsibilities for OGE.

Prior to the election, we briefed candidates' staffs on the ethics laws covering high level appointees and how OGE works with appointees and the White House Office in the appointment process.

The financial disclosure statements of individuals nominated by the President for positions to be confirmed by the Senate are reviewed by the agencies and by OGE prior to the nominees confirmation hearings. The personal finances of individuals nominated are thoroughly analyzed, problem areas are discussed with them, and workable agreements are reached which may include recusals, blind trusts, divestiture of securities, and/or the resignation of positions in the private sector. This is an extremely important part of staffing a new Administration to prevent conflicts of interest from occurring once an individual has taken office. Our Office of General Counsel has the lead role in this effort with much assistance from the Office of Program Assistance and Review.

President Clinton's Executive Order, 12834, signed shortly after his swearing-in ceremony, requires certain persons appointed on or after January 20, 1993, to sign a pledge which establishes a contractual commitment regarding their activities after they have

terminated their positions as "senior appointees" or after they have participated personally and substantially in trade negotiations. Under the Order, OGE is to develop a form for the pledges to be completed by senior appointees and trade negotiators, to assist ethics officers in providing advice regarding the pledges, and to adopt rules and procedures as are necessary or appropriate to carry out these responsibilities. On January 22, 1993 I sent a memo to all Designated Agency Ethics Officials concerning the implementation of this Order and included copies of the two pledge forms for agency reproduction.

Within the first week of the Clinton Administration, OGE twice briefed White House staff on ethics rules and regulations. President Clinton stopped by the first such briefing, indicating his personal commitment for adherence to high ethical standards. As time goes on, OGE staff expects to provide ethics briefings to new members of the SES, both career and non-career, and new Schedule C appointments through training sessions sponsored by the Office of Personnel Management and will provide the same service to Presidential Personnel should it request briefings for new Presidential appointees.

A recent GAO survey of the views of Senate-confirmed presidential appointees (Report B-251275, December 28, 1992) found that 62.5% of respondents believe that orientation to ethical guidelines is of very great importance, 31.3% believe it very important. When asked to rate the adequacy of the orientations they had received, 97.7% stated that the subject was covered and 67.5% believed it to be Very Adequate and 27.5% Generally Adequate. We believe thcir understanding of the ethics program and their support of its goals is particularly important as these executives provide leadership to their employees throughout government. The expert instructors conducting these sessions are from the Office of Government Ethics and from the larger ethics community.

GENERAL MANAGEMENT

Since its inception the Office of Government Ethics has been small by any standard. Its programs have been necessarily focused and leanly staffed. Its size, its mission and its funding have required efficiency. Recent growth in the size of the Office has been conducted in an environment of fiscal stringency and has been done as prudently as possible.

We have made the best use of equipment to reduce personnel costs. The use of computers has resulted in a very low ratio of clerical support staff to professional staff. Each computer is part of a LAN network so that all staff can easily share documents throughout the system. This provides access to appropriate documents throughout the office, making it possible for several people to work on preparation of material. A voice mail system reduces the need for phone tending yet is an efficient means of

communication. An electronic mail system is fast and efficient, providing instant interoffice communication, reducing paperwork, and wasted staff time. Last Fall we established The Electronic Bulletin Board System (TEBBS) which provides to departments and agencies a modern method for obtaining information about ethics laws, regulations, policies, opinions and other related material about executive branch ethics activities. The System is fast, efficient, and paperless. It is generally and easily available 7 days a week and since the System is managed by OGE, the information available is correct and reliable.

JURIS, LEXIS/NEXIS and LEGI-SLATE data bases are available to our employees for research. These systems are easy to store, easy to use, are always up-to-date, are paperless and easily facilitate searches for information.

OGE develops training materials, videos and pamphlets which are shared with the ethics community and they order quantities together saving repeated developmental costs and purchasing quantities at lower per unit cost.

We are continually fine-tuning the administrative systems in place and examining our programs to see if we can operate more efficiently or if we are doing unnecessary tasks. We look for small economies as well as effective project management. Last Fall we decentralized time and attendance recordkeeping to the divisions and offices of OGE, releasing considerable time for one person to do other duties. Since making Metro fare cards available for local business travel, paperwork, approvals and staff time needed to manage the Imprest Fund has been considerably reduced. We have also been able to reduce the amount of the funds on hand for the Imprest Fund.

We also make the best use of our staff resources. When possible, certain labor intensive projects have been scheduled during the summer when temporary summer hires are available. In developing the Office of Program Assistance and Review we have recruited Outstanding Scholars as entry level employees when specific previous experience was not essential.

I appreciate your interest in the Office of Government Ethics. I hope that this statement has provided a useful overview of its programs and operations. I'll be happy to answer questions from the subcommittee.

STEPHEN D. POTTS
Director, U.S. Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917
202-523-5377

EMPLOYMENT EXPERIENCE:

--Director, U.S. Office of Government Ethics, 1201 New York Avenue, Suite 500, Washington, DC 20005-3917, 202-523-5377, (August 1990 to present).

--Partner, Shaw, Pittman, Potts & Trowbridge, 2300 N Street, NW., Washington, DC 20037, 202/663-8029 (July 1961-August 1990).

--Vice President, Cherokee Life Insurance Co., Nashville, TN (July 1959-July 1961).

--Associate Attorney, Farris, Evans & Evans, Nashville, TN (1957-1959).

--U.S. Army, Judge Advocate General's Corps, Defense Appellate Division, The Pentagon, Washington, DC (1955-57).

--U.S. Army stationed in South Carolina, Georgia, Virginia (May 1954-April 1955).

--Agent, Mutual Benefit Life Insurance Co., Nashville, TN (January 1953-May 1954).

BUSINESS EXPERIENCE:

--Member, Board of Directors, Fairways Corporation (1972-1990);
--Member, Board of Directors, Wood River Capital Corp. (1985-1988);
--Member, Board of Directors, Marline Oil Corp. (1978-1985);
--Member, Board of Directors, Overseas National Airways (1970-1978);
--Agency Vice-President, Cherokee Life Insurance Co., Nashville, TN (1959-61).

BAR ADMISSIONS:

U.S. Supreme Court
District of Columbia
Tennessee

EDUCATION:

Vanderbilt Law School, L.L.B. 1954; Law Review; Winner, Morgan Prize for Best Student Note.

Vanderbilt University Political Science Major, A.B. 1952, Cum Laude, Phi Beta Kappa; attended on combined scholastic and athletic scholarship.

The Darlington School, Rome, GA, 1948, Salutatorian, Faculty Medal for Overall Excellence.

CIVIC POSITIONS:

--Past President Washington Vanderbilt Alumni Club (1965)
--Past President Holton-Arms School Fathers' Club (1974-75)
--Past President Woodacres School PTA (1970-72)
--Past President Washington Tennis Patrons Foundation (1970-1972)
--Board of Advisors, Patterson School of Diplomacy, University of Kentucky, Lexington, KY (1976-85)
--Board of Governors and Vice-President, Chevy Chase Club (1982-86)

MEMBERSHIPS:

--American Bar Association
--District of Columbia Bar Association
--Bar Association of the District of Columbia
--Tennessee Bar Association
--Washington Area Tennis Patrons Foundation (former President)
--United States Tennis Association (Member Executive, Communications, Marketing, Olympic, and Davis Cup Committees)

HONORS AND AWARDS:

--Attended Vanderbilt University on combination scholastic/athletic scholarship
--Member of Omicron Delta Kappa and received ODK scholarship
--Elected to Phi Beta Kappa
-- Awarded U.S. Army Commendation Ribbon
--Member Washington Capital Area Tennis Hall of Fame
--Distinguished Alumnus Award, Vanderbilt University Law School

PUBLISHED WRITINGS:

--Case note re Beauharnais v. Illinois, 6 Vand. L. Rev. 393 (1953)
--Note, Falsification as Contempt, 7 Vand. L. Rev. 272 (1954)

PERSONAL:

Born: November 20, 1930 in Memphis, TN
Married: March 14, 1953 to the former Irene Potter of Nashville, TN, two daughters, one son, all married, three granddaughters, two grandsons

ATHLETICS:

--Won five National and one International Father/Son Tennis Championships
--Twice ranked #1 in the United States for Father/Son Tennis
--Former Tennessee State singles champion
--Former Mason-Dixon singles champion
--Finalist, Irish National Tennis Championships
--Qualified and played in Wimbledon and U.S. Nationals

DONALD E. CAMPBELL
Deputy Director
Office of Government Ethics
1201 New York Avenue, N.W.
Washington, D.C. 20005

PROFESSIONAL BACKGROUND

Served as Deputy Director, Office of Government Ethics, since March 1985. Supervise a staff of 30 attorneys, management analysts and support personnel in the management of an office charged with oversight responsibility for the federal executive branch ethical standards program. The Deputy Director advises the Director on all policy, personnel and operational matters as well as being responsible for providing overall direction of executive branch policies related to preventing conflicts of interest, in monitoring the government's financial disclosure requirements, in monitoring post-employment regulations and agency ethical education programs.

Served as Chief Counsel, Office of Government Ethics from October 1984 to March 1985. Supervised the legal staff and their work product. Reviewed all legal opinions prior to transmittal to the Director and oversaw the drafting and preparation of all rules, regulations and instructions and other official office statements prior to transmittal to the Director.

Served as Assistant United States Attorney for the District of Columbia from March 1970 to October 1984.

Positions Held:

Senior Investigative Counsel: November 1983-October 1984. One of four assistants designated by the United States Attorney to investigate and prosecute the more complex and significant cases handled by the office. Also, rendered advice to the supervisory personnel in the office on investigative procedures and techniques.

Chief, Major Crimes Division: November 1975-November 1983. The Major Crimes Division had two primary functions: (a) the identification of the principals behind area crime and the development of successful prosecutions against them, and (b) the development and use of a senior trial lawyer's capacity to handle the investigation and trial of complex and highly visible cases. The Chief of the Major Crimes Division directed the coordinated efforts of 15 Assistant United States Attorneys working with federal and local investigators to accomplish these functions. Three of the most important cases handled in the Division at this time were the *Letelier* case, the *Wilson/Terpel* case and the *John Hinckley* case. The Division also pioneered the first video undercover sting operation in 1975-76.

Deputy Chief, Major Crimes Division: March 1974-November 1975.

Trial Attorney, Fraud Division: February 1974-March 1974.

Trial Attorney, Felony Trial Division: Superior Court, September 1973-February 1974.

Supervised, along with two other attorneys, the Special Grand Jury investigation and trial in the *Watergate* case, June 1972-July 1973.

Trial Attorney: Major Crimes Unit and Deputy Chief for the Office of Drug Abuse Law Enforcement (DALE) in the Washington, D.C., area, May 1972-June 1972.

Trial Attorney: Misdemeanor Trial Section, Superior Court, February 1972- May 1972.

Trial Attorney: Major Crimes Unit, March 1970-February 1972.

Served as Trial Attorney, Organized Crime and Racketeering Section, Criminal Division, Department of Justice, June 1966-March 1970.

Positions Held:

Supervised the processing of all applications for wire intercepts through the Department of Justice and was the area coordinator for the State of Virginia and the Syracuse-Utica, New York area for all law enforcement activities directed at organized crime, June 1967-March 1970.

Assigned to the Buffalo Strike Force on Organized Crime. This was the first strike force set up by the federal government. Its purpose was to initiate and coordinate the law enforcement activities directed at organized crime in New York State, September 1966-June 1969.

Assigned to the Labor, Gambling, and Narcotics Unit, July 1966-August 1966.

Served in the Judge Advocate General's Office, United States Navy, after attending U.S. Naval Officer's Candidate School from January 1963 to May 1963. Held the grade of Lieutenant, U.S. Naval Reserve.

Positions Held:

Assigned as the Legal Officer for the U.S. Naval Security Station, Ward Circle, Washington, D.C., June 1965-May 1966.

Advisory legal attorney on the staff of the Judge Advocate General of the Navy, assigned to the Investigation Division at the Pentagon, July 1963-June 1965.

U.S. Naval Justice School, May 1963-July 1963.

PRINCIPAL COMMENDATIONS

Upon recommendation of United States Attorney Harold Titus, received on December 11, 1973, from the then Attorney General, a "Special Commendation" given to Assistant United States Attorneys throughout the country for outstanding service to the United States Department of Justice.

Upon recommendation of United States Attorney Earl J. Silbert, received on June 7, 1979, a "Special Achievement Award" from the Department of Justice for sustained superior performance.

Upon recommendation of various individuals, I was invited to lecture at a number of conferences sponsored by the Department of Justice on the following subjects: theft from interstate shipments, electronic surveillance, conspiracy law, search and seizure, The Racketeer Influenced and Corrupt Organizations Act, the Continuing Criminal Enterprise Act, effective use of the Grand Jury and organized crime. I also lecture and conduct training classes on Government Ethics.

BAR ADMISSIONS

Court of Appeals of Maryland	October 19, 1962
U.S. Court of Military Appeals	October 11, 1963
U.S. District Court for the District of Columbia	June 29, 1970
U.S. Court of Appeals for the District of Columbia	August 28, 1973
The District of Columbia Bar	June 29, 1970

EDUCATION

Law School:	UNIVERSITY OF MARYLAND School of Law, Baltimore, Maryland L.L.B.-1962 Scholastic Standing -- upper one-third of class
Undergraduate:	UNIVERSITY OF MARYLAND College Park, Maryland B.S.-1959

PERSONAL INFORMATION

Born:	December 11, 1937
Married:	1964, three children
Residence:	675 Discovery Court, Davidsonville, MD 21035
Telephone:	202-523-5757 (work); 301-956-3730(home)
Office mailing address:	Office of Government Ethics 1201 New York Avenue Suite 500 Washington, DC 20005

F. GARY DAVIS

Office Address:
Suite 500
1201 New York Avenue, N.W.
Washington, D.C. 20005-3917
202-523-5757

Admitted to the Bar, 1962.

LEGAL EMPLOYMENT AND EXPERIENCE

April 1987 --	General Counsel Office of Government Ethics Washington, D.C.
April 1979 - April 1987	Staff Attorney Office of Government Ethics Washington, D.C.
May 1977 - April 1979	Special Assistant to the Assistant Secretary of Defense (Comptroller) Department of Defense Washington, D.C.
May 1968 - May 1977	Partner Griffith, Davis & Chopp 1300 Old Chain Bridge Road McLean, Virginia 22101
September 1967 - May 1968	Staff Attorney U.S. Post Office Department Washington, D.C.
August 1962 - August 1967	Captain Judge Advocate General Corps United States Army Duty Stations: The Pentagon and the Republic of Viet Nam

U. S. OFFICE OF GOVERNMENT ETHICS

EXPLANATORY NOTES

Prepared for the
Committee on Appropriations

February 1993

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

February 17, 1993

The Honorable Robert C. Byrd
Chairman
Committee on Appropriations
United States Senate
Room S-128
Washington, D C 20510

The Honorable William H. Natcher
Chairman
Committee on Appropriations
United States House of Representatives
Room H-218
Washington, D C 20515

Dear Mr. Chairman:

With this letter I am pleased to transmit to you the Office of Government Ethics' Budget Explanatory Notes. The Explanatory Notes reflect current resources required to administer the ethics program in the executive branch.

With this level of resources, we believe that we can continue to meet our responsibilities under the Ethics in Government Act and yet enhance the ethics training plan for executive branch employees.

Copies of this submission are being transmitted to the House Committee on Judiciary and the Committee on Post Office and Civil Service and the Senate Committee on Governmental Affairs. If I can provide you with any further information on this matter, please do not hesitate to contact me.

Sincerely,

Stephen D. Potts
Director

Enclosure

cc: The Honorable Jack Brooks
Chairman
Committee on Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D C 20515-6218

The Honorable William L. Clay
Chairman
Committee on Post Office and Civil Service
United States House of Representatives
309 Cannon House Office Building
Washington, D C 20515-6243

The Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
340 Dirksen Senate Building
Washington, D C 20510-6250

Mission Statement

The Office of Government Ethics provides overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of all executive agencies as outlined in 5 U.S.C. app., s 402. The major program activities of the agency are:

Regulatory Authority -- To develop, recommend and review statutes and regulations pertaining to conflicts of interest, post employment restrictions, standards of conduct, and public and confidential financial disclosure in the executive branch.

Financial Disclosure -- To review executive branch public financial disclosure reports of certain Presidential appointees for actual or potential violations of applicable laws or regulations and recommend appropriate corrective action; administer executive branch blind trusts and certificates of divestiture program.

Education and Training -- To provide information on and promote understanding of ethical standards in executive agencies, by providing an ethics manual, video tapes, printed materials, and coordinating required annual agency ethics training plans for executive branch employees.

Guidance and Interpretation -- To prepare formal advisory opinions, informal letter opinions and policy memoranda on how to interpret and comply with requirements on conflicts of interest, post-employment, standards of conduct, and financial disclosure in the executive branch; consult with agency ethics officials in individual cases.

Enforcement -- To monitor agency ethics programs and review compliance, including financial disclosure; refer possible violations of conflict of interest laws to the Department of Justice, and advise them on prosecutions and appeals; investigate possible ethics violations and order corrective action or recommend disciplinary action in unique individual cases.

Evaluation -- To evaluate the effectiveness of conflict of interest laws and recommend appropriate amendments.

OFFICE OF GOVERNMENT ETHICS
DIRECT OBLIGATIONS BY UNIT

(dollars in thousands)

UNIT	FY 1992 Actual		FY 1993 Estimate	
	FTE	Amount	FTE	Amount
Office of the Director	6	$ 636	4	$ 499
Program Assistance and Review	29	$2,215	50	$3,684
Office of General Counsel And Legal Policy	16	$1,785	22	$2,281
Education	6	$ 602	10	$ 797
Office of Administration	10	$ 782	15	$1,004
Total	67	$6,020	101	$8,265

OFFICE OF GOVERNMENT ETHICS

Fiscal Year 1992 Accomplishments

Office of the Director

- Administered the first year of the three-year operation plan to improve program responsiveness and overall performance

Program Assistance and Review

In the Program Assistance area we:

- Monitored the ethics agreements of 120 presidential appointees concerning their financial interests and ensured that such agreements were completed
- Tracked, collected, reviewed and certified 1,072 annual and termination financial disclosure statements of presidential appointees confirmed by the Senate
- Assisted in the review of financial disclosure statements of presidential nominees for their Senate confirmation hearings
- Released over 600 financial disclosure statements to the news media and the public
- Continued the development of a desk officer system to monitor and assist 300 agency ethics staff on a daily basis and respond to all agency requests for waivers, exemptions, information, etc.
- Tracked, collected, analyzed and made available to the public, the semiannual reports from 120 agencies of travel payments accepted under 31 U.S.C. § 1353 from nongovernment sources
- Reviewed and responded to approximately 1,000 pieces of correspondence from agency ethics officials
- Responded to over 5,000 telephone requests from agency ethics officials for assistance on all types of ethics matters

In the Program Review area we:

- Conducted ethics program reviews in 47 Federal agencies in Washington, DC
- Conducted ethics program reviews in 17 regional offices and 28 military bases in 15 regions
- Conducted follow-up reviews in all 27 agencies due for a follow-up review
- Initiated the first OGE single-issue review of six agencies to determine agency practices and procedures in the acceptance by employees of travel expenses under 31 U.S.C. § 1353
- Developed formal procedures to conduct six-month follow-up reviews to ensure agencies implement OGE report recommendations
- Developed an internal report review system to streamline the processing and issuance of OGE reports to Department and Agency ethics officials
- Recruited new staff to expand the Program Review area in FY 1992

Office of General Counsel and Legal Policy

- Reviewed the comments and issued the final executive branch uniform standards of conduct and began reviewing agency requests for supplemental regulations
- Continued to give top priority to the review and certification to the Senate of PAS financial disclosure reports
- Issued interim regulations and the standard form on confidential financial disclosure
- Issued interim regulations on public financial disclosure
- Drafted and published OGE's Equal Access to Justice regulations required of OGE as an agency
- Processed all requests for certificates of divestiture in a timely fashion

- Carried out OGE responsibilities for the Government-wide system of safe harbor opinions in the area of procurement integrity

- Hired an individual experienced in congressional relations to support the legislative program and address the concerns of OGE and began to establish more direct contact with the appropriate congressional committees

- Hired one staff member with some experience in procurement issues

- Supported the OGE training division programs and met the expected increase in requests for specialized training sessions from agencies and the public on complex legal issues

- Supported the White House Personnel PAS training, and the OPM sponsored seminars for new SES and Schedule C personnel

- Provided additional support to the expanded staff of the Program Assistance and Review division

- Drafted the script of the primary employee training film on ethics and assisted in the oversight of its production

- Completed coordination on the GSA travel regulation

- Responded promptly to agency/third-party requests for advisory opinions

- Completed a special OGE review of travel activities of the Chief of Staff to the President

- Provided general legal service to the agency

- Planned and coordinated press and public response to the final executive branch uniform standards of conduct

- Supported agency response to all press inquiries

Education

- Coordinated and edited OGE's Second Biennial Report to Congress
- Provided training for approximately 580 field Ethics practitioners at 28 training sessions held in Atlanta, Boston, Chicago, Cleveland, Dallas, Denver, Kansas City, New Orleans, New York, Norfolk, Philadelphia and San Francisco
- Planned and sponsored a Washington, DC mini-conference for approximately 500 Executive branch ethics practitioners, focusing on the new Standards of Ethical Conduct for Employees of the executive branch
- Produced and/or contracted for three ethics training videotapes for use by OGE and Executive branch departments and agencies in their ethics training programs
- Produced approximately 1,000 ethics training manuals for use in OGE ethics training
- Produced three issues of the Government Ethics Newsgram and continued to expand its circulation
- Finalized the regulation implementing the ethics training provision of Executive Order 12674
- Designed a system for approving and monitoring written plans for ethics training submitted to OGE by executive branch departments and agencies in accordance with OGE regulatory requirements; initiated the review of the initial plans submitted by executive branch departments and agencies
- Represented OGE before a number of forums to explain both the nature of ethics rules and the mission of the agency
- Revised, disseminated, collected and analyzed the annual agency ethics questionnaires submitted by executive branch agencies to OGE required by OGE's 1988 Reauthorization Act
- Developed an easy to read pamphlet explaining the standards of conduct

- Developed two ethics awareness posters for use by OGE and Executive branch agencies

Office of Administration

- Initiated recruitment actions and subsequently filled twenty five positions

- Conducted an extensive study using GSA approved methodology to determine the minimum primary office and special space needs to accommodate the projected growth of the agency for the request to GSA for space through FY 1994

- Completed the agency upward mobility plan

- Initiated the use of the Government-wide commercial credit card service to streamline the processing of small purchases

- Implemented the automated property management system for the control of capitalized equipment

- Submitted for final approval to HHS a revised Drug-Free Workplace Plan

- Established, pursuant to the Treasury, Postal Service and General Government Appropriations Act of 1990, a transit subsidy program to enhance the use of public transportation and reduce the use of the automobile for employees commuting to the workplace

- Continued the development of agency personnel policy directives to include the establishment of a part-time career employment program and other directives relating to employee discipline and adverse actions

- Installed and configured a computer based Ethics Bulletin Board System (EBBS), which allows agency ethics counselors and others using a computer and a modem to access and download OGE opinions, regulations, training announcements, newsletters, and other ethics-related material

- Provided computer use and applications training to OGE staff members

- Upgraded, configured and maintained OGE's telephone and automated voice message systems

- Developed an electronic version of the executive branch public and confidential financial disclosure reporting forms which can be completed and printed using a computer and laser printer

- Completed the initial draft of an OGE Computer Security Manual, to implement the requirements of the Computer Security Act of 1987

- Planned and conducted a workshop on Using Computers in an Ethics Program at a conference of department and agency ethics officials

- Compiled, prepared, and distributed the results of an Ethics Information Technology Survey to department and agency ethics officials

OFFICE OF GOVERNMENT ETHICS

Fiscal Year 1993 Planning Level

Office of the Director

- Establish a dialogue with senior department and agency ethics officials to determine their needs and evaluate OGE responsiveness in meeting those needs
- Determine appropriate levels of management training necessary to achieve the goals of the agency
- Evaluate the organizational structure of the agency to determine what adjustments may be necessary to accomplish the mission of the agency
- Review and determine the need for additional employee development programs, flexible work schedules, flexiplace and the relationship between recognition and performance

Program Assistance and Review

- Monitor the ethics agreements of approximately 150 presidential appointees concerning their financial interests and ensure that such agreements are completed
- Track, collect, review and certify approximately 1,000 annual and termination financial disclosure statements of presidential appointees confirmed by the Senate
- Review and certify financial disclosure statements of presidential nominees for their Senate confirmation hearings
- Release over 600 financial disclosure statements to the news media and the public
- Continue the development of a desk officer system to monitor and assist 300 agency ethics staff on a daily basis and respond to all agency requests for waivers, exemptions, information, etc. 8

- Track, collect, analyze and make available to the public, the semiannual reports from 120 agencies of travel payments accepted under 31 U.S.C. § 1353 from nongovernment sources

- Respond to over 5,000 telephone requests from agency ethics officials for assistance on all types of ethics matters

- Conduct ethics program reviews in 60 Federal agencies in Washington, DC

- Conduct ethics program reviews in 30 regional offices and 15 military bases

- Conduct follow-up reviews in all agencies due for a six-month follow-up review

- Continue to program single-issue reviews Government-wide, of major ethics issues to determine whether OGE and agency policies are effectively meeting intended objectives

- Recruit new staff to expand the Program Review area in FY 1993.

- Assist the Education Division in conducting ethics training courses in Federal regions

Office of General Counsel and Legal Policy

- Give top priority to the review and certification to the Senate of PAS financial disclosure reports

- Fully support the anticipated increase in the certificate of divestiture requests and the establishment of blind trusts resulting from the increased number of Presidential appointments

- Review agency requests for regulations to supplement branch-wide standards of conduct

- Meet the increased requirements for interpretation of the executive branch standards of conduct

- Address any remaining issues not addressed by final standards of conduct (i.e. professional associations) 9

- Provide the primary support for the active process of seeking and securing reauthorization in 1994

- Provide assistance as necessary to the Presidential transition team in order to assist with the processes following a Presidential election

- Coordinate with OPM and DOJ regarding proposed regulations on §§ 207, 208, and 209 and issue regulations on § 208(b)(2) waivers

- Issue final regulations on honoraria and outside earned income

- Issue final regulations on certificates of divestiture

- Approve regulations submitted by various agencies to adapt and tailor the new model confidential financial disclosure system to their specific requirements

- Develop final regulations for publication in the FAR for implementing the post-employment, gifts, negotiating for employment and safe harbor opinion provisions of the Procurement Integrity Act

- Begin to issue advisory opinions on regulations covering the new standards of conduct and financial disclosure

- Continue to support the White House Personnel PAS training, and the OPM sponsored seminars for new SES and Schedule C personnel

- Continue to provide support to the expanding Program Assistance and Review Division

- Continue to support the OGE Office of Education programs as well as meeting the Office's requests for specialized training sessions on complex legal issues

- Continue to draft and publish administrative regulations required of OGE as an agency

- Adjudicate individual corrective actions presented to OGE

- Continue to support OGE's Congressional relations requirements 10

including drafting all testimony required to be given by representatives of the Office, drafting all legislation to be proposed by OGE, and responding to all requests for technical assistance from Congress and other agencies

- Continue to provide all liaison on regulations with the Office of the Federal Register and with OMB

- Continue to provide comment to OMB on legislative proposals from within the Administration as well as legislation introduced in Congress

- Continue to provide all legal services for OGE as an agency including liaison with the Department of Justice on litigation matters

- Continue to respond to all complex requests for legal advice on conflict of interest matters from employees, agencies and the public

Education

- Continue the ongoing training, liaison, and development activities from FY 1992

- Provide administration and staff to assist approximately 39 micro-agencies in providing annual ethics training to employees required to receive such training in accordance with subpart G of 5 C. F. R. part 2638

- Expand the basic ethics training course from a half-day to a full day and hold additional courses covering the new requirements related to public financial disclosure, confidential financial disclosure and post-employment

- Create and produce OGE ethics reports (based on OGE data on agency ethics programs) to better understand what makes ethics programs effective

- Plan, develop and coordinate an International Conference for public officials in order to strengthen the concepts that integrity and ethical conduct are critical for the success of free market economies 11

and democratic institutions

- Develop three new ethics training videotapes

- Plan, administer and support the OGE 1993 annual ethics conference, expanded to allow 400 ethics practitioners to attend

- Continue implementation of the ethics training regulation through review and approval of annual ethics training plans, as well as approving initial agency ethics training plans submitted in accordance with the training regulation

- Complete the design and coordinate the dissemination of the standards of conduct pamphlet

Office of Administration

- Design and implement systems for tracking personnel action requests, awards reporting, internal control reviews, and capturing training data for external reporting

- Initiate the development of a supervisors' handbook to serve as a desk reference guide for personnel practices

- Conduct an evaluation to ascertain the effectiveness of the transportation subsidy program in increasing employee use of the public transportation system

- Establish, issue and implement internal procedures governing the use of electronically generated OGE forms

- Establish and staff a communication center to provide agency-wide service in the areas of printing, mail management, correspondence control, office supplies and receptionist coverage

- Evaluate staffing, classification, awards and training functions of the agency's internal personnel management program to assure compliance with OPM regulations and take appropriate action to correct discrepancies as necessary

- Develop and prepare OGE's first "Five Year Strategic Information Resources Management Plan", as required by OMB Circular A-130, implementing GSA regulations

- Establish and staff a full-time graphics function to produce OGE graphics, publications, forms and visual aids, including: OGE Newsgram, training and conference materials, in-house newsletters, internal and external paper and electronic forms, internal and external OGE manuals, publishing OGE advisory opinions and exhibition materials

- Assist the Education Division in the development and publication of an OGE Ethics Manual on CD-ROM (a read only optical storage disk that can store up to 250,000 pages of information that can be retrieved on the computer's display)

- Plan, develop and publish modified and enhanced electronic versions of the executive branch public and confidential financial disclosure reporting forms

- Develop, test, and update the agency's ADP security plan, providing all employees with appropriate security training, and publishing ADP security policies and procedures

- Provide new and upgraded software applications training to each OGE staff member

OFFICE OF GOVERNMENT ETHICS
OBJECT CLASSIFICATION
(dollars in thousands)

Direct Obligations	1992 Actual	1993 Estimate
Personnel Compensation		
11.1 Full-time permanent	$3,228	$4,983
11.3 Other than full-time permanent	75	78
11.5 Other personnel compensation	93	148
11.9 Total personnel compensation	$3,396	$5,209
12.1 Civilian personnel benefits	582	910
21.0 Travel & transportation of persons	96	136
22.0 Transportation of things	5	7
23.1 Rental payments to GSA	771	1,084
23.2 Rental payments to others	30	38
23.3 Communications, utilities and miscellaneous charges	60	55
24.0 Printing and reproduction	100	56
25.1 Consulting Services	4	---
25.2 Other services	381	523
26.0 Supplies and materials	152	97
31.0 Equipment	385	150
99.0 Subtotal, direct obligations	$5,962	$8,265
99.0 Reimbursable obligations	58	97
99.9 Total obligations	$6,020	$8,362

OGE's implementation of its drug-free workplace plan is being held in obeyance pending approval of the plan by the Department of Health and Human Services and the Department of Justice.

The development and implementation of OGE's plan to convert to the metric system of measurement will be carried out upon receipt and pursuant to the guidelines and policies of its cross-servicing activity, the USDA National Finance Center.

OFFICE OF GOVERNMENT ETHICS
DETAIL OF PERMANENT POSITIONS

Grade	1992 Actual	1993 Estimate
Executive Level III	1	1
ES 6	2	2
ES 5	1	1
ES 3	--	1
ES 2	1	--
GS/GM 15	13	15
GS/GM 14	7	11
GS/GM 13	16	19
GS 12	5	8
GS 11	3	3
GS 9	8	18
GS 8	1	1
GS 7	14	14
GS 6	2	4
GS 5	--	1
GS 4	2	2
Total Filled EOY Permanent Positions	76	101
Funded FTE	67	101

BUDGET REQUEST

Mr. HOYER. What is your budget for fiscal year 1993, sir?

Mr. POTTS. $8,265,000.

Mr. HOYER. What is your request for fiscal year 1994?

Mr. POTTS. It is $9 million plus.

Mr. HOYER. I am really looking for your request to OMB. OMB has not given it back to you, right?

Mr. POTTS. That is right.

Mr. HOYER. What was your request for?

Mr. POTTS. It was approximately $9.4 million, formulated last summer under the previous administration. Today, with the many reductions in government being discussed, we recognize that we can manage with less.

Mr. HOYER. You have a FTE of 101 but you have on board now 90 people?

Mr. POTTS. Right.

Mr. HOYER. Is your presumption that if 4 percent is applied, you will have to reduce down to 97? That is 4 from 101.

Mr. POTTS. That is correct.

Mr. HOYER. Let me make a comment I already made when Archives came before me, and I think you can understand it. The public perception is going to get pretty cynical and jaded if we present them with a presentation that we are going to cut 100,000 employees out of the Federal Government, and they are then going to say—and I am, as you know, a strong supporter of Federal employees. Oh, where are they? Well, there are four papered people from the Office of Government Ethics and 110 papered people from Archives, and at the end of the day, nobody is a real person. They are going to feel that is a pretty cynical endeavor.

So I might indicate to you I understand what you said, you want to plus up to 97 from your present 90 so you can do your job and that obviously makes sense. I am sure my committee and other committees will be looking at this and will be discussing with Mr. Panetta exactly what we mean and what we are representing to the public makes sense. Admittedly the 2.1 million figure is an FTE figure that they are looking at as a target, which is how you have to get to 4 percent, take 100,000 for the very small agencies, and you are under the 100.

Mr. POTTS. That is right.

Mr. HOYER. I don't know whether that is going to apply to you or not. The agency that appeared prior to you was even smaller than yours, the 4 percent would not apply to agencies less than 100 in strength for obvious reasons. They don't have the flexibility that a larger agency has.

Mr. POTTS. I think one of the things that is a little different about us is we have been on this substantial growth curve and, you know, frankly, the rate at which we have ramped up has been limited primarily just by our ability to digest the people that we brought in and to get them trained and harnessed. So we have had to phase them in to do it in a sensible way. I would hate for us to be penalized just because we were doing it in a logical way and not trying to go out and just hire everybody at once, get them on

board, but then really have them thrashing out and being on the payroll and not being productive yet.

Mr. HOYER. Well, I presume that every agency would feel that if they lose people, that they were penalized for one reason or another, and I don't say that argumentatively. I say that because it is obviously the thing to do.

POST-EMPLOYMENT

President Clinton's executive order requiring certain executive branch officials to sign a pledge regarding post-employment activities is stricter than that required by current law. Can you compare the provisions? Have you had an opportunity to analyze that?

Mr. POTTS. Let me talk a little bit and then perhaps Gary will want to add to this. We were consulted with regard to the pledge and the pledge essentially will extend the period of time that is kind of the cooling-off period for high ranking senior officials, as well as people involved in trade negotiations, to five years.

Now, there are a series of laws that are on the books now that provide cooling-off periods. One, which is more than a cooling-off period, is just a flat prohibition, is that if an official leaves the government, he or she may not go back to that agency and represent anyone about a matter that the person was involved with. So if they specifically were involved with a particular issue, then when they go out into, say, private practice, they can't come back and appear before that agency regarding that issue forever.

Then there is a rule that if you were in the supervisory chain, I believe that there is a two-year cooling off period, that you can't come back, even if you weren't literally involved in the issue. So, you know, there are some prohibitions right now.

Then there is, for senior officials, pursuant to statute, a one-year cooling off period so that you just can't go back for a year to your department or agency for anything. And really, I would say that particular provision was expanded to five years under the contractual pledge that top officials are having to sign.

There are some exceptions that are built into that pledge that we really felt were sensible. In fact, our counsel was that there were certain exceptions which should be added to the pledge to make a little better balance between the need to be able to recruit the best people into the Federal Government without placing undue restrictions on them, and at the same time we have the President's pledge to try to, you know, have an extremely ethical administration.

I will give you one example. The pledge as it was originally drafted would have prevented a lawyer who was with an agency going out into private practice. Let's say he was with the Justice Department. He could not have gone into private practice and represented a client in a plea bargain or even tried the case representing an individual for five years; we said we really don't think that is what, you know, was intended here when you are talking about preventing lobbying which is inappropriate.

So there is in that pledge an exception for formal adjudicatory matters. And there was are a few others like that. For example, another one had to do with an exception for people who leave their

department or agency and go with a State or local government. The original draft would have prevented them from coming back and representing their State or their municipality back to the department or agency where they had worked, and we didn't think that that was really what was intended either, so there are some exceptions that in the discussions with the counsel that were preparing that pledge, that we felt were appropriate kind of exceptions to this broad rule.

[The information follows:]

The pledge contains a contractual commitment by senior appointees (full-time, non-career political appointees at certain pay levels) in the executive branch which:

1) prohibits lobbying their former agency for a period offive years after termination of service as a senior appointee;

2) extends this five-year ban for senior appointees in the Executive Office of the President to lobbying any other executive agency with respect to which they had personal and substantial responsibility;

3) prohibits for life any activity on behalf of a foreign government or political party which would require registration under the Foreign Agents Registration Act; and

4) prohibits, for five years after personal and substantial participation in a trade negotiation, any representation, aiding, or advising of foreign governments, foreign political parties or foreign business entities with the intent to influence any executive agency.

A pledge must also be executed by trade negotiators (if they are full-time, non-career political appointees) in the executive branch, whether or not they are also senior appointees, which contains the fourth prohibition listed above.

In contrast, 18 U.S.C. § 207(c) criminally prohibits former senior employees from communicating to or appearing before their former agency with an intent to influence on behalf of another for a period of one year, and 18 U.S.C. § 207(d) extends this prohibition for former very senior employees to include communications to and appearances before any Executive Level official listed in 5 U.S.C. §§ 5312-5316. Further, 18 U.S.C. § 207(f) criminally prohibits for one year former senior and very senior employees from representing, aiding, or advising foreign governments or political parties before the executive branch or with the intent to influence executive branch employees. Additionally, 18 U.S.C. § 207(b) criminally prohibits for one year certain employees, regardless of seniority, who were involved in trade or treaty negotiation, from representing, aiding, or advising others concerning the same ongoing trade or treaty negotiation, based on protected information to which they had access.

There are several differences between the pledge and the related statutory bans. The most prominent difference is duration: the pledge expands the cooling off period for senior personnel and trade negotiators from the statutory period of one year to a period of five years, and expands the more general ban on activity for foreign entities from one year to a lifetime ban.

Additionally, there are differences in employee coverage between the pledge and the statute. Specifically, the pledge covers senior appointees, defined as full-time, non-career political appointees paid at a minimum of Executive Schedule V,

other than foreign and uniformed service officers. The statute covers senior employees, which includes all employees paid at a rate equivalent to Executive Schedules V through II, military O-7s and above, and certain additional White House appointees; and very senior employees, which includes those paid at a rate equivalent to Executive Schedule I and certain additional White House appointees. Also, the pledge covers trade negotiators, defined as full-time, non-career political appointees who participate personally and substantially in trade negotiation, while the statute covers executive branch employees who participate personally and substantially in trade or treaty negotiations during the last year of Government service.

In addition, the activity prohibited by the pledge and the statute is not identical, although the definition of the term lobbying and its exemptions for purposes of the pledge have many similarities to the statutory restriction on representational activities. Also, the extent of banned activity in behalf of foreign entities or in relation to certain trade or treaty matters varies, as indicated in the summary above.

In the matter of enforcement, the pledge provides for administrative measures through agency debarment and judicial civil proceedings, while the statute is enforced through the criminal and civil courts.

Finally, the post-employment statute contains additional bans in 18 U.S.C. § 207(a) which have no counterpart in President Clinton's pledge. All former executive branch employees are subject to a lifetime ban on representing others before the executive branch or the courts on particular matters involving specific parties in which they participated personally and substantially while Government employees. A similar ban also applies for a period of two years for those who, even though not personally and substantially involved, had such matters pending under their official responsibility during their last year of Government service.

COMPLIANCE

Mr. HOYER. Sounds sensible to me. How effective have the executive branch agencies and employees been with complying with relevant law, orders and regulations regarding ethics and have you had any problems regarding compliance by any executive agency?

Mr. POTTS. To the first part of your question, I would say overall we are very pleased with the level of compliance, and because of our increased staffing, we have been able to accomplish many more on-site reviews of agency ethics programs than we were able to do in the past; I ultimately sign off on all those reports which are then sent back to the agency and we lay out our analysis of their program with suggestions for improvement and then we follow up to make sure that those recommendations are followed.

Literally in the time that I have been at OGE, which is a little over two-and-a-half years, we have had really only one substantial problem in this regard and it was with AID. Their program needed a lot of improvement and we submitted a report outlining what the problems were. We got some assurances that things were going to be taken care of. When we went back to follow up, we found that they were not and we issued a second report, which was pretty harsh, to be frank, and said, you know, if things weren't shaped up in a very short time, that our remedy is to send a copy of that report to the President of the United States with recommendations of what actions should be taken. That was like the two-by-four smacking the mule in the forehead.

It really got their attention and they shook up their program from top to bottom, brought in a new ethics official, and hired more people. We worked with those people very closely, and we are very encouraged at the way that that program has turned out in the last four or five months.

FOLLOW-UP REVIEWS

Mr. HOYER. Good. Are there procedures in place which assure that proper follow-up reviews are being conducted on previously reported deficiencies in the ethics program?

Mr. POTTS. They are, and I think the AID experience was the best case in point where the follow-up did indicate that they had failed to follow up on our recommendations and that second report with the threat of some corrective action really got their attention.

Mr. HOYER. We have some other questions and we will give them to you for the record. We will be reviewing your budget when it comes up. Obviously, this is a relatively unique year. This President has been put to initiating a budget for the first time in a long time as a new President, and as a result we are going to be late in the cycle getting the numbers. We are getting many of the hearings completed prior to receiving the budget, and if we have any questions about the numbers when we get them we will call you.

We would reiterate our continuing concern about what we are going to do. I am going to be discussing with Mr. Panetta along with the Members of this committee, as to what we think the proper policy ought to be with respect to the levels of personnel. We weill also discuss at that point in time what numbers we are

working with and what our base is, and we will be in communication with you.

Mr. POTTS. All right, sir.

Mr. HOYER. Your work is critically important. The American public has a very jaundiced view of Congress, not as much as of the executive department. To the extent we can assure them that we are handling their business in an ethical, honest and open fashion, we will all be better served. The role that you play is a very important one.

We appreciate your office. You had a very, very distinguished private career and you have given that up to come in and do some very important work here in government. We appreciate it.

Mr. POTTS. Thank you, Mr. Chairman. Let me mention one last thing. We are attempting to do some outreach into the private sector community to make them aware of what efforts and strides have been made within the executive branch for a strong ethics program to try to build up that level of confidence and because there have been a lot of changes made that have occurred just in the last few years, and to make them aware of all those changes and the determination to continue down that path to try to build up that sense of progress.

Mr. HOYER. I think you make a good point. My own view is that government operates as ethically, if not more ethically, than the private sector. That is not necessarily a criticism of the private sector. We operate in more of a fishbowl perhaps because we are watched. That may be the case, but of course the perception is different than that. I share that view with respect to Federal employees, who I believe are highly motivated and highly detailed. But again, the perception is different. And so you make another good observation. It is not only important to do, it is important to let people understand.

Mr. POTTS. To understand it, right.

Mr. HOYER. Thank you very much.

Mr. POTTS. Thank you.

[Questions for the record follow:]

HOUSE COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON TREASURY, POSTAL SERVICE AND GENERAL GOVERNMENT
U.S. Office of Government Ethics
Fiscal Year 1994 Appropriations Hearing
Questions Submitted for the Record

LEGAL AUTHORITY

Mr. Hoyer. Specifically what actual legal authority does the Office of Government Ethics have to require Executive Branch Agencies to establish ethics programs regarding financial disclosure?

Answer: Section 402(d)(1) of the Ethics in Government Act of 1978 (as amended by Public Law 100-598 of November 3, 1988) states: "The Director shall, by the exercise of any authority otherwise available to the Director under this title, ensure that each executive agency has established written procedures relating to how the agency is to collect, review, evaluate, and if applicable, make publicly available, financial disclosure statements filed by any of its officers or employees."

Subsequently, Executive Order 12674 of April 1989 authorized OGE (in section 201(d)) to reestablish a confidential financial disclosure system for the executive branch and to provide guidance for agencies in determining who should file. The Ethics Reform Act of 1989 (which amended Title I of the Ethics in Government Act of 1978) reestablished a system of public financial disclosure, which continued direct involvement of all executive branch agencies in the collection, review, and custody of public reports, as well as the general administration and enforcement of the public disclosure system as a means of avoiding conflicts of interest. Additionally, the Reform Act authorized OGE to establish a confidential financial disclosure system (5 U.S.C. app. § 107), which we were already in the process of accomplishing under the Executive Order authority.

FINANCIAL DISCLOSURE

Mr. Hoyer. What does your review of financial disclosure statements of individuals nominated by the President consist of? During the usual course of these reviews would you be able to identify problems such as the one Ms. Baird had?

Answer: The Office of Government Ethics' review of nominee financial disclosure reports often begins before the President has made a formal nomination. Even before FBI and White House background screening is completed, potential nominees may be asked by the White House to complete a draft of their financial disclosure report, so that any resolution of potential conflicts can be considered as early as possible. Also, this serves as a screening process to discover whether persons being considered as

nominees may have any overriding conflicts which could dictate that they not be nominated at all.

OGE's review of draft disclosure reports consists first of an examination of all entries for completeness. We then compare the general responsibilities of the Government position in which nominees would serve to their financial interests, liabilities, anticipated ties to former employers, and outside positions. This comparison relies heavily on input from ethics officials at the agency where the nominee would serve. Through discussions with the White House, the agency ethics officials, and the nominee or his representative we can begin to fashion ethics agreements, including such remedies as divestitures, resignations, conflict waivers, recusals, and other means to alleviate potential conflicts. Once the President actually sends forward a nomination, the filer updates his draft disclosure report, and the agency and OGE prepare certifications which detail to the Senate committee any ethics agreements to alleviate potential conflicts.

Our review and certification of public financial disclosure reports would not likely identify the problem which Ms. Baird experienced. Disclosures are strictly governed by statute (5 U.S.C. app. § 102). Nominee reports must disclose certain sources of income, assets held for investment or the production of income, liabilities, agreements or arrangements for past or future employment, and outside positions. Employment of someone to provide household services would not likely be disclosed, as it would not fit any of the above-described categories for disclosure which are required by statute.

PROVIDE REGULATIONS

Mr. Hoyer. How has the increased workload for OGE affected its ability to provide the agencies with important current regulations necessary to meet agency needs?

Answer: The increased workload for OGE, which arose primarily from the Ethics Reform Act of 1989 and President Bush's 1989 executive order, has delayed our issuance of several important regulations for agency guidance, primarily those required under executive order and statute to implement the criminal conflict statutes and to provide guidance and regulatory exemptions under 18 U.S.C. § 208(b). In addition, the regulations which we have issued were themselves not as timely as we would have liked, due to the sheer number of regulations required and the time-consuming process of accomplishing the requisite concurrences and clearances, as well as the solicitation and review of public comments.

Nonetheless, we have succeeded in issuing a record number of ethics regulations of uniform application for the executive branch during the period 1990 through 1992, including proposed and final rules establishing an entirely new set of standards of conduct, interim rules reestablishing a system of both confidential and public financial disclosure, interim rules implementing the

statutory tax rollover relief and the honoraria ban, final rules on ethics training, corrective action, and agency reports required by statute, and several other program-related regulations.

DESIGNATED AGENCY ETHICS OFFICIALS

Mr. Hoyer. What is the relationship between the Designated Agency Ethics Official (DAEO), and members of your office? Are the DAEO positions Full- or Part-time jobs in agencies?

Answer: The DAEO's are responsible for the program in their department or agency. The DAEO's interact with our Office in many ways and on many levels. Each department and agency has been assigned an OGE desk officer who responds to calls for advice on a wide variety of ethics issues and handles written requests for waivers, exemptions, etc. The desk officer also reviews the financial disclosure statements of presidential appointees confirmed by the Senate in the agency. The desk officer or OGE's Education Division will respond to agency requests for training. The DAEO may call OGE's Office of General Counsel to discuss a legal problem or get an advisory opinion. The analysts in the Program Review Division review the DAEO's ethics program and make recommendations to him.

DAEO positions are full-time in some agencies, mostly the larger departments and agencies, and part-time in others. Most DAEO's have staff to assist them in managing the program, again some being full-time while others perform ethics duties as part of other duties.

CURRENT RESOURCES

Mr. Hoyer. How many positions and how much money are currently allocated to each of these major activities:

a) General Counsel and Legal Policy

b) Office of Program Assistance and Review

c) Office of Education

Answer: In the Office of General Counsel and Legal Policy we currently have allocated 22 FTEs with a budget of $2,281,000, in the Office of Program Assistance and Review we have 50 FTEs allocated with a budget of $3,684,000 and in the Office of Education, 10 FTEs and a budget of $797,000.

Mr. McDade. From 1992 to 1993, OGE received a substantial increase in funding, growing from $6.0 million to $8.3 million. According to your testimony, your request to OMB for 1994 is estimated $9.4 million. What accounts for OGE's increased funding requirements? Legislative mandates? Executive Orders?

Answer: OGE's increased funding requirements stem from several factors. First, on June 5, 1990, the subcommittee on Oversight of Government Management of the Senate committee on Governmental Affairs held an oversight hearing of the Office of Government Ethics. In that hearing Senator Levin focused on the lack of resources in OGE that were devoted to the statutory mission of the agency to perform reviews of all executive branch department and agency ethics programs. There are approximately 300 such programs to examine and at that time OGE had approximately three analysts to perform this function. Further, Chairman Levin advised the Director at his subsequent confirmation hearing to staff this function adequately. OGE has with the increased funding, staffed this statutory mission, so as to be able to review each department and agency approximately every three years.

Second, the General Accounting Office noted this lack of necessary personnel as they reviewed OGE's oversight role. OGE could not meet its goal of reviewing an agency's ethics program every three years because of our limited staffing. The GAO recommended strengthening our oversight through more aggressive follow-up with agencies on remedial actions taken.

Third, in 1989, every statute and executive order on which the executive branch ethics program was based was amended, repealed, replaced or augmented. Executive Order 12674 directed OGE to establish a single uniform set of standards of conduct for the executive branch. These new standards became effective February 3, 1993 and has resulted in much new work for the Office. In effect, we have put in place an entirely new ethics program in the executive branch, with all departments and agencies relying on OGE for guidance. We now are now required to approve training plans for all agencies, supplemental public and confidential financial disclosure regulations, and agency supplements to the standards of conduct. This new ethics program has led to an increased volume of requests for agency assistance as they implement the new program. Additionally, OGE has been required to allocate resources to address the training requirements mandated by Executive Order 12674. This Executive Order requires that all Executive Branch employees receive ethics training, with certain categories to receive annual training. To achieve this level of required training the executive branch needs over 7000 qualified trainers. OGE continues to strive to develop a core group of competent instructors and to provide quality training materials to assist agencies to accomplish training requirements. Currently, we are making available to agencies, video tapes, produced under the guidance of our staff for use in their training endeavors.

Fourth, we are receiving an increased volume of requests for advisory assistance on other matters, such as the procurement integrity regulations issued by the Office of Federal Procurement Policy in 1990, as well as continuing questions on the honoraria ban passed by Congress for the executive branch. We are also in the middle of a Presidential transition year, requiring us to review the public financial disclosure statements of presidential

appointees nominated by the President and render an opinion to the Senate confirmation committee.

Finally, with the increased emphasis on ethics, OGE continually receives new functions, and must give guidance to the agencies on these new functions. On Inauguration Day, President Clinton signed Executive Order 12834 requiring certain persons to sign a pledge regarding their activities after they have terminated their positions as "senior appointees" or after they have participated personally and substantially in trade negotiations. Under the Order, OGE has been given several duties.

INCREASED WORKLOAD

Mr. McDade. Do you anticipate an increased workload based on the President's proposed ethics reforms?

Answer: We are not yet aware of what will actually be included in any ethics reform proposals by President Clinton, other than the ethics commitments which he established under Executive Order 12834 of January 20, 1993. That Order requires OGE to develop and make available a form for ethics pledges by covered senior appointees and trade negotiators; to assist agencies in providing advice to current and former senior appointees and trade negotiators regarding application of the pledges, and to develop rules as necessary to carry out that responsibility; and to provide consultation to every agency in fulfilling its responsibility to establish procedures for enforcing ethics commitments through debarment proceedings.

While we have completed the development and distribution of ethics pledge forms, considerable work remains in carrying out the other responsibilities of providing advice, promulgating rules, and assisting with the establishment of enforcement procedures. This will be an ongoing process, which we anticipate could involve considerable time on the part of several OGE staff attorneys and desk officers through the duration of this Administration.

Mr. McDade. Please provide a breakdown of major workloads (e.g. number of training courses, number of ethics program reviews) by OGE unit from 1990 (actual) to 1994 (estimated)

	1990	1991	1992	1993 Est.	1994 Est.
Ethics Program Reviews	10	7	47	57	60
Regional Program Reviews	6	2	17	20	20
Nominee statements	306	328	156	600	400

Annual & Termination Statements	775	949	894	900	900
Estimated Requests for Assistance	2000	3000	3000	4000	5000
Ethics Agreements Monitored (# of Appointees)	107	108	85	300	200
Annual Ethics Conference (# of attendees)	n/a	200	240	400	500
Training Sessions	25	30	30	50	50
Speeches, Lectures & Panels	76	87	73	90	90
OGE Newsgram Circulation	3000	3000	3600	4000	4300

THURSDAY, FEBRUARY 25, 1993.

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

WITNESSES

BEVERLY L. MILKMAN, EXECUTIVE DIRECTOR
E. RICHARD ALLEY, JR., DEPUTY EXECUTIVE DIRECTOR
CONNIE S. CORLEY, ADMINISTRATIVE OFFICER

Mr. HOYER. We will now have the hearing on the Committee for Purchase for People who are Blind or Severely Disabled. Ms. Milkman, we are very pleased to have you here and we look forward to hearing from you. You can introduce your colleagues.

Ms. MILKMAN. Thank you. I have with me today Dick Alley, who is the Deputy Executive Director of the Committee, and Connie Corley, who is our administrative officer. Ira Kemp, who is the Chair of the Committee and the Air Force Representative, asked me to convey his apologies. He planned to be here on Tuesday but he had to go out of town and couldn't reschedule to make it today. So we are pleased to be here. You have our prepared statement.

Mr. HOYER. You can summarize it for the record.

Ms. MILKMAN. I will summarize it for the record. I know you are running late. I won't give you boilerplate. As you know, we do not have a fiscal 1994 budget request for you today. However, as soon as the administration has completed its budget, we will have our request for you and we will be glad to answer any questions you have about it at that time.

BACKGROUND

I think you are probably more familiar with the Committee's work than perhaps some of the other Members of this subcommittee, so I am not going to go into a lot of detail. This is a very small agency. Someone has said it is the smallest in the government. I don't know if that is the case, but we have 18 staff members and 15 Committee members, 11 of whom are Federal executives. The other four are private citizens. They are all appointed by the President and they do the work of the Committee.

The work is to decide which products and services the Federal Government purchases should be set aside for provision by nonprofit agencies employing people with severe disabilities.

We have made a lot of progress, I think, in the last decade in that respect. This program is quite different in terms of numbers than it was 10 years ago. At the same time, it is still a relatively small proportion of Federal procurement. We think that the Committee is growing at a reasonable rate and we think that the work we are doing is benefiting people with severe disabilities throughout the country.

FY 1992 DATA

Mr. HOYER. When you say the Committee is growing——

Ms. MILKMAN. The Committee's program, the number of contracts that are set aside under this program. From an overall standpoint, fiscal year 1992 was a good year for us. We added approximately 1,500 full-time jobs. That translates probably into about 4,000 new people with disabilities who will be working under the program as a result of the things that the Committee did during 1992 to add products and services to the program.

In terms of actual employment during fiscal 1992, we increased to 18 million hours. That was up 13 percent from the year before. So that is 18 million hours of work for people who are blind or have severe disabilities under the program. Wages for those people rose by 20 percent in fiscal 1992 to $95 million, so we are almost at $100 million in wages.

IMPACT OF DEFENSE REDUCTIONS

We did not have an increase in sales in 1992 despite the fact that we had these other increases, which to us are much more important than sales. The bottom line for us is jobs for people with disabilities and hours worked and not sales.

We didn't have a sales increase, and frankly we are not sure that we are going to see an increase this year. The Defense Department reductions do affect our program. We are, I think, perhaps too dependent on Defense expenditures. We have recognized for some time that the time was coming when Defense expenditures would be going down, so we have been doing a lot of expansion in terms of civilian contracts, also picking up more Defense work so we would be more diversified. At the same time the handwriting is on the wall, and we are very aware of that.

We are trying to make sure that as we do our work, that we can protect the jobs of people with disabilities that we currently have and expand a little bit if we can. But frankly, we are almost in a maintenance mode.

We are particularly concerned about the effects that the reductions in Defense expenditures are having on the blind people who work under this program. Our blind nonprofit agencies are more dependent on products. They have not been able to break into the service contracts to the extent that agencies serving people with other disabilities have, and I think those are the ones you are particularly familiar with, like Melwood in your district.

But the blind workers are pretty much working in facilities and they are—while they are doing some service work, it is mostly products, and the products category, of course, is where we are seeing the big downturn in terms of Defense purchases. So that is something that the Committee is concerned about and is working on.

FY 1993 FUNDING

We are currently operating with a budget of $1,653,000. That is our budget for fiscal 1993. That supports 18 full-time Committee staff members, who are Federal employees. It also supports four of

the private citizen Committee members who are paid when they come into town or go somewhere else in the country.

I should mention that a good part of the work that the private citizen members do is without compensation, because they make decisions every week on new contracts to be added to this program and we do that via electronic mail and other mail and telephone, and they are not paid for those hours. Just so you are aware of that. That is something that they are contributing.

With respect to whether or not the funds that we have available to us now are sufficient, they are. They are enabling us to put in a new computer system which has already had a beneficial effect on our productivity. They also enable us to support a very small contract research program.

One of the things we are going to be starting this year is a comprehensive cost benefits analysis of this program which has not been done. We think the outcome is going to be positive, but it is something that every agency in my opinion should do.

EFFORTS TO OFFSET DEFENSE REDUCTIONS

As we advised your predecessor last year and in the past, we do see the reduced Defense expenditures as continuing to have an impact on this program, and we have already seen it this year. We certainly have reductions in commodity purchases under the program. That translates into fewer hours of employment for people with disabilities and we frankly don't see any prospect that current customers will purchase more of our products.

So what we are doing to offset these reductions is, one, we are looking for other products and services that can be added to the program to be provided by people with disabilities. We are also trying to do a better job of educating the Federal work force with regard to what this program is and the benefits that it can bring. Because, while we have a law that says you will buy these things that the Committee has identified from nonprofit agencies, you know, not everybody knows about that law, and inadvertently, or perhaps consciously, Federal agencies don't always buy what they are supposed to.

So what we are trying to do is to do a better job of educating Federal agency employees about the program and what it means, including providing work for people with disabilities and the benefits that they can get in terms of quality services, what they need on time, et cetera. So that is what we are focusing on in terms of trying to offset the changes that we see coming with the Defense reductions.

OTHER CURRENT ISSUES

With respect to other issues that we are concerned about right now, one of the things that we are concerned about, and we don't see this as a major problem but it certainly will affect the way the local nonprofit agencies operate, those that do products, is that historically GSA and the Defense Logistics Agency, which buy products and then sell them to other Federal agencies, have bought them and then put them in warehouses. They have then been responsible for shipping them out. If it is a small order, large order,

it doesn't make any difference to them. We supply them several times a year with fairly large orders and they warehouse them.

They are looking at, in an effort to reduce their costs, going to direct delivery. So they will have a contract with one of our agencies or some private firm and they will say you are responsible for direct delivery to your customer when they need it and in the amounts they need. There is a big difference between shipping a bunch of cases of pens twice a year to one source and shipping pens, smaller amounts, every week to different sources all over the country.

So we feel we can do this if that is the direction they move in, but it is something we are concerned about and we are working on right now. And there are several other things.

Again, as you are probably aware, agencies like GSA and the Defense Logistics Agency, which are responsible for procurement for other Federal agencies, are looking at a lot of changes in the way they do business, trying to better satisfy their customers, reduce costs, trying to be more efficient, and some of those changes could affect our program. We are and we will continue to be working very closely with those agencies in the years and months ahead so that we make sure that we will not reduce employment for people with disabilities as a result of changes in the way the government does business.

Any questions?

[The information follows:]

Biography

United States Air Force

Secretary of the Air Force, Office of Public Affairs, Washington, D.C. 20330-1000

IRA L. KEMP

Ira L. Kemp is associate director of contracting and manufacturing policy, Office of the Assistant Secretary of the Air Force for Acquisition, Washington, D.C. As the associate, he shares with the director responsibility for the development of contracting and manufacturing policies and procedures governing the acquisition of weapon systems, logistics support, materiel and services for the Department of the Air Force.

Mr. Kemp was born March 31, 1934, in Brooklyn, N.Y., where he graduated from James Madison High School in 1951. He later attended Brooklyn College and Phoenix College. In 1960 he received a bachelor of science degree from Arizona State University.

He was an employee of Frontier Airlines for 10 years. He then served two years in the Army as a cryptographer with the National Security Agency. Mr. Kemp entered federal service in July 1963 as a management intern for the Air Force Logistics Command at the San Bernadino Air Materiel Area, Norton Air Force Base, Calif., where he worked as a logistician, buyer and price analyst. In 1965 he transferred to Headquarters Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, Office of the Deputy Chief of Staff for Procurement and Production, where he performed staff duties in the positions of procurement analyst and price analyst.

In December 1970 he was appointed chief of pricing in the Directorate of Procurement and Production, Warner Robins Air Logistics Center, Robins Air Force Base Ga. He later served as executive assistant to the director of procurement and production, and as chief of a central procurement buying branch.

Mr. Kemp returned to Air Force Logistics Command headquarters in March 1974 and served as deputy director of contract placement, Office of the Deputy Chief of Staff for Procurement and Production. He had command responsibility for pre-award contract policy major program planning, and contract pricing and negotiation. He assumed his present duties at the Pentagon in June 1976.

He is the recipient of both the Meritorious Executive Award in 1987 and Presidential Distinguished Rank Award in 1989. Mr. Kemp is a member of the National Contract Management Association and Senior Executive Association. He is chairman of the Air Force Debarment and Suspension Review Board and serves as a member of the Air Force Contract Adjustment Board and the Air Force Contractor Integrity Review Board. Also, he is the Air Force appointed representative to the President's Committee for Purchase from the Blind and Other Severely Handicapped.

Mr. Kemp is married to the former Frances Hernes of Phoenix. They have three children: Michael, Mitchell and Elisa. The Kemps reside in Rockville, Md.

(Current as of February 1990)

BEVERLY LYFORD MILKMAN

Resume Brief

PRESENT ACTIVITIES

8/88 to Present

Executive Director (SES Level V), Committee for Purchase from People Who Are Blind or Severely Disabled. Responsibility for overseeing staff of 17 involved in performing a wide range of activities under the Javits-Wagner-O'Day (JWOD) Act. Also act on behalf of Committee in dealing within the Executive Branch and with Congress.

The Committee is an independent Federal agency whose functions include educating and encouraging Federal agencies to initiate and expand procurement from nonprofit agencies employing persons who are blind or severely disabled; adding items to the Committee's Procurement List; establishing and revising fair market prices for such items; verifying the qualifications and monitoring the performance of nonprofit agencies participating in the JWOD Program; providing technical assistance to nonprofit agencies to enhance their ability to take part in the Program; and carrying out research to provide information on Program impacts and operations.

In addition to directing work of the staff, the position involves considerable interaction with two national organizations. The National Industries for the Blind, whose population serves people who are blind and NISH, an organization serving people with severe disabilities. These two relatively large nonprofit agencies that provide various forms of assistance to state and private nonprofit agencies participating in the Program and serve as liaisons between the agencies and the Committee in a number of areas. The Executive Director is responsible for providing guidance to these organizations on a wide range of policy and operational matters.

PAST ACTIVITIES

6/86 to 7/88

Deputy Director for Grant Programs (SES Level IV), Economic Economic Development Administration (EDA), U.S. Department of Commerce. Responsibility for managing staff in the development of policy and implementation of EDA programs: planning, technical assistance, research and evaluation, public works, and economic adjustment. Directed 50 professionals in Washington and provided policy guidance to staff of six regional offices regarding the provision of $150+ million annually in grants to states, cities, counties, multi-county groups, colleges and universities, nonprofit organizations, and firms. Guided Federal and grantee staff on issues involving urban and rural economic development planning and technical assistance to areas and businesses, evaluation of development programs, industrial park utilization and economic research. Represented agency in wide variety of public and private sector forums.

10/81 to 5/86	Director (SES Level III), Office of Planning, Technical Assistance, Research and Evaluation, EDA. Responsibility for managing a staff of 30 professionals in Washington in developing policy for and carrying out grant programs with a $35 million annual budget. Provided policy guidance to staff in six regional offices. Oversaw projects involving economic development planning aid to state and local governments and Indian tribes; technical assistance to depressed areas and firms; and economic development research and evaluation.
11/80 to 9/81	Director (SES Level I), Office of Technical Assistance, EDA. Responsibility for management of $27 million technical assistance program to create and save jobs in distressed areas and $18 million trade adjustment program to help firms and industries hurt by imports. Directed staff of 25 professional in Washington and provided policy guidance to staff in six regional offices.
4/73 to 10/80	Special Assistant to the Assistant Secretary of Commerce for Economic Development (GM-15). Under four Assistant Secretaries, responsibility for such tasks as management of EDA's Minority Economic Development and Women's Business Enterprise Programs; formulation of new EDA legislation; liaison with the Office of Management and Budget and Congress during consideration of new EDA urban policy task force; analysis and documentation of $6 billion countercyclical public works program; and direction of EDA's public affairs office.
8/72 to 3/73	Special Assistant to the Deputy Assistant Secretary of Commerce for Economic Development (GS-12). Responsibility for policy development and program management tasks, including review of all EDA projects and formulation of new growth center strategy to promote rural economic development.
1/70 to 7/72	Program Specialist (GS-11), EDA. Responsibility for conducting evaluations of Agency programs and preparing results for Department officials and the Office of Management and Budget. Evaluated various EDA programs and policies, including Agency growth center strategy and projects designed to benefit minority contractors.
9/67 to 8/69	Staff member, Peat, Marwick Mitchell & Co. Responsibility for research and report preparation tasks for various clients in government and industry.

OTHER

Bachelor of Arts Degree in Journalism and History from the University of Arizona. Graduated Magna Cum Laude. Member of Phi Beta Kappa, Phi Kappa Phi, and Theta Sigma Phi. Master of Liberal Arts Degree from the Johns Hopkins University. Graduated with honors. Master of Philosophy and coursework completed for Ph.D. in American Civilization at the George Washington University. Co-author of book entitled: Alleviating Economic Distress: Evaluating a Federal Effort. Author of numerous Commerce Department publications. Associate Editor of Economic Development Quarterly. Recipient of SES Bonuses, various Commerce Department awards, and 1992 Meritorious Executive Presidential Rank Award.

MR. IRA L. KEMP, CHAIRPERSON
COMMITTEE FOR PURCHASE FROM PEOPLE
WHO ARE BLIND OR SEVERELY DISABLED

Mr. Chairman, we are pleased to appear here today to discuss the operations of the Committee for Purchase from People Who Are Blind or Severely Disabled. At the outset, I want to emphasize that the Administration is currently formulating the President's FY 1994 Budget. Accordingly, we are not in a position to provide you with the Administration's position on funding for specific Committee activities. As soon as the President's FY 1994 Budget is released, we would be pleased to provide you with the Committee's views.

Background

The Committee administers a program which was created in 1938 for the purpose of providing employment opportunities for persons who are blind. The program in place today was authorized by the Javits-Wagner-O'Day (JWOD) Act (Public Law 92-98) in 1971. Its mission is to generate employment and training opportunities not only for people who are blind, but for individuals with other severe disabilities as well. The Committee is composed of 15 Presidentially appointed members, 11 of whom represent Federal agencies. The other four members are private citizens who are knowledgeable about the employment problems of persons who are blind or have other severe disabilities.

The long range goals of the Committee are to increase employment opportunities for Americans with severe disabilities and, whenever possible, to prepare them to engage in normal competitive employment. Our primary means of achieving these goals is by directing Federal agencies to procure selected commodities and services from nonprofit agencies employing such persons. In accordance with the JWOD Act, the Committee determines which products and services are suitable for provision by such agencies. When a product or service is found to be suitable, it is added to the Committee's Procurement List and must thereafter be purchased from the nonprofit agency (or agencies) designated by the Committee. Those products sold to other Federal agencies by the General Services Administration (GSA), the Defense Logistics Agency (DLA), or the Department of Veterans Affairs (VA) are identified as Procurement List items in the GSA, DLA, and VA catalogs or computerized procurement systems.

The Committee carries out other functions as well, including regularly scheduled visits to participating nonprofit agencies to assure their continued compliance with Committee regulations. This function has grown increasingly time-consuming as the number of agencies participating in the JWOD Program has escalated in recent years (currently, over 500 agencies have JWOD work). A related responsibility involves providing guidance to the two

central nonprofit agencies designated by the Committee to help the State and private nonprofit agencies participate in the Program. These central nonprofit agencies--the National Industries for the Blind (NIB) and NISH--provide a wide range of assistance to the local organizations, including aid in developing employment and other data for consideration by the Committee, financial assistance, and training to assist in establishing the capability to provide particular commodities and services.

A particularly important function of the Committee is educating Federal officials with respect to the existence and purpose of the JWOD Program and the need for their help in identifying items for addition to the Procurement List. The large numbers and frequent turnover of Federal procurement personnel, particularly in the military, make the education process a sizeable, ongoing effort.

The Committee employs a staff of 18 persons to help it administer the JWOD Program. The staff is responsible for developing information on items proposed for addition to the Procurement List, as well as on other matters, for consideration by the Committee. Among the staff activities are assisting in the establishment and revision of fair market prices for commodities and services; verifying the qualifications and monitoring the performances of the nonprofit agencies participating in the Program; and serving as a link between the nonprofit agencies, NIB and NISH, and Federal Government units in expanding the Program and resolving problems.

In addition, the staff handles all the administrative functions for the Committee. These include developing policies and procedures, initiating and responding to correspondence, and performing the numerous other tasks required of every independent Federal agency.

FY 1992 Record

Despite no increase in sales of JWOD products and services, FY 1992 was another record-breaking year with respect to the most important statistic the Committee tracks. That statistic is the number of hours of employment generated by the JWOD Program for persons who are blind or have other severe disabilities. In FY 1992, that figure rose to 18.2 million, up from 16.1 million in FY 1991. Similarly, wages paid to people with severe disabilities under the JWOD Program increased by 20 percent to $95.9 million. These increases were attributable to new service and commodity contracts added to the Committee's Procurement List in recent years. The work associated with these new contracts, especially the service contracts, offset the loss of work associated with reduced commodity purchases by Federal customers, particularly the military.

FY 1992 was also a productive year from the standpoint of additions to the Procurement List. Over the course of the year, products and services expected to generate almost 1500 full-time jobs for people with severe disabilities were added. With the exception of FY 1990 and FY 1991, this was the largest number of employment opportunities added to the Program in its more than 50 years of operation.

Once again, however, the overall statistics masked underlying problems, particularly relating to JWOD employment for people who are blind. As previously noted, reductions in Defense Department spending resulted in decreased sales of JWOD commodities. Such decreases disproportionately affect JWOD workers who are blind because they are almost wholly dependent on product sales. As a result, the hours of employment generated for blind workers during FY 1992 dropped to 3.8 million, a decrease of five percent. Additional Defense Department downsizing is expected to continue to reduce the amount of JWOD work available to people who are blind during this fiscal year and in the foreseeable future.

FY 1993 Operations

The Committee's FY 1993 budget is $1,653,000, which is the amount requested by the Administration. These resources support 18 staff members and four private citizen Committee members. In addition to funds for travel and other administrative functions, the FY 1993 budget is being used for the hardware, software, training, and conversion of data for a new computer system. At this time, the hardware and software is in place, and conversion is well underway. The new system has already increased staff efficiency, and additional productivity gains are expected once it is fully operational.

The FY 1993 budget also includes resources for contract research. The research funds will primarily be used to fund the development of a methodology for a comprehensive assessment of the costs and benefits of the JWOD Program. In addition, the Committee will use FY 1993 resources to print and disseminate a JWOD Handbook, which will explain all aspects of the JWOD Program to Federal personnel, including ways of increasing support for the program.

Program Issues

The Committee is off to an excellent start in FY 1993 with respect to adding items to the JWOD Program for future provision by nonprofit agencies employing people who are blind or have other severe disabilities. Nonetheless, the continuing reduction of DoD expenditures is a source of worry, as are two other developments that are likely to significantly impair the ability of the Committee to maintain JWOD employment, particularly for

persons who are blind. One of these developments involves the possible change by GSA and the Defense Logistics Agency from requiring suppliers to deliver products to Government warehouses (for subsequent delivery to individual customers) to requiring suppliers to deliver products directly to such customers. Although the Committee is confident the nonprofit agencies will be able to adapt to such an approach, there is no question that it will require modifications in the way they do business.

We understand that over the next year, GSA may be modifying a number of their other procurement practices. We'll be reviewing these changes to determine the effects they might have on the JWOD Program.

In the coming months, the Committee will be working closely with GSA, military procurement officials, NIB, NISH and the State and private nonprofit agencies participating in the JWOD Program to determine the possible impacts of these trends. Our efforts will include increased emphasis on educating Federal consumers about the JWOD Program and continued expansion of the number of products and services included on the Committee's Procurement List. We appreciate your support for our activities and assure you we are committed to meeting the challenges that confront us today.

FY 1993 BUDGET

111.901 Personnel Compensation - $906,000

This amount is being used to pay salaries of 18 FTEs who perform a variety of functions in order to carry out the Committee's mission. Four private citizen Committee members are also paid a salary when they conduct Committee business. This estimated figure includes the 3.7% cost of living increase effective January 1993, anticipated promotions for certain staff members and scheduled within grade increases. Also included are resources for performance awards.

112.101 Civilian Personnel Benefits - $133,000

This reflects the estimated portion of the benefits the Committee will pay for its 18 FTEs. This figure is based on the total salaries estimated for FY 1993.

121.001 Travel and Transportation of Persons - $70,000

Resources in this category primarily cover costs associated with site visits of the 130 nonprofit agencies expected to be reviewed this year. Also covered is travel by the four private citizen Committee members in order to attend monthly Committee meetings. Staff travel for information or special meetings and speeches or presentations at conferences is also reflected here.

123.101 Rental Payments to GSA - $124,000

This figure, which is provided by GSA, reflects the rental payment for the space the Committee occupies. This amount increased significantly in FY 1993 due to the Committee staff's move to a new location last year.

123.301 Communications, Utilities, and Miscellaneous Charges - $60,000

This area covers costs associated with day-to-day operations such as telephone (including FTS2000) and facsimile use, postage and overnight delivery, and rental on reproduction equipment. Costs in this area continue to rise. In addition, the Committee anticipates converting to direct accountability of its postage which could significantly increase costs in this area.

124.001 Printing and Reproduction - $85,000

This year the Committee will print its Annual Report and a handbook which will be disseminated to Government employees on how to work with the JWOD Program. Other printing projects include brochures and catalogs, which will replace the Procurement List as a marketing tool, and a brochure describing the Committee's compliance procedures to assist nonprofit agencies in preparing for scheduled compliance reviews. These resources also cover weekly printing in the Federal Register of items proposed for addition or that are being added to the JWOD Program. Federal Register costs continue to rise due to the increase in items being added to the Program and the need to address comments received in connection with the actions.

125.001 Other Services - $250,000

Resources in this category reflect costs associated with the final phase of the Committee's conversion to a new computer system which began in FY 1992. With all the hardware in place, work is now in progress to have vital databases on the old system converted to the new system. Also included in this category are resources for the Committee's research agenda. One major study which will be contracted out this year will be the development of a methodology to assess the costs and benefits of the JWOD Program. Other smaller studies will be conducted to obtain data and insights about the impacts of the Committee's efforts, the needs of its target population, and the efficiency of its operations. Other services resources are being used to obtain microfiching services in order to improve the size and efficiency of the Committee's files. Other services also includes resources for any service required in the day-to-day operation of the Committee.

126.001 Supplies and Materials - $15,000

These resources are being used to purchase necessary supplies in order for the Committee to function on a day-to-day basis. Included in this amount are costs that have been incurred in connection with the Committee's name change effective last October.

131.001 Equipment - $10,000

In connection with the microfiching project, the Committee will be purchasing a microfiche reader/printer. As the new computer system gets fully operational, it may be necessary to purchase additional equipment.

199.901 Total FY 1993 Budget - $1,653,000

JWOD EMPLOYMENT

Mr. HOYER. How many people do we serve at this point in time? How many blind and disabled?

Ms. MILKMAN. In terms of the number of individuals, which is the number I am going to give you—it is not my favorite number—but it reached around 23,000 last year. Some of those people may have worked only a week, others may have worked a full year.

I think that probably the more significant number is the hours which I gave you, which is 18 million. That number is up—it has been up every year and continues to go up. That is what we think really amounts to a lot.

If you divide that, by what is generally considered a work year, 2,000 hours, you get around—2,000 into 18 million is 9,000 work years. I think there are definitely more people than 9,000 working in the program, but some of the people that work in the program really do not want to work full time. So the bulk numbers are good but the 18 million is the important number.

FISCAL YEAR 1994 CONSIDERATIONS

Mr. HOYER. Okay. You indicated that your budget of $1.6 was sufficient?

Ms. MILKMAN. It is sufficient this year, that is correct.

Mr. HOYER. Is that the number you are asking from OMB, a freeze level?

Ms. MILKMAN. Back last September when we submitted our budget request, we asked for a slight increase. It was not a large one, and we have been told that budget is dead. What we will be getting, I don't know at this point, but we did not ask for a big increase in our budget.

Mr. HOYER. How much of that is personnel and rent?

Ms. MILKMAN. Let's see. Personnel is a significant portion of it. Personnel is around $900,000 this year out of the $1.6 million; and rent, I believe, is $124,000.

Mr. HOYER. The reason I ask that, the administration has talked about a 3 percent across the board cut in administrative expenses. Administrative expenses are generally defined as those expenses other than personnel and rent, which would mean about—if you are talking about $.5 million, about an amount of approximately $15,000.

Ms. MILKMAN. That is just about right. That is the figure we have heard, and I think in addition to that they are talking about perhaps some cuts associated with the freeze on the cost of living increases.

Mr. HOYER. Have you received any information on that because the first agency that appeared was an agency of less than 100 people, they were not sure if the 4 percent freeze applied to agencies of less than 100 people. You are obviously less than 100 people by a substantial amount.

Ms. MILKMAN. I think the 4 percent cut in full time positions may not apply to us. I think the cost of living freeze will apply to us.

Mr. HOYER. Oh, yes.

Ms. MILKMAN. That is right. The 4 percent may not, but we don't have the final call on that yet. We are hopeful that it will not frankly because we need every person we have.

Mr. HOYER. You have a FTE of 18 and you have 18 on board.

Ms. MILKMAN. We have 17 on board. I hope to have 18 on board within the next two weeks. We had 18 on board until two months ago and then a long time engineer retired and we are filling that as quickly as we can.

Mr. HOYER. I am very interested in the work you do, considering my involvement with the Americans with Disabilities Act. I am pleased to see the hours going up, like you. I would like to see the number of people go up as well in trying to not only do product production, but service as we go into a greater service economy.

Ms. MILKMAN. That is our growth right now, the services. There is just no question about that.

Mr. HOYER. Melwood, you are right, does a great job. Thank you very much, appreciate it.

[Questions from Mr. Hoyer for the record follow:]

COMMITTEE RESPONSES TO SUBCOMMITTEE QUESTIONS

1. What are the criteria used to determine what products the Committee will include on the Procurement List for the Federal Government?

The Committee has established several criteria for use in determining whether a particular supply or service purchased by the Federal Government is suitable for addition to the Procurement List for future provision by a nonprofit agency employing persons who are blind or have other severe disabilities. The criteria, which must be satisfied independently, are:

- o employment potential for persons with severe disabilities;
- o the existence of a qualified nonprofit agency serving persons with severe disabilities which is capable of providing the supply or commodity to the Federal Government under the Committee's Program;
- o the willingness of a qualified nonprofit agency to provide the item to the Government at the fair market price established by the Committee; and
- o an acceptable level of potential adverse impact on the current or most recent contractor for the commodity or service. The Committee will not place an item on its Procurement List if that action will have a severe adverse impact on the current contractor for that item. The Committee defines severe adverse impact as that level of impact which might weaken the business base of the contractor to the extent that the firm's viability could be in jeopardy.

2. What is the process followed by the Committee in informing the Federal Government of the services and products the nonprofit organizations have available?

With respect to items which the Committee has placed on its Procurement List, those Federal agencies which have responsibility for purchasing the services or commodities from the nonprofit agencies providing them are advised in writing by the Committee when the item is added to the Procurement List. Subsequently, such agencies receive periodic written notifications of price changes for the items.

This approach is sufficient for services already on the Procurement List and for commodities on the Procurement List which are used by the agency purchasing them. It does not, however, suffice with respect to products and services purchased by an agency like the General Services Administration, which in

turn sells them to other agencies. It also is not a particularly effective means of informing Federal agencies of the range of supplies and services not on the Procurement List which they might be interested in purchasing from nonprofit agencies under the Javits-Wagner-O'Day (JWOD) Program.

As a result, the Committee has developed an education program which includes a variety of activities designed to better acquaint Federal employees with the JWOD Program and the variety of commodities and services available from nonprofit agencies employing individuals with severe disabilities. The program includes making presentations and providing written material on the JWOD Program at Federal procurement conferences and training sessions; enlisting the support of Committee members and liaisons in all major Federal Departments and agencies to promote the JWOD Program within their respective organizations; ensuring that JWOD items are clearly marked in catalogs published by GSA and the Department of Veterans Affairs; attempting to identify JWOD items in Federal agencies' automated procurement systems; writing articles for publication in various Federal agency newsletters; etc.

Materials describing the JWOD Program include a video, annual reports which describe the program and contain pictures of individuals with disabilities working on JWOD projects, brochures describing the program, and various case studies of persons with disabilities who have benefitted or are benefitting from JWOD employment opportunities. The Committee is also in the process of publishing a handbook on the JWOD Program aimed at telling Federal employees, particularly those involved in purchasing, more about the Program's operations and impacts.

3. What is the total volume of sales in 1993 and what are you projecting for 1994?

Through February, sales for FY 1993 are $164 million. Projected sales for the end of FY 1993 were $490 million in September of 1992 but, based on sales data to date, have been revised to $425 million. In FY 1994, sales are projected to be $500 million, which is a decrease of $20 million since FY 1994 sales were initially projected in September of 1992.

4. Are there other areas of work that the Committee can explore which would compensate for the continuing Department of Defense reductions in the procurement of goods manufactured by the blind and severely disabled?

As indicated in our testimony, the Committee is currently pursuing several strategies aimed at offsetting the continuing

reductions in DoD procurement. These include identifying commodities and services purchased by civilian agencies for addition to the JWOD Program and identifying other DoD commodities and services which have the potential to be added to the Procurement List. Through its education efforts, the Committee is also attempting to increase purchases of JWOD products and services by informing Federal agencies of the importance of such purchases and the high quality and reasonable costs of JWOD items. During the coming months, the Committee will also be considering alternative strategies for using the Federal procurement system to generate employment and training opportunities for persons with severe disabilities.

5. How many blind and handicapped people does this program support?

In FY 1992, 23,524 persons who are blind or have other severe disabilities were employed as direct labor on JWOD projects. These individuals worked a total of 18.2 million hours and received $95.9 million in wages.

6. When the Committee visits the participating nonprofit agencies to determine if they are in compliance with the Committee regulations, how often are these visits and what specifically does the Committee review? Are most in compliance?

Nonprofit agencies new to the program are initially reviewed within six months. All agencies that have been found in full compliance are reviewed every three years. Agencies that are found not to be in full compliance are reviewed after 18 months.

Committee staff members review the following areas during compliance visits:

1. Work performed at the facility and capability for expansion
2. Medical documentation of disability of each direct labor employee.
3. Initial evaluation and annual reevaluation of each direct labor employee with respect to current ability for competitive employment.
4. Adequacy of direct labor recording system.
5. Total agency and JWOD direct labor ratio.
6. Agency's awareness of OSHA requirements.
7. Adequacy of placement and upward mobility programs.
8. Method of establishing prevailing wage rates.
9. Method of determining productivity rates.
10. Department of Labor (DOL) certification.
11. Status of phase-in schedules.

Committee staff members also interview JWOD employees and representatives of nonprofit agency boards to obtain additional insights about the impacts of the JWOD Program in each area.

In FY 1992, the Committee, NIB and NISH compliance staffs reviewed a total of 244 nonprofit agencies. Of those agencies reviewed, 35% were in full compliance. It should be noted, however, that most of the reviews focused on new agencies and those agencies having problems; it was expected that these agencies would be in noncompliance. The major area of noncompliance is the requirement for medical documentation of disability and the annual evaluation of the employee's ability to be placed into competitive employment. This area can be and is quickly corrected; most of the agencies found not to be in full compliance corrected areas where they were deficient and came into compliance within 90 days. Last year, only 8% of the agencies reviewed were in noncompliance because of ratio problems (i.e., the percentage of direct labor hours worked by people with severe disabilities in those agency during the previous fiscal year was less than 75 percent).

Specialists from Department of Labor Regional Offices also conduct reviews of nonprofit agencies' wage and hour data to determine their compliance with the Fair Labor Standards Act and Service Contract Act. Although these reviews are random, DOL is giving priority to businesses which contract with the Federal Government, including nonprofit agencies participating in the JWOD Program.

7. How often does the Committee update their policies and procedures?

Updating the Committee's policies and procedures is an ongoing process. Policies and procedures are often revised in response to new issues and challenges which the Committee faces. The Committee recently revised its fair market pricing policies and procedures as the result of a report from a task group which studied the issue. We are currently revising written procedures relating to nonprofit agencies to align them with changes in the Committee's regulations and to include updated language.

8. In your statement you talked about two developments which are likely to significantly impair the ability of the Committee to maintain JWOD employment; however, you only discussed one concerning the possible changes by GSA and the Defense Logistics Agency process of delivering supplies by the Committee. What is the other development which may impair the Committee?

The other development the Committee is watching closely involves the interest in some quarters in having Federal supply agencies like GSA purchase more commercial products. Historically, many commodities purchased by the Government have been manufactured to detailed specifications developed by the Government. For example, the Government buys paper clips that are much stronger than many found in the commercial marketplace and ballpoint pens that have a much longer writing life. Similarly, the Government has its own specifications for disinfectants, sweatsuits, and thousands of other supplies. Nonprofit agencies participating in the JWOD Program follow the Government specifications to make these items, as do thousands of small and disadvantaged businesses which contract with the Government.

For a variety of reasons, including cost considerations and customer preference, issues have been raised regarding the Government's historic approach to purchasing supplies--buying special "Government-spec" items--when the needs such items fulfill can be met by products available in the commercial marketplace. Because the commodity portion of the JWOD Program, which is responsible for almost all JWOD jobs for blind persons is to a large extent dependent upon the Government's continuing to purchase "Government-spec" products, the Committee is obviously concerned about and will be following closely discussions regarding this policy.

9. What additional equipment is necessary to fully operate the new computer system, and what are the additional costs?

The new computer system will not require any additional hardware. However, after having used the system for the past several months, it is clear that we will require additional software programming and/or software packages to fully implement the capability of the system. We are in the preliminary stages of this effort and while we do not expect the costs to be substantial, we cannot, at this time, project what additional costs we will have to incur. The President's fiscal year 1994 request will be sufficient to fund any additional costs.

THURSDAY, FEBRUARY 25, 1993.

U.S. MERIT SYSTEMS PROTECTION BOARD

WITNESSES

DANIEL R. LEVINSON, CHAIRMAN
ANTONIO C. AMADOR, VICE CHAIRMAN
JESSICA L. PARKS, MEMBER
LUCRETIA F. MYERS, EXECUTIVE DIRECTOR
LLEWELLYN M. FISCHER, GENERAL COUNSEL
JOHN M. PALGUTA, DEPUTY DIRECTOR, OFFICE OF POLICY AND EVALUATION

INTRODUCTION

Mr. HOYER. We are now going to go to the U.S. Merit Systems Protection Board, Levinson and Company. Mr. Levinson, we very much appreciate you being with us this morning and we appreciate your proceeding and introducing your colleagues, and then we will include your statement in full in the record at this time.

Mr. LEVINSON. Mr. Chairman, thank you very much, and good morning. I am pleased to introduce the people at the table with me this morning, the Vice Chairman of the Board, Antonio Amador to my right, and to my left, the Member of the Board, Jessica Parks. Right behind me is the Executive Director of the Board, Lucretia Myers, the General Counsel of the Board, Llewellyn Fischer and the Deputy Director of the Office of Policy and Evaluation, John Palguta.

I must confess that there is no way I can talk as fast as your previous witness, so it is going to be a little slower. We may have to move from fourth gear down to third. I will do the best I can to keep you on schedule.

Mr. HOYER. We may let you say half as much.

Mr. LEVINSON. One thing that certainly helps in that regard is that you know the Merit Systems Protection Board well. We know that you have been a great supporter of the Board over many years. You understand and appreciate the responsibility of the Board in protecting merit principles, assuring that employment decisions are made in the Executive branch in full compliance with merit systems principles, and the important role we play in ensuring workplace due process.

OPENING STATEMENT

This is a very unusual year, as you mentioned earlier this morning. I will not read the statement that I have prepared in writing. I do ask that it be made a part of the record, and as a courtesy to OMB, will note up front that I am not in a position to provide you with the Administration's position on funding for the Board. As

soon as the President's budget is released, I would be pleased to provide you with the Board's views.

As part of my prepared statement, I noted briefly the history of appropriations for the Board. This is a matter that you and I discussed in 1989 at the appropriation hearing for fiscal year 1990. Over the years, the Board's budget has continued to shrink in terms of real dollars. In 1984, our budget was $21.1 million; by 1993, it had increased to $26.4 million. But, because inflation had eroded the dollar at rates of anywhere between 2 and 4 percent in each of those years, we actually are millions of real dollars behind just keeping even with the appropriations that we enjoyed in the mid-1980s.

The dollars have shrunk for us and the FTEs have shrunk as well. Our authorized FTE level in the mid-1980s was close to 400. We are down now to a level of 318.

Mr. HOYER. That is fiscal year 1993, FTE, 318?

Mr. LEVINSON. That is correct. Under the Executive Order for reduction in positions, for fiscal year 1993, our authorized FTEs would be reduced to about 315. Our OMB request for 1994 was 318.

As the Board looked at the Executive Order on reduction of Federal positions, we looked at the impact on affordable FTEs, what we actually can staff given the actual money we have. The affordable FTEs for FY 1993 are actually 309. Applying for the 4 percent reduction to that figure, we would expect to absorb a reduction of 3 FTEs for FY 1993, and we would need to get down to a level of 306 FTEs by the end of this fiscal year.

Mr. HOYER. I didn't follow that 4 percent reduction.

Mr. LEVINSON. A 4 percent reduction from the 309 affordable FTEs that the Board has would bring us down to a target of 306 FTEs for fiscal year 1993.

Mr. HOYER. How do you figure 4 percent of 309 is 3?

Mr. LEVINSON. The 4 percent reduction represents a 12 FTE cut spread over three fiscal years. It would be a reduction of 3 in 1993, 5 in 1994 and 4 in 1995. We are running this year at a level that would bring us in at around 307, so we are close to being able to absorb the reduction for this year without any substantial deviation from our current personnel situation.

The Executive Order on reduction of administrative, non-personnel, costs by 14 percent requires a 3 percent reduction in fiscal year 1994. That translates to $92,000 under current services budget for fiscal year 1994. Simply taken, the fiscal year 1993 figures are already lower than provided in the current services budget.

For the record, our appropriation this year is $26.4 million. That includes $24,450,000 in appropriated funds and $1.95 million in reimbursements from OPM's civil service retirement trust fund for adjudicating retirement cases. The OMB request level for 1994 was $27.16 million for appropriated funds. The trust fund request was in the neighborhood of $2 million.

I want to leave as much time as possible for you to ask us questions to make sure we are responding to the specific concerns you have.

[The information follows:]

STATEMENT

DANIEL R. LEVINSON

CHAIRMAN

U.S. MERIT SYSTEMS PROTECTION BOARD

BEFORE

SUBCOMMITTEE ON TREASURY, POSTAL SERVICE

AND GENERAL GOVERNMENT

COMMITTEE ON APPROPRIATIONS

U.S. HOUSE OF REPRESENTATIVES

FEBRUARY 24, 1993

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you today to discuss the resources and performance of the U.S. Merit Systems Protection Board. I want to emphasize that the Administration is currently formulating the President's FY 1994 budget. Because of that, I am not in a position to provide you with the Administration's position on funding at this time. As soon as the President's budget is released, I would be pleased to provide you with the Board's views. I am pleased to report to you, however, that the Board's productivity is high and we have accomplished this with limited resources.

A brief background overview may be helpful. As you know, Mr. Chairman, the Board was established by the Civil Service Reform Act of 1978 as an independent agency and successor to the Civil Service Commission. The Board's mission is to ensure that agencies make employment decisions in accordance with the merit systems principles and that the merit systems are kept free of prohibited personnel practices. Our mission has two principal components.

First, we adjudicate employee appeals of agency personnel actions, Office of Personnel Management (OPM) retirement decisions and other appeals made subject to our jurisdiction by law. Approximately two million federal employees--two-thirds of the civilian workforce--have appeal rights to the Board. In addition to employee appeals, we adjudicate disciplinary and corrective action cases

brought by the Special Counsel involving prohibited personnel practices and the Hatch Act. We also hear cases involving actions against administrative law judges and requests to review OPM regulations. As the second component of our mission, we conduct studies of the merit systems that examine a broad range of civil service issues, and we review the significant actions of the OPM.

Since 1987, our caseload has grown, on average, at a rate of about 3 percent per year. Much of this upward trend can be explained by new laws extending appeal rights to additional employees and creating new remedies. In 1987, the Postal Employees Appeal Rights Act gave certain Postal Service supervisors and managers the right to appeal suspensions and firings to the Board. The Whistleblower Protection Act of 1989 broadened the range of personnel actions whistleblowers can appeal to the Board. In 1990, the Civil Service Due Process Amendments extended appeal rights for firings, suspensions, and actions taken because of alleged poor performance to additional employees in the excepted service.

During fiscal years 1984-1992, after the approximately 11,000 appeals from the fired air traffic controllers had been decided at the regional level, the number of cases decided by our administrative judges each year has averaged 7,854, with a high of 8,300 in 1991. Since 1986, excluding the period while air traffic controller cases were before

the three-member Board, the average number of cases decided annually by the Board on petitions for review has averaged 1,548, with a high of almost 1,800 in FY 1992.

Despite overall increases in our caseload, the Board's resources, adjusted for inflation, have decreased sharply. Our budget was $21.1 million for FY 1984 and $26.4 million for FY 1993. Because inflation has eroded the dollar at rates of from 2 to 4 percent in each of those years, we would need more than $35.5 million in the current fiscal year to equal our FY 1984 appropriation. Considering that the Board in recent years has absorbed most of the unavoidable cost increases in employee pay and benefits, we are doing significantly more with fewer resources than we had in 1984.

In our regional offices, we are processing more cases. Nonetheless, our administrative judges continue to produce high quality decisions with an enviable record for timeliness. In FY 1992, our administrative judges decided cases in an average of 79 days, with 97 per cent decided within our 120-day standard. At headquarters, the Board reduced the pending workload--from just over 1,000 on October 1, 1990, to about 580 two years later--while continuing to process newly-received cases. Board decisions continue to be upheld at a remarkable rate by our primary reviewing court. In FY 1992, the U.S. Court of Appeals for

the Federal Circuit left 93 percent of the Board decisions it reviewed unchanged.

Despite limited resources, we have also stepped up our studies function. Since 1987, we have steadily increased the number, quality and timeliness of the published reports of our studies. The Board has issued 31 reports in the past five years. The reports cover such topical subjects as sexual harassment, the "glass ceiling," recruiting for Federal positions, employee turnover and workforce quality. These studies are widely recognized as groundbreaking in providing fundamental information about the Federal workplace. Yet, the budget allocation for studies represents only about five percent of the Board's total resources.

Our record of steady productivity improvement is attributable to several management initiatives. The success of our program of alternative dispute resolution through settlement of cases is a major factor. The rate of settlement of cases not dismissed has risen from 6 percent in FY 1984 to approximately 50 percent in each of the past five years. Settlements cut costs for the Board and the parties by eliminating the need for hearings and travel. We increased staff productivity by computerizing case management, decision drafting and other functions. We believe productivity was also increased by professional development activities and creativity in case management.

The benefits of these initiatives, however, may already have been fully realized, with little room for further improvement.

In my view, Mr. Chairman, the Board is already producing cost-efficient results. In the seven appearances I have made before this Subcommittee, we have requested only modest increases in appropriations for uncontrollable costs, such as salary and rent, and expansions in our jurisdiction. We expect that when the President's budget is complete, we will be requesting an appropriation for FY 1994 that will allow us to continue to accomplish our mission effectively and efficiently.

MERIT SYSTEMS PROTECTION BOARD

1994 CURRENT SERVICES BUDGET

(Dollars in Thousands)

FY 1994 Current Services	Object Class
19,671	Personnel Comp. & Benefits
728	Travel
86	Transportation
2,235	Rental Payments to GSA
74	Rental Payment to Others
596	Rent, Communications, & Utilities
127	Printing and Reproduction
1,137	Other Services
306	Supplies & Materials
617	Equipment
25,577	Total, Appropriated Funds
2,051	Trust Fund
27,628	Total Request

United States Merit Systems Protection Board

Daniel R. Levinson

Chairman

Daniel R. Levinson was appointed Chairman of the U.S. Merit Systems Protection Board, an independent Federal agency, on August 15, 1986, following Presidential nomination and Senate confirmation.

As the Board's chief executive officer, he administers an agency with a $27 million budget and 300 employees, nearly half of whom are adjudicators and lawyers. Together with two Board members, he exercises final Executive Branch authority in deciding appeals from major adverse personnel actions, retirement decisions, whistleblower, and Hatch Act matters for the three million member Federal civilian workforce.

Mr. Levinson previously held the positions of General Counsel of the U.S. Consumer Product Safety Commission (1985-1986) and Deputy General Counsel of the U.S. Office of Personnel Management (1983-1985).

Prior to joining the Reagan-Bush Administration, Mr. Levinson was a partner in the Washington, DC, law firm of McGuiness & Williams, where he represented management in labor and employment matters. He also served as an adjunct lecturer at the American University Law School and the Catholic University of America. He began his career with a two-year clerkship to the Appellate Division of the New York Supreme Court.

Mr. Levinson is a Phi Beta Kappa graduate of the University of Southern California and received his law degree from Georgetown University. He also holds a master of laws degree in labor law from The George Washington University. Among his published works are *Quayle Law Reforms and the MSPB* (The Federal Circuit Bar Journal, Fall 1991), *Federal Personnel Law and the Mixed Case* (Labor Law Journal, December 1986), and *Voluntary Standards: Integral to CPSC Mission* (Legal Times, September 9, 1985).

Mr. Levinson resides with his wife and their two daughters in Chevy Chase, Maryland.

January 1992

United States Merit Systems Protection Board

Antonio C. Amador

Vice Chairman

Antonio C. Amador took the oath of office as Vice Chairman of the U.S. Merit Systems Protection Board on November 1, 1990, following his nomination by President Bush and confirmation by the U.S. Senate. At the time of his appointment, Mr. Amador was Deputy Director, Program Review Branch, Employment Development Department of the State of California. He commenced his service in the Employment Development Department in 1983.

From December 1981 to January 1983, Mr. Amador was Director of the California Youth Authority, the nation's largest youthful offender corrections program, serving 9,000 wards in institutions and camps and 4,100 parolees. From 1979 to 1981, he was a member of the Youthful Offender Parole Board and served as its Chairman from 1980 to 1981. During the time of his service, the Board was responsible for approximately 40,000 case decisions affecting youthful offenders annually.

From 1966 to 1979, Mr. Amador was a police officer in the Los Angeles Police Department. During this time, he also served for five years as President and member of the Board of Directors of the Los Angeles Police Protective League. In this position, he was actively involved in labor relations, initiating the first written contract between police officers and the City of Los Angeles.

Mr. Amador is a member of the California Peace Officers Association, the Latino Peace Officers Association, the California State Juvenile Officers Association, and other law enforcement organizations. He has served on numerous boards and commissions in California.

Mr. Amador served in the U.S. Army from January 1963 to December 1964 and was a member of the Utah Air National Guard from 1964 to 1966.

A native of Utah, Mr. Amador attended the University of Utah and Los Angeles Harbor College. He received his law degree from the McGeorge School of Law, University of the Pacific, in 1988.

Mr. Amador resides with his wife and family in Fairfax County, Virginia.

December 1990

United States Merit Systems Protection Board

Jessica L. Parks

Member

Jessica L. Parks took the oath of office as a Member of the U.S. Merit Systems Protection Board on May 18, 1990, following nomination by President Bush and confirmation by the Senate.

At the time of her appointment, Ms. Parks was Associate Regional Counsel for Litigation and Program Enforcement for the U.S. Department of Housing and Urban Development in Atlanta, Georgia. From 1982 to 1985, Ms. Parks served as an administrative judge in the Board's Atlanta Regional Office.

Ms. Parks has also been the Agency Counsel for the Craven County Department of Social Services in New Bern, North Carolina; a private practitioner in Jacksonville, North Carolina; an associate with the firm of Bowers and Sledge in New Bern; and a law clerk to the Chief Counsel at the George C. Marshall Space Flight Center, National Aeronautics and Space Administration, in Huntsville, Alabama.

She is a member of the North Carolina Bar and is admitted to practice before the U.S. Court of Appeals for the Sixth Circuit and the U.S. District Court for the Eastern District of North Carolina.

Ms. Parks received her bachelor of arts degree cum laude from Tulane University, and her law degree from the University of Tennessee College of Law.

A native of Chattanooga, Tennessee, Ms. Parks resides with her husband and their two daughters in Alexandria, Virginia.

May 1990

United States Merit Systems Protection Board

Lucretia F. Myers

Executive Director

Lucretia F. Myers was appointed Executive Director of the U.S. Merit Systems Protection Board in January 1987. She manages the programs and operations of the Board and its 11 regional offices. In addition to her MSPB responsibilities, she serves on the 15-member International Civil Service Commission, which regulates the conditions of service for more than 50,000 United Nations employees at some 600 duty stations worldwide. She was appointed to this position by the U.N. General Assembly in February 1992.

Prior to her MSPB appointment, Ms. Myers served in a variety of positions at the U.S. Office of Personnel Management (OPM). From June 1986 to January 1987, she was Deputy Associate Director for Administration, responsible for the agency's fiscal, administrative, electronic data processing, and human resources management functions.

Previously, she served as Deputy Associate Director for Compliance and Investigations, where she managed one of the civilian sector's largest background investigations programs, as well as the personnel management evaluation and workforce information programs. In OPM's Compensation Group, she served first as the Assistant Director for Retirement Programs and later as Assistant Director for Pay and Benefits Policy. In these positions, she was in charge of administering the Government's fourth largest entitlement program and directing the policy for the largest pay and benefits program in the Free World. Ms. Myers joined OPM in 1979 as a member of the personnel office and quickly rose to head that office as Assistant Director for Personnel and EEO. She went to OPM from the Department of the Air Force, where she held mid to upper management positions in human resources management at a variety of locations.

Ms. Myers was appointed to the Senior Executive Service in 1980 and is a 1983 graduate of the Senior Executive Fellows Program at Harvard's John F. Kennedy School of Government. During her Government tenure, she has received numerous awards for outstanding performance and executive excellence, including the Board's highest honor, the Theodore Roosevelt Award, in 1989. In 1988, President Reagan awarded her the Presidential Rank Award of Distinguished Executive.

March 1992

United States Merit Systems Protection Board

Llewellyn M. Fischer

General Counsel

Llewellyn M. (Lew) Fischer was appointed in January 1987 to the position of General Counsel of the U.S. Merit Systems Protection Board after serving as Deputy General Counsel since October 1985. From July 1989 to June 1990, he served as Assistant Counsel to the President in the Office of Counsel to the President at the White House.

Prior to his appointment with the Board, he had served as the Associate General Counsel of the Office of Personnel Management since 1973. He was also a personnel management specialist in the Civil Service Commission's Portland, Oregon Area Office from 1966 until 1972.

Mr. Fischer was previously an investigator for the Civil Service Commission's Bureau of Personnel Investigations in Las Vegas, Nevada and later became a personnel staffing specialist in Portland, Oregon. He was a reporter for Dun & Bradstreet in Seattle, Washington from 1964 to 1966.

A veteran of the United States Air Force, he served from 1955 until 1959 as a cryptographer in France.

Mr. Fischer holds a bachelor of arts degree in history and political science from the University of Montana, where he graduated with honors in 1962. He earned his juris doctor degree from the Northwestern School of Law, Lewis & Clark College, Portland, Oregon in 1973, and was an editor of the Law Review. He is a member of the Oregon Bar Association and the District of Columbia Bar Association.

A native of Montana, he currently resides with his wife, the former Mary Terry of Danville, Virginia, in Great Falls, Virginia, a suburb of Washington, DC.

September 1990

United States Merit Systems Protection Board

John M. Palguta

Deputy Director
Policy and Evaluation

John M. Palguta has served as Deputy Director, Office of Policy and Evaluation, U.S. Merit Systems Protection Board, since 1989. He is responsible for supervising the operations of the Policy and Evaluation staff in performing the Board's statutory mission to conduct merit systems studies and to report on the significant actions of the Office of Personnel Management (OPM).

Mr. Palguta joined the Board in December 1979. He was employed in the predecessor office of the Office of Policy and Evaluation, first as a senior research analyst and, from 1984, as one of two supervisory analysts. Prior to joining the Board, he was a branch chief in the personnel office of OPM.

Mr. Palguta held various positions with the Civil Service Commission after joining that agency as a personnel management intern in 1970. Until 1976, he held positions in the San Francisco Region, including that of personnel management advisor for Federal agencies in the four states served by the region. In 1976, he moved to Washington, DC, to become an agency officer in the Commission's Bureau of Personnel Management Evaluation. He began his Federal service career with the U.S. Post Office in 1968.

Mr. Palguta received a B.A. degree from the University of California at Northridge and a Master of Public Administration degree from the University of Southern California. He is active in a number of professional associations and will serve as President-Elect of the Federal Section of the International Personnel Management Association in 1992 and as President in 1993. He is also the 1991 recipient of the Board's highest honor, the Theodore Roosevelt Award.

Mr. Palguta resides with his wife and two daughters in Vienna, Virginia.

September 1991

AFFORDABLE FTE

Mr. HOYER. All right. First of all, I like your phrase, I haven't heard it before but I think it is probably the most accurate phrase that I have heard, affordable FTEs. I also like the fact that you are looking at what you have on board as the figure to which the cut is going to be applied and trying to work with that.

I think that is very responsible and the best presentation of what our expectations are probably going to be and the most realistic. I think you are looking at it as realistically as can be. My concern has been over the years in this agency, and continues to be, the ability that we have to handle cases that come before you on the theory that if the resolution of these cases was delayed for long periods of time, the employee, no matter what their rights may be, effectively have been denied. How are we in terms of case management?

CASE MANAGEMENT

Mr. LEVINSON. The Board has moved expeditiously during the last couple of years to make sure that the pending cases are kept at an absolute minimum, both in the regions and at headquarters. We are able to maintain a short turnaround time throughout the regions. For FY 1992, the average case processing time for the approximately 7,000 cases filed in the regions, where our primary intake is, was around 78 to 79 days.

At the Board, the average turnaround time on petitions for review of initial decisions has come down a great deal over the last couple of years. Seventy percent of those cases are resolved within the 110 days that we set for ourselves as a deadline. The balance takes a good deal longer, but we have reduced the number of cases at headquarters from close to 1,000 cases pending a couple of years ago to more in the neighborhood of 500 to 600 cases that are pending in some office at headquarters.

Mr. HOYER. What is the average length that those 500 cases have been pending and what is the longest period of time that a case has been pending? You can provide that for the record if you need to.

Mr. LEVINSON. I know that we have that information. I just don't want to take up your valuable time looking for the correct chart to give you the numbers.

Mr. HOYER. We may go on to some other question and somebody can look it up.

Ms. MYERS. The average processing time for those cases that were decided in FY 1992 is 165 days at the headquarters. That compares to 220 days in 1991. The average dropped during fiscal year 1992.

Mr. HOYER. My question was, you had 500 cases—perhaps I am incorrect. Does that deal with the 500 pending cases?

Ms. MYERS. The average age of cases pending, at the end of January 1993, was 160 days. Most of the pending cases are not old cases that are being held. Many of the old cases have been cleared out.

Mr. HOYER. And what is the longest time that a case has been pending of those 500?

Ms. MYERS. I do not have that information.

Mr. HOYER. Could you get us that information as well?

Mr. LEVINSON. We certainly can, but in terms of our entire caseload, I can say flatly that we have only a handful of cases that date back more than a couple of years.

[The information follows:]

PENDING CASES

The oldest pending case at the Board is *Peggy I. Hawkins v. U.S. Postal Service*, MSPB Docket No. AT-0752-87-0068-X-1, which was received at headquarters on July 22, 1988. This case stems from Ms. Hawkins' removal by the agency, which she appealed to MSPB in October 1986. The initial decision of the administrative judge, issued in February 1987, affirmed the removal. Ms. Hawkins then filed a petition for review with the Board, and the Board's decision, issued in November 1987, mitigated the removal to a demotion. In April 1988, Ms. Hawkins filed a petition for enforcement with the regional office, claiming that the agency had placed her in a lesser position than it should have and disputing the computation of her back pay and the amount of annual leave restored to her. The administrative judge's decision, issued in June 1988, found that the agency had not complied with the Board's order of November 1987 and referred the case to headquarters for enforcement.

This is one of about 10 Postal Service cases that have been referred to Board headquarters to enforce compliance, in which the dispute is over computation of back pay and/or restoration of annual leave. These cases involve difficult issues relating to the Postal Service's annual leave regulations and the applicability of the Back Pay Act to the Postal Service. The Board has just issued the lead case dealing with these issues and expects to issue *Hawkins* and the other cases raising similar issues shortly.

This case is also one, as I said, of only a handful pending at headquarters that date back more than a couple of years. The current 3-member Board, with two of its members appointed in 1990, has made a concerted effort over the past two fiscal years to complete old cases and to reduce the backlog of pending cases. In fiscal year 1991, the Board issued 1,942 decisions and reduced the number of cases pending from 1,021 at the beginning of the fiscal year to 784 at the end of that year. In fiscal year 1992, the Board issued 1,910 decisions and further reduced the number of pending cases to 630. [NOTE: The figure cited earlier, 580, is the number of pending petitions for review and is included in the 630, which also includes reopenings, court remands, cases referred to enforce compliance, and mixed cases in which EEOC does not concur with the Board decision.] The Board reduced the pending caseload while continuing to process newly-received cases.

PROHIBITED PERSONNEL PRACTICES

Mr. HOYER. Now let me ask you some specific substantive questions about your jurisdictional issues. Specifically, what prohibited personnel practices do you have jurisdiction over?

Mr. LEVINSON. Prohibited personnel practices are listed in Title V of the United States Code. The Office of Special Counsel receives and investigates alleged violations of prohibited personnel practices listed in section 2302 of Title V.

Mr. FISCHER. Yes, 2302.

ALLEGATIONS OF DISCRIMINATION

Mr. HOYER. Do you adjudicate sexual harassment cases?

Mr. LEVINSON. Sexual harassment does come up as an issue. Our jurisdiction includes civil rights matters when they are appended to a civil service action, and sex discrimination accounts for a fair number of the civil rights charges that are made. That is, the defense to adverse actions often includes a claim that the individual has been subject to sex discrimination, and sexual harassment often is the specific charge that is made.

Mr. HOYER. In other words, that the adverse action was related to sexual harassment?

Mr. LEVINSON. That is correct. I think we had in the neighborhood of 50 allegations of sexual harassment over the course of the last year.

Mr. FISCHER. 41.

Ms. MYERS. Of the 495 allegations of sex discrimination, 41 involved claims of sexual harassment.

Mr. HOYER. That was 41 out of 490?

Ms. MYERS. 495 allegations of sex discrimination. About nine percent of the claims of sex discrimination involved sexual harassment.

Mr. HOYER. That 495 is a total of how many cases, and therefore I am asking you what percentage of the cases raised were sex discrimination cases?

Ms. MYERS. 17 percent of the allegations of discrimination involved sex discrimination.

The number one allegation of discrimination is based on disability. Thirty-three percent of the 2,941 allegations of discrimination involved disability. Cases decided involving allegations of discrimination were 11 percent of the total caseload. As the Chairman mentioned earlier, we decided 7,294 in the regions and, of those, 777 or 11 percent retained allegations of discrimination, some of the allegations being withdrawn during the adjudication of cases.

Mr. HOYER. Of which 33 percent were disability claims?

Ms. MYERS. Yes. Thirty-three percent or 975 allegations related to disability. Disability is the number one allegation. Cases may raise multiple allegations involving discrimination. They might allege both sex discrimination and disability in the same case. I am

talking about allegations—if there were three allegations in one case, I have counted it three times.

Mr. HOYER. On the disability allegation, what is the most common or I want a common example of the allegation that would be raised. If you can't give that to me, maybe you could provide that for the record. Do you understand what I am saying?

Ms. MYERS. Yes.

Mr. LEVINSON. What kind of disabilities might be——

Mr. HOYER. Is it an allegation they are discriminated against because of a disability? I am wondering if there is a common strain as to what shall—how the discrimination manifests itself. For instance, if I am in a wheelchair and they don't make a reasonable accommodation for me to do another function for a job that I might otherwise be qualified to do. Obviously, I am pretty interested in that having been the sponsor of the ADA in which employment was one of those included provisions in the ADA. Of course the Federal Government has been covered by the 1973 act for some time.

Mr. LEVINSON. That is correct. We have had disability claims before the Board throughout its history. It is not uncommon to get that kind of defense from an employee—that the agency has failed to accommodate in a reasonable way to an individual with a disability notwithstanding that the person is qualified to do the job.

Mr. HOYER. I would be very interested for related reasons unrelated to budget reasons the—relatively brief. I don't want your staff to spend a large amount of time on it. I want to know what substantive allegations are being raised and the disposition of those, and how successful we are at bringing the Federal Government to accommodating those with disabilities.

Mr. LEVINSON. If you really want to get a global view of the issue, of course, it will be important to get EEOC's sense of how these charges are made since our jurisdiction is much more limited in this area. There has to be an adverse action that brings the issue before us. Whereas, the EEOC will see a much broader range of civil rights.

Mr. HOYER. That is a good point, but I would still be interested. I don't want you to take a lot of time on that. I don't expect any detailed study, but to the extent you can with relative ease give me some general idea of what issues are being raised and how they are disposed of.

[The information follows:]

DISABILITY (HANDICAP) DISCRIMINATION CASES

The Board's automated Case Management System tracks the kinds of discrimination alleged in mixed cases (race, sex, age, disability, etc.), but does not contain data on specific allegations made in disability cases. Our regional directors, however, advise us that the most common allegations involving disability (handicapping condition) made by appellants are that the agency failed to provide a reasonable accommodation of the appellant's disability and that the appellant received disparate treatment because of his/her disability. The most common allegations made by agencies are that the appellant is not a "qualified" handicapped employee, i.e., he/she does not meet the requirements to invoke the statutory protections against discrimination on the basis of disability (handicapping condition) and that the appellant did not show a causal connection between the misconduct charged and the disability.

As Ms. Myers stated, discrimination on the basis of disability was the form of discrimination alleged most frequently in cases decided by MSPB administrative judges in fiscal year 1992. There were 975 such allegations, accounting for 33 percent of the total number of allegations of discrimination.

Our regional directors advise us that the disability most commonly claimed is alcoholism. After alcoholism, and sometimes in conjunction with it, the next most frequently claimed disability is drug dependency.

The regional directors also advise us that many of the cases involving alcoholism are settled, generally because the employee agrees to enter a rehabilitation program. In the cases that are adjudicated on the merits, our administrative judges apply Board, EEOC, and court precedent to the unique facts of each case and render a decision.

THE BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS

Mr. HOYER. Have you had any recent allegations of sexual harassment at the Bureau of Alcohol, Tobacco, and Firearms?

Mr. LEVINSON. In the context of cases that have come before us?

Mr. HOYER. Yes.

Mr. LEVINSON. I have no specific recollection of cases actually crossing my desk that have raised sexual harassment at the Bureau.

Mr. HOYER. If you would have your staff check into that, and provide for us any pertinent information, we will be having a hearing with ATF soon, we have substantial trouble with the allegations regarding ATF.

[The information follows:]

ALLEGATIONS OF SEXUAL HARASSMENT

A survey of our regional offices indicates that no appeals have been received involving the recent allegations of sexual harassment of employees at the Bureau of Alcohol, Tobacco and Firearms.

OUTREACH

Mr. HOYER. Its each agency responsible for educating Federal employees as to what prohibited personnel practices are, what their procedural rights are under current law? Is the agency responsible for that?

Mr. LEVINSON. I can think of nothing in positive law that places that obligation on agencies to inform, to educate employees in any general way.

Mr. FISCHER. I don't think there is a statutory provision.

Mr. HOYER. You don't know of any personnel, OPM order that relates to that, notification to the employees as to what prohibited personnel practices are?

Mr. FISCHER. I don't know that OPM has that responsibility.

Mr. LEVINSON. A very disturbing number came out of a recent GAO survey. It found that 70 percent of Federal workers were not familiar with the Whistleblower Protection Act rules and requirements, what exactly the law meant by fraud, waste and abuse, and how to go about vindicating rights under the Act. GAO suggested that whistleblower law training should be considered a part of ethics training throughout the Federal Government.

I thought that was a worthwhile idea. In fact, there are many issues in our field that cross boundaries with our sister agencies, and should be considered not only from a budgetary perspective to see where money can be saved, but also from a policy perspective

to ensure workplace due process works right. It would be valuable, as we look for ways to improve the internal workings of the Federal Government, to give serious attention to how we can rationalize the very convoluted and balkanized process of resolving personnel disputes in the Federal Government, involving the EEOC, the FLRA, the FSIP and the Office of Special Counsel.

This is a highly complicated area and some might argue rather persuasively that the sheer complexity works against vindicating rights in a fair and efficient way. If the Administration is going to be looking at ways to make the Federal Government more efficient, more effective, more entrepreneurial, I think it is important that we focus as well on the workplace due process side of the system. I am looking forward to a new OPM director and others in the personnel policy field to play an important role in reforming the process.

And given your special interest, and that you have followed this field closely for so many years, I would hope that you would be interested in being part of the leadership on this as well.

Mr. HOYER. I very much look forward to pursuing that with you. I think your observations are correct. I think in terms of reinventing government, that is certainly part and parcel of it. Good. We will do that. All right. Thank you very much.

We know that your budget will be coming down. We will be having further discussions with you as it relates to the numbers that come down, particularly as it relates, to your ability to process your cases which is of great concern to this committee.

Mr. LEVINSON. Thank you very much.

[Questions from Mr. Hoyer for the record follow:]

U.S. MERIT SYSTEMS PROTECTION BOARD

ANSWERS TO WRITTEN QUESTIONS FROM SUBCOMMITTEE ON TREASURY,
POSTAL SERVICE & GENERAL GOVERNMENT,
HOUSE APPROPRIATIONS COMMITTEE

1. Would you please explain to the committee the duties of the Board and specifically how they relate to the duties of the Special Counsel. Please include in that explanation whether or not you think there should be separate appropriations for each operation.

The Board has a two-part mission--adjudication and studies. The Board's adjudicatory mission consists of: (1) deciding appeals by Federal employees of agency actions that are appealable to the Board under a law, rule, or regulation; and (2) deciding complaints and stay requests brought by the Special Counsel, proposed agency actions against administrative law judges, and requests to review regulations of the Office of Personnel Management (OPM). The Board's studies mission consists of: (1) conducting studies of the civil service and other merit systems in the Executive branch; and (2) conducting an annual review of the significant actions of OPM.

The Civil Service Reform Act of 1978, which created the Board, established the Special Counsel as an office within MSPB. Then, as now, the Special Counsel was charged with investigating complaints of prohibited personnel practices, violations of the Hatch Act, and violations of other civil service laws, and, where warranted, bringing corrective or disciplinary actions before the Board. In effect, the Special Counsel functions as prosecutor, and the Board functions as judge. The Special Counsel functioned independently during the time it was an office of MSPB, and it became a separate independent Executive branch agency on July 9, 1989, in accordance with the Whistleblower Protection Act.

The Office of Special Counsel and the MSPB receive separate appropriations from the Congress, and we believe this is an appropriate reflection of the separate and independent roles the two agencies perform as prosecutor and adjudicator, respectively, of certain personnel disputes between Federal employees and Executive branch agencies.

2. Your caseload continues to grow at three percent a year because of new laws extending appeal rights to additional employees and the creation of new remedies. What steps has the Board taken to educate the agencies with regard to these new laws?

The Board conducts, on a continuing basis, extensive outreach to its major constituencies, including Federal employee organizations and unions, agency counsel and other agency representatives, and members of the private bar. In FY 1992, approximately 240 outreach activities were conducted, an average of almost one for each working day.

Outreach activities include speeches and other personal appearances by Board members and regional and headquarters staff, conducting or participating in seminars and other training programs, and providing various written materials. As new laws extend Board appeal rights to additional employees and/or create new remedies, MSPB personnel incorporate information on such new rights and remedies into their outreach presentations. Furthermore, as the Board interprets provisions of new laws in the context of its decisions on individual appeals, information on these developments in Board case law is also incorporated into outreach presentations. The publication of Board decisions also serves to educate agencies and employees about the impact of new laws. The Board's information publications are continually updated to reflect changes in the law affecting Board jurisdiction and procedures, and Board personnel also write articles discussing new laws for publication in law reviews and publications concerned with human resources management and public administration.

The most significant legislation affecting Board jurisdiction in recent years was the Whistleblower Protection Act of 1989. Following enactment of that law, the Board quickly developed its implementing regulations and then proceeded to train its employees, both in the regional offices and at headquarters, in the provisions of both the law and the implementing regulations. Regional and headquarters personnel, in turn, conducted extensive outreach to familiarize both agency and employee representatives with the provisions of the new law and the Board's regulations. At headquarters, attorneys held a symposium on the Whistleblower Protection Act that was attended by many agency and employee representatives. Board staff developed a new publication, "Questions & Answers About Whistleblower Appeals," which was printed and given wide distribution soon after the law took effect. The publication has been reprinted several times in the past three years, and over 50,000 copies have been distributed by MSPB. In addition, camera-ready copy has been provided to a number of agencies so that they could print a large number of

copies for internal distribution. As the Board has issued decisions interpreting various provisions of the Whistleblower Protection Act, Board personnel have developed written handouts summarizing these significant decisions and have distributed these handouts widely in outreach presentations.

3. Specifically what "prohibited personnel practices" do you have jurisdiction over?

Any of the prohibited personnel practices described at 5 U.S.C. 2302 (b)(1) through (11) may come before the Board as either a charge against an appellant or an affirmative defense raised by an appellant in an appeal of an agency personnel action, or as a charge in a disciplinary or corrective action complaint (or stay request) brought by the Special Counsel.

It is important to remember that the commission of a prohibited personnel practice, in and of itself, does not confer jurisdiction on the Board regardless of whether the prohibited personnel practice is raised as a charge against an employee or as an affirmative defense against an agency action. In Federal employee appeals, the Board may only consider an allegation that a prohibited personnel practice has been committed if the allegation is raised in connection with an appealable personnel action. If the Board finds that an appealed action was the result of a prohibited personnel practice, it must reverse the agency action.

The Special Counsel is responsible for investigating allegations of all of the prohibited personnel practices described at 5 U.S.C. 2302 (b)(1) through (11). If the Special Counsel believes that a prohibited personnel practice has been or is about to be committed, and the Special Counsel is unable to bring about corrective action through negotiations with the agency, the Special Counsel may file with the Board a corrective action complaint against the agency or a disciplinary action complaint against the responsible employee(s).

The Congress has singled out one prohibited personnel practice--taking, failing to take, or threatening to take or fail to take a personnel action because of "whistleblowing" [5 U.S.C. 2302(b)(8)]--for different treatment from the others. Under the Whistleblower Protection Act, an individual affected by certain personnel actions [described at 5 U.S.C. 2302(a)(2)(A)] allegedly based on whistleblowing may appeal to the Merit Systems Protection Board if he/she first files a complaint with the Special Counsel and: (1) the Special Counsel notifies the individual that the Special Counsel will not seek corrective action from the Board, or (2) 120 days pass after the filing of the complaint and the Special Counsel has not notified the

individual that the Special Counsel will seek corrective action from the Board.

4. Do you adjudicate sexual harassment cases, and have any cases been filed against the Board?

The Board adjudicates cases involving sexual harassment as an affirmative defense raised by a Federal employee appealing an agency personnel action. Sexual harassment may also be a charge against an employee who appeals a disciplinary action such as a removal, demotion, or suspension. In addition, the Office of Special Counsel is authorized to investigate allegations of sex discrimination under the Civil Service Reform Act [5 U.S.C. 2302 (b)(1)], and to bring such complaints to the Board for adjudication if, after investigation of a complaint, the Special Counsel determines that there are reasonable grounds to believe that a violation has occurred or may occur.

In 1989 and 1990, one person filed allegations of sexual harassment against the agency, which were settled in 1991. No decision finding sexual harassment has been entered against the Board.

5. How would an investigation of a sexual harassment case typically begin?

In cases filed with the Board for adjudication, it does not conduct an investigation. As a quasi-judicial agency, the Board has no authority to investigate individual complaints. Rather, the Board, like a court, decides cases on the evidence of record submitted by the parties. Employee complaints are investigated as part of agencies' EEO complaint procedures if employees choose to pursue that avenue of redress.

In handling allegations of discrimination made against the Board, the Board would proceed in accordance with the regulations recently issued by the Equal Employment Opportunity Commission (EEOC) [29 C.F.R. 1614]. An employee with a claim of sexual harassment would contact one of the Board's equal employment opportunity counselors. The initial counseling stage of 30 days may be extended for an additional 60 days if the employee agrees to the extension. During counseling, the priority is to resolve the matter informally.

If no settlement is reached during the counseling stage, the counselor must hold a final interview with the employee. Within 15 days of receiving the written notice of final interview, the employee may file a formal EEO complaint with the EEO office of the Board or with the Chairman of the Board. If a formal complaint is filed and accepted for investigation, the investigation must be completed within 180 days. The Board has used an outside investigator for such investigations.

When an investigation is complete, the Board turns the investigative file over to the complainant, who may then request a final decision from the head of the agency or a hearing before an administrative judge at the EEOC. If the complainant does not request a final decision or a hearing, the agency will issue a final decision.

6. Is each agency responsible for educating Federal employees as to what "prohibited personnel practices" are and what their procedural rights are under current law?

To our knowledge, there is no statutory or regulatory requirement that agencies educate their employees as to what the statutory prohibited personnel practices are and what employees' procedural rights are under the law.

Under recently promulgated regulations of the Office of Government Ethics and related executive orders, all agencies are required to provide training on standards of ethical conduct for Executive branch employees. These standards include the prohibition of certain personnel practices as described in 5 U.S.C. 2302.

7. Do you have any educational or audit responsibilities to insure that this is done?

There is no statutory or regulatory requirement that the Board educate Federal employees as to what the statutory prohibited personnel practices are and what employees' procedural rights are under the law. The Board, however, does describe the statutory prohibited personnel practices (as well as the merit system principles) in its widely-distributed publication, "An Introduction to the MSPB." With respect to the prohibited personnel practice of taking actions based on whistleblowing, the Board has undertaken extensive educational initiatives, including seminars and other training programs, speeches and other personal appearances, articles, and information publications.

With respect to "audit" responsibilities, it should be noted that both components of the Board's studies mission are related to prohibited personnel practices. The Board is charged by the Congress to conduct studies of the civil service and other merit systems in the Executive branch in order to determine "whether the public interest in a civil service free of prohibited personnel practices is being adequately protected." The Board is also to conduct an annual review of the significant actions of OPM to determine "whether the actions [of OPM] are in accord with merit system principles and free from prohibited personnel practices." The results of these studies are required by law to be reported to the President and the Congress. As a matter of practice, the Board distributes the reports of its studies

widely--to agency heads, employee organizations, and many others with an interest in public administration and human resources management issues.

8. A high of 11,000 cases were processed in the early 1980's for the air traffic controllers. Do you have any similar types of cases that you are able to expedite because of their similarity?

The ATC cases in the early 1980's presented a unique situation because such a large number of cases involved virtually identical issues of law and fact. Even with the streamlined processing applied to these cases, however, the Board's resources were severely strained. It would be far more difficult to replicate such an effort today because of the Board's diminished resources.

According to our regional directors, reduction-in-force (RIF) cases most readily lend themselves to processing as a group because of the similarity of the issues involved. Among major RIFs that have resulted in significant numbers of RIF appeals being processed by our regional offices are the Census Bureau RIFs in the early 1980's, the abolishment of the Community Services Administration in the mid 1980's, and the Tennessee Valley Authority RIFs in 1987-88. Although RIF appeals involving a single installation may be processed as a group because of the similarity of the issues, it must be remembered that the appellants have competing interests under the RIF regulations. Also, there is a practical limit to how much the process can be expedited as the number of appeals increases.

Aside from RIF cases, the most recent example of processing a group of cases that presented similar issues resulted from the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) in 1989. Under that law, several thrift institution regulatory agencies were abolished and their employees transferred to the Comptroller of the Currency or the newly-established Office of Thrift Supervision (OTS). The Comptroller of the Currency and the Director of OTS were directed to implement restructured pay systems for their employees in early 1991. The implementation of the new pay systems resulted in approximately 100 adverse action appeals to MSPB, which were processed in the Board's Washington Regional Office.

It should be pointed out that, although our regional offices have had some experience in processing RIF and other types of cases in an expedited manner, none of these experiences begins to approach the numbers that were involved in the air traffic controller appeals in the early 1980's. An experience of even greater magnitude almost occurred in the fall of 1990, when a governmentwide furlough was anticipated because a budget agreement for the new fiscal year had not been reached. In late

August and early September of 1990, agencies issued proposed furlough notices to over 1 million Federal employees. Had these furloughs actually been effected, the Board expected to receive approximately 120,000 appeals, more than 10 times the number of ATC appeals processed in the early 1980's. Even with expedited processing, an influx of appeals of this magnitude would have strained the Board's resources considerably.

9. In your statement you say approximately $35.5 million would be needed in the current fiscal year (instead of the $26.4 million actually appropriated) to equal the fiscal year 1984 appropriation. Would you please explain to the committee how you were able to achieve this savings?

The Board believes that the increased efficiency that has enabled it to operate successfully without major increases in appropriations is the result primarily of the Board's emphasis on alternative dispute resolution and the widespread automation of agency functions.

The emphasis on alternative dispute resolution has resulted in an increase in the rate of settlement of appeals that are not dismissed from 6 percent in FY 1984 to 48 percent in FY 1988, then to 49 percent in both FY 1989 and FY 1990, and finally to 50 percent in both FY 1991 and FY 1992. A greater number of settlements means fewer hearings, and that results in cost savings to the Board and the parties, primarily in travel and court reporting costs.

With respect to automation of functions, all Board personnel have personal computers with advanced word processing software. This permits administrative judges and headquarters attorneys, for example, to draft decisions on their computers and cuts down on the need for clerical staff. All personal computers are connected to the Board's minicomputer, giving all employees access to the automated Case Management System, the Assignment and Correspondence Tracking System, summaries of Board decisions, and electronic mail. Board attorneys also have access to WESTLAW for on-line legal research, saving time and ensuring that current case law is applied.

In addition to promoting settlements and automation of functions, the Board has achieved savings through:

- Entering into interagency agreements for certain services, such as payroll, administrative payments, and accounting services from the National Finance Center; and drug testing services from the Department of Transportation;

- Making its decisions available to commercial publishers, rather than publishing decisions at its own expense;
- Purchasing, rather than leasing, equipment;
- Using system furniture, thus reducing the amount of space needed per employee;
- Grouping hearings at fixed hearing sites to reduce costs of travel and court reporting; and
- Using audio tapes of hearings rather than written transcripts.

As noted in our statement, the benefits of these initiatives--both program and management--may have been fully realized, with little room for further improvement.

10. How have the administrative judges been able to reduce the pending workload down to 580 cases, with a three percent annual increase in workload since 1987 and with decreasing resources?

The pending workload of the administrative judges at the end of FY 1992 was almost 1,800 cases (almost 1,600 initial appeals plus about 200 addendum cases and stay requests). At Board headquarters, there were about 580 petitions for review pending at the end of FY 1992.

The continued high level of receipts in the regional offices resulted in some increase in pending workload for the administrative judges in FY 1992, and the average time to process initial appeals increased slightly, from 74 days to 79 days. The administrative judges have been able to maintain their productivity in the face of increased receipts over the past few years because of Board initiatives to increase efficiency and the Board's investment in training for its judges, including training in alternative dispute resolution methods.

The average caseload per administrative judge increased from 123 in FY 1990 to 138 in FY 1991 and 137 in FY 1992. Because the judges could not be expected to carry this increased workload indefinitely, the Board in FY 1992 reduced FTE allocations to the non-legal offices at headquarters and transferred these FTE to the regional offices in order to add 8 new administrative judge positions. These positions were filled in the last half of the fiscal year, and, as a result, the Board expects that the average caseload per judge will return to a more manageable level in FY 1993.

At headquarters, the reduction in the pending appellate caseload from just over 1,000 cases at the beginning of FY 1991 to about

580 petitions for review pending two years later is the result primarily of the commitment of the current Board to complete old cases and to reduce the number of pending cases. The reduction in FTE allocations to the non-legal offices at headquarters also permitted the creation and filling of additional attorney positions in headquarters legal offices during that time.

Will you be able to continue to do more with less?

As noted in our statement, the benefits of the Board's initiatives to improve productivity may have been fully realized, with little room for further improvement. Also, because of the recent Executive Order calling for both staff reductions and reductions in administrative expenses over the next several years, it will become increasingly difficult to keep the pending workload at the current level, both in the regional offices and at headquarters, in spite of the redirection of resources to the adjudicatory function.

11. The 93 percent of Board decisions upheld by the court is impressive. What percentage of the cases heard by the Board are appealed to the courts?

Of the 1,799 decisions issued by the Board on petitions for review in FY 1992, 494--or 27 percent--were appealed to the courts.

THURSDAY, FEBRUARY 25, 1993.

U.S. OFFICE OF SPECIAL COUNSEL

WITNESSES

KATHLEEN DAY KOCH, SPECIAL COUNSEL

WILLIAM E. REUKAUF, ASSOCIATE SPECIAL COUNSEL FOR PROSECUTION

ROBERT D. L'HEUREUX, ASSOCIATE SPECIAL COUNSEL FOR INVESTIGATION

Mr. HOYER. We will now have the U.S. Office of Special Counsel. Ms. Koch.

Ms. KOCH. Thank you.

Mr. HOYER. Ms. Koch, we are very pleased to have you here as Special Counsel. We would be glad to have you introduce your colleagues, and we will include your entire statement for the record at this time, and you may proceed to highlight it as you deem most appropriate.

Ms. KOCH. Mr. Chairman, I am pleased to be here today to testify in support of the Office of Special Counsel.

With me today are William Reukauf, Associate Special Counsel for Prosecution, and Robert L'Heureux, Associate Special Counsel for Investigation.

Mr. Chairman, although this is my second appearance before this subcommittee as the Special Counsel, it is my first appearance since you became the Chairman. And knowing of your long-term concern for the rights of public employees, I look forward to working with you and other members of the subcommittee and the staff.

I would like at this time to take a brief moment to thank the staff already for their assistance and very responsive communication in the scheduling and rescheduling of this particular meeting. In the interest of time, as you mentioned, I will submit my prepared statement for the record. I will summarize it at this time, and I will even attempt to summarize the boilerplate disclaimer that we all are supposed to present you with.

We, as you know, do not have the administration's position on a budget, and we do not have specific funding figures or activities. As soon as the President's 1994 budget is released, I would be pleased to provide you with our views.

INCREASE IN ALLEGATIONS RECEIVED

Since the enactment of the Whistleblower Protection Act in 1989, the Office of Special Counsel has experienced a dramatic increase in the number of new complaints we have received. In fiscal year 1990 we received 31 percent more complaints than we received in fiscal year 1989. That number increased again in 1992 with an 18 percent increase.

And our first quarter experience in this particular fiscal year indicates that we will be receiving approximately 2,100 new complaints in this year. This number would be a 69 percent increase over the number received in our first year of operation under the Whistleblower Protection Act in 1989.

I also would like to point out that people count and not numbers, and that is the business we are in is people. And we can number crunch all we want, but we are in the business of protecting individuals who have, in the whistle blower area, been retaliated against for bringing forth information about fraud, waste and abuse in the government.

The total number of new complaints we receive in a year, going back to a little bit of number crunching, is not a reliable indicator of our work load because each matter that we receive often contains multiple allegations, so you will have more than one prohibited personnel practice alleged within one case. We are required by the statute to investigate each allegation, not just lump it together.

And so, if someone alleges sexual harassment and whistleblower retaliation, we must look into each one of those things. If warranted by the evidence, corrective action and/or disciplinary action proceedings are initiated. We received 3,170 allegations in fiscal year 1992 and see that this year the potential will be something like 3,400.

IMPROVEMENTS IN OSC PERFORMANCE

Consistent funding and stable staffing over the last two years, together with innovations in methods for reviewing and investigating new complaints, has allowed this office to become more productive and timely. We continue to focus on the goal of being as responsive and efficient as possible in safeguarding the merit system and protecting the rights of Federal employees. Our success in attaining this goal depends in very large measure on continued stable funding and staff.

I have been the Special Counsel for just over a year. In that time I have come to appreciate the importance and, quite often, the difficulties of this job. As I am sure you know, in this office approximately one hundred people must respond to the requests of a work force of over 3 million people. This office's main objective is to right wrongs and to help Federal employees who have unjustly been reprised against.

In my brief tenure, I have observed and worked with the committed staff of career civil servants dedicated to those high principles. In this appropriations process, I speak for them when I report on our past and future work.

As an aside, when I look at what we do, I look at the cost of what we do. When we talk about 3 million people, it costs about $8 million for us to do that. That is a little bit less than $3 a person in terms of a protective function that we are able to provide.

This concludes my statement. My associates and I would be pleased to answer any questions you or other members of the subcommittee have or to submit anything for the record.

Mr. HOYER. All right, thank you very much.

[The information follows:]

ROBERT D. L'HEUREUX
Associate Special Counsel for Investigation
U.S. Office of Special Counsel

Robert D. L'Heureux has been with the Office of Special Counsel since December, 1982 in various capacities in the Investigation Division.

He came to OSC from the Office of Inspector General, Small Business Administration where he was an assistant to the Inspector General starting in June, 1979. Before that time, Mr. L'Heureux was a Special Agent with the Naval Investigative Service from 1973 to 1979. He was a Captain in the United States Marines where he served from 1964 until 1973, including service in Vietnam.

Mr. L'Heureux is a graduate of the Georgetown University Law Center in Washington, D.C. and St. Joseph's College in Rensselaer, Indiana. He is a member of the Bar of the District of Columbia.

WILLIAM E. REUKAUF
Associate Special Counsel for Prosecution
U.S. Office of Special Counsel

William E. Reukauf was appointed Associate Special Counsel for Prosecution on March 18, 1985. He had served as Deputy Associate Special Counsel prior to this appointment. Prior to joining the Office of Special Counsel, Mr. Reukauf had been in private law practice in Washington, D.C. from 1976-1983.

He began his government service in 1969 as a law clerk in the Office of the United States Attorney for the District of Columbia. He was appointed Assistant United States Attorney in 1970, and served in that capacity until 1973. From 1973-1976 he served on the staff of the General Counsel of the United States Environmental Protection Agency.

Mr. Reukauf graduated from Hamilton College in 1966 with a B.A. degree and received his J.D. from the Georgetown University Law Center in 1969. He is a member of the District of Columbia Bar.

U.S. OFFICE OF SPECIAL COUNSEL
Current Services Budget - FY 1993
(in thousands of dollars)

OBJECT CLASSIFICATION		EST FY 1993
11.1	Personnel compensation	5,636
12.1	Civilian personnel benefits	940
21.0	Travel and transportation of persons	299
22.0	Transportation of things	10
23.1	Rental payments to GSA	481
23.3	Communications, utilities, and miscellaneous charges	232
24.0	Printing and reproduction	32
25.0	Other services	225
26.0	Supplies and materials	72
31.0	Equipment	35
99.9	TOTAL	7,962

STATEMENT OF
KATHLEEN DAY KOCH
SPECIAL COUNSEL
U.S. OFFICE OF SPECIAL COUNSEL

BEFORE THE SUBCOMMITTEE ON TREASURY, POSTAL SERVICE
AND GENERAL GOVERNMENT
COMMITTEE ON APPROPRIATIONS
U.S. HOUSE OF REPRESENTATIVES

FEBRUARY 24, 1993

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to appear before the subcommittee. In testifying today, I want to emphasize at the outset that the Administration is currently formulating the President's Fiscal Year (FY) 1994 Budget. I cannot, therefore, provide you with the Administration's position on funding for specific programs or activities. As soon as the President's 1994 Budget is released, I would be pleased to provide you with our views. Along with every other agency in government, we know we must work today and in the future to achieve the maximum return out of every dollar spent on our mission. With me today are Mr. William E. Reukauf, Associate Special Counsel for Prosecution and Mr. Robert D. L'Heureux, Associate Special Counsel for Investigation.

The Office of Special Counsel became an independent agency on July 9, 1989, the effective date of the Whistleblower Protection Act of 1989 passed by Congress in March of that year. Prior to that, the Office of the Special Counsel had operated as an autonomous investigative and prosecutive arm of the Merit Systems Protection Board since January 1, 1979, following Reorganization Plan Number 2 of 1978, and the Civil Service Reform Act of 1978.

The independence for OSC legislated by the Whistleblower Protection Act further enhanced the ability of OSC to enforce the expanded protection that the Act provides federal

employees who disclose wrongdoing in the government. The Office of Special Counsel now has the clear responsibility under the Civil Service Reform Act, as amended, for:

- the investigation of allegations of prohibited personnel practices, especially reprisal for whistleblowing, prohibited by civil service law, rule or regulation, and the initiation of corrective and disciplinary actions when such remedial actions are warranted;

- the interpretation and enforcement of the Hatch Act provisions on political activity; and,

- the provision of a secure channel through which federal employees can make disclosures of information evidencing violations of law, rule or regulation, gross waste of funds, gross mismanagement, abuse of authority, or substantial and specific dangers to public health or safety, without fear of retaliation and without disclosure of an employee's identity (except with the employee's consent).

We take our responsibility very seriously. Our commitment to that responsibility is at least in part responsible for the increase in the workload of the Office since enactment of the WPA in 1989.

The total number of complaints received in any year is not the exclusive barometer of our workload because a single complaint quite frequently has multiple allegations of wrong doing. For example, we received 1,239 complaints in FY 1989 which contained 1,891 allegations, 1,623 new complaints in FY 1990 which contained 2,588 allegations, 1,600 complaints in FY 1991 containing 2,441 allegations and, 1,891 complaints in FY 1992 containing 3,170 separate allegations. Based on the 706 complaints we have received through

January,1993 of FY 1993, we estimate that we will receive approximately 2,100 new complaints by the year's end. If the number of allegations we have received in complaints thus far in FY 1993 continue at a similar rate through the end of the year, we expect to receive approximately 3,400 allegations this Fiscal Year. This would be a 69 percent increase over the number of complaints received in FY 1989 and a 79 percent increase over the number of allegations received in that year. The continued increase in complaints and allegations demands careful allocation and management of our resources. This is particularly true since OSC is required by statute to investigate every allegation to the extent necessary to determine if reasonable grounds exist to believe a violation of law has occurred. If appropriate and warranted by the evidence, corrective and/or disciplinary action proceedings are initiated.

Consistent funding and a stable level of staffing, coupled with refinements in the processing of complaints over the past two years, have enabled us to meet the challenges of increased workload successfully. OSC achieves its goal of ensuring the integrity of the merit system by maintaining responsive and efficient operations which protect federal employees and applicants for employment. Continued review and evaluation of complaint processing procedures are an important aspect of OSC's future to increase productivity in light of increasing caseloads.

One example of OSC's increased effectiveness is the dramatic increase in the number of corrective actions obtained over each of the last three years (a 100% increase between FY 90 and FY 92). In FY 1990 we obtained 51 corrective actions, 80 in FY 91 and 102 in FY 1992. Preliminary indicators show the increase continuing this year. The majority of these corrective actions have come in cases where employees had been victimized for making whistleblower type disclosures within their agencies. Where evidence of wrongdoing is uncovered, our success in obtaining relief for federal employees results from our policy of vigorously seeking a negotiated corrective action before litigation or the institution of other

formal action by OSC. Negotiated corrective actions have benefitted both the victims of prohibited personnel actions and the government, while saving money for the taxpaying public by avoiding protracted and costly litigation. Our success in negotiating corrective actions permits us to focus resources that would otherwise be used for litigation in other productive areas such as increasing the awareness of federal managers and employees about their responsibilities, rights and protections.

While it is true that we attempt to negotiate corrective actions in the majority of cases where it is determined that a prohibited personnel action has occurred, we are neither shy about nor reluctant to institute litigation in those cases where settlement cannot be reached or more importantly, the offense is so egregious as to warrant prosecution. In those cases OSC initiates litigation before an administrative law judge of the Merit Systems Protection Board (MSPB) requesting the MSPB to order corrective and/or disciplinary action.

The Office of Special Counsel also has the statutory responsibility to enforce the Hatch Act. This includes investigating and prosecuting alleged violations of the Act before the MSPB as well as issuing advisory opinions to state, local and federal employees on Hatch Act questions. In FY 1992 OSC received 156 allegations of violations of the Act, conducted 55 field investigations and filed 13 cases with MSPB seeking disciplinary action. In addition, we issued 312 written advisory opinions, responded orally to almost 1100 telephoned requests for opinions, as well as responding to an additional 630 telephoned requests for general information.

As alluded to earlier in my statement, the OSC has a very active program to educate federal employees and managers about prohibited personnel practices, and other matters within the jurisdiction of this agency. Apart from the goal of ensuring that federal employees are fully aware of their rights and responsibilities, this educational effort is also intended to reduce the incidence of prohibited personnel practices, and other violations, through greater

awareness of the law. During the last year I and other members of the senior staff participated in over 50 programs and conferences throughout the United States and overseas. The programs and conferences were sponsored by organizations such as the Office of Personnel Management, federal employee unions, the Merit Systems Protection Board and other groups having an interest in federal personnel and fraud matters.

Briefly summarized, OSC's responsibilities are to investigate prohibited personnel practices and prosecute those persons believed to be in violation of the statute, interpret and enforce the Hatch Act provisions concerning political activity, and provide a channel through which federal employees may report wrong doing in their government without fear of reprisal. This latter responsibility authorizes the Special Counsel to review the disclosure and, when warranted, to require the concerned agency to investigate and report the results of the investigation to OSC. After OSC receives the report, the disclosing employee is given an opportunity to comment on it. The Special Counsel reviews the final package for responsiveness and statutory compliance. If the report satisfies those requirements, it is transmitted by the Special Counsel to the President and the Congress. During this entire process, OSC keeps the individual's identity Confidential if requested to do so by the employee. In that function, and in all of our work, we are concerned with our overall statutory obligation to protect employees, former employees and applicants for employment, and whistleblowers in particular, from prohibited personnel practices.

We predict that FY 1994 will bring a workload larger than we have experienced in past years. We will continue to dedicate our resources and efforts to acting timely and responsively on all matters and to effectively managing our pending workload. As I remarked earlier, it has only been with consistent funding and stable staffing that OSC has been able to keep pace with the increasing workload. We look forward to the future to develop a plan for continued improvement in the delivery of services to protect employees and the valuable merit system upon which federal employment is based.

This concludes my formal statement. Mr. Chairman, my associates and I would be pleased to answer any questions that you or other members of the Subcommittee may have at this time.

Mr. HOYER. You indicate that there are 100 people on board.
Ms. KOCH. We have 98 people.
Mr. HOYER. What is your authorized FTE?

STAFFING LEVELS

Ms. KOCH. Our authorized FTEs are 101. That does lead us to—by being over 100, we have been informed that we are to take the cut. We—as I said, we do not have the final budget returned to us in terms of what that is going to look like, but we anticipate that will happen to us.

The 98 that we are working with is—we are looking to hire the other individuals, and I have—at my office, I generally have on my desk requests from division heads asking for more people than we have FTEs. We have been very successful in expanding our staff by using special programs like stay in school programs. We have been able to hire on a part-time basis individuals from the University of the District of Columbia and University of Maryland quite frequently.

I have an excellent personnel director who seems to have what every manager needs, radar. She can find just wonderful people to do many of our tasks, and that expands our capability to get our work done.

Mr. HOYER. How do you perceive that—your understanding of the application of the 4 percent cut, would that be a reduction of four over the next four years or one year?

Ms. KOCH. In time, yes. That is the way I understand it.

Mr. HOYER. We correct then that at the end of four years you would be down to 97?

Ms. KOCH. That is my understanding of what we will be receiving.

Mr. HOYER. In your statement you said OSC is required by statute to investigate every allegation to the extent necessary to determine if reasonable grounds exist to believe a violation of law has occurred. How detailed is the initial investigation? How long does this investigation normally take?

Ms. KOCH. Let me defer to—either one of these individuals can give you a little more detail.

LENGTH OF INITIAL INVESTIGATIONS

Mr. REUKAUF. I believe we are at the situation now where the average age for this initial investigation is under 45 days. It entails in each case a conversation with the complainant, usually on the telephone, and written submissions from the complainant, oftentimes requests to the agency for particular documents relating to the personnel actions that are under challenge. We can usually in about a month figure out whether it needs to be fully investigated or if we have jurisdiction or whether it clearly is lacking in merit.

ASSISTING WHISTLEBLOWERS

Ms. KOCH. The initial phase often will go through a process, and we will discover that although someone may have a problem in the workplace—and we frequently get troubled people who come—that

is why they are there. They are troubled. And we have a staff of people that are trained to be very patient with the people who come to us. We work toward discovering whether we have jurisdiction because, although they may be troubled, we may not have jurisdiction.

And my goal is that this person shouldn't feel worse because they came to us, even if we can't help them. So I am very proud of the people when I walk through that part of the office sometimes, listening to them working with these individuals.

And when I mention in my statement about these caring people that work on my staff, it is very true. And I have been in government now 15 years and I have been—as Mr. Levinson mentioned all those different agencies—I have worked in three of those four or five agencies, so I am very familiar with the frustrations that Federal civilians run into when they can't figure out where to go to get help. So I am very concerned that my staff not add to that problem.

Mr. HOYER. I agree with that, and that is a good observation. The obverse of that is that Federal managers are incredibly frustrated with the inability to remove nonperforming employees. Both problems are important. I am absolutely committed to having Federal employees receive a fair hearing on their complaint, it is also going to be essential that we have a Federal system that allows managers to remove nonperforming employees in a manner other than destructive one.

The previous speaker obviously talked about these four or five different agencies. Both from the manager's standpoint, as well as the employees' and those who work within those agencies. There must be a great deal of confusion. Would that be a fair observation?

INFORMING FEDERAL EMPLOYEES OF THEIR RIGHTS

Ms. KOCH. I think the word frustration may be more fitting. I do outreach quite a bit to try to overcome what the—as Mr. Levinson mentioned—this perception that people don't know what a PPP is, what fraud, waste and abuse is, where to go to get help. It has been traditional for agencies not to teach their employees that there is this particular avenue that they have because that might cause more problems in terms of managing staff.

When I get out there and try to explain this mechanism, I frequently get comments from managers that they are frustrated by the employee having so many avenues and them having to try to remember all of these things. That is a bit true in terms of managing staff.

On the other hand, I try to remind them that the Federal work force is an example of how people ought to be treated, and there are sometimes costs that, just as we have in the Office of Government Ethics, which is a cost of doing business. It is important sometimes to—although we try to minimize that cost, it is important to at least have that little cost, and it is a tiny little cost, to remind people of rights and responsibilities and that it is perhaps a cost of doing business in government that we have chosen to expend because it is important that people be treated properly.

There is very little protection for a whistleblower in the private sector, and that is something we have determined that should exist in the public sector, that the separation between policy makers and workers has become so great in our government that we need perhaps some mechanism where people can come forward, where the policy maker, if the person down here makes a little bit of noise, finally will hear them.

Mr. HOYER. Which is, of course, the whole objective of the statute and your being here. You are right.

Of the 1,600 complaints received and investigated in 1991, how many did you determine were meritorious?

Ms. KOCH. Let's see.

Mr. REUKAUF. This is fiscal year 1992.

Mr. HOYER. 1991.

CORRECTIVE ACTIONS IN FISCAL YEAR 1991

Ms. KOCH. We had—that is not the determination of meritorious, but we were able to obtain corrective action, which means we actually got relief, in 72 of those cases. That does not mean that there weren't other—that they weren't investigated, but 72 we were able——

Mr. HOYER. Were resolved in favor of the employee with action being taken?

Ms. KOCH. With action being taken.

Mr. HOYER. We will be in contact with you again through the staff. I don't think a hearing will be necessary as it relates to the budget. When we receive your budget we will be in contact with you. Any observations you have with respect to the budget, we would be glad to receive from you.

Ms. KOCH. Thank you very much. I appreciate this opportunity.

Mr. HOYER. Hearing is adjourned.

[Questions for the record follow:]

QUESTIONS FROM CONGRESSMAN HOYER

OFFICE OF SPECIAL COUNSEL (OSC)

1. IN YOUR STATEMENT YOU SAID THAT OSC IS REQUIRED BY STATUTE TO INVESTIGATE EVERY ALLEGATION TO THE EXTENT NECESSARY TO DETERMINE IF REASONABLE GROUNDS EXIST TO BELIEVE A VIOLATION OF LAW HAS OCCURRED. HOW DETAILED IS THE INITIAL INVESTIGATION AND HOW LONG DOES THIS INVESTIGATION NORMALLY TAKE?

ANSWER: The initial investigation of complaints received in OSC is conducted in our Complaints Examining Unit. This investigation includes, at a minimum, a comprehensive review of all documents submitted to determine if any violation within our jurisdiction is apparent. Additionally we discuss the matter in detail with the complainant to be sure that we understand the complaint and to ascertain if any other information (not contained in the written materials) might support a violation within our jurisdiction. In the majority of complaints we also contact the agency personnel office. In many instances we also contact other persons who may have witnessed pertinent events. This initial investigation is normally completed within 30 to 60 days.

2. OF THE 1,600 COMPLAINTS RECEIVED AND INVESTIGATED IN 1991, HOW MANY DID YOU DETERMINE WERE MERITORIOUS?

ANSWER: During FY 91 OSC completed 204 on-site investigations (including investigations into matters received during FY 91 and carried over from FY 90), obtained 74 corrective actions, filed 5 disciplinary action complaints with MSPB, obtained 6 stays of personnel actions from MSPB and an additional 10 from the agencies involved, and intervened on behalf of one whistleblower in his appeal to the MSPB.

Further, although your question only asked about FY 91 matters, at this time we have compiled FY 92 numbers as well. In FY 92 OSC received over 1800 complaints, referred 270 complaints to the Investigation Division for further on-site investigation and an additional 62 complaints were referred to the Disclosure Unit. During FY 92 the OSC completed 234 field investigations (including investigations carried over from FY 91), obtained 104 corrective actions, initiated corrective action in 8 additional matters pending at the end of the fiscal year, filed 13 disciplinary action complaints with the MSPB, secured one stay of personnel action, and three extensions of that stay, from the MSPB and obtained 11 stays through direct requests to the agencies.

3. WHAT ALTERNATIVES DO FEDERAL EMPLOYEES AND AGENCIES HAVE ONCE OSC DETERMINES THAT A VIOLATION OF LAW HAS OCCURRED?

Answer: Under law, if OSC determines that there has been a prohibited personnel practice which warrants corrective action, it must notify the agency and give the agency an opportunity to take corrective action. If the agency fails to take appropriate action, OSC has the option of referring the matter to the Merit Systems Protection Board (MSPB) which has the authority to adjudicate the matter and to order the agency to take corrective action.

Likewise, a federal employee who has been charged with committing a prohibited personnel practice may either negotiate a settlement of the matter with OSC or, alternatively, OSC can file a complaint against the employee and litigate the charge in proceedings before MSPB. The employee has a right to appeal an adverse decision to the Federal Circuit Court of Appeals.

4. WHAT EDUCATIONAL INFORMATION DOES OSC PROVIDE TO INCREASE THE AWARENESS OF FEDERAL MANAGERS AND EMPLOYEES ABOUT THEIR RESPONSIBILITIES, RIGHTS, AND PROTECTIONS?

Answer: OSC conducts an extensive outreach effort to educate federal employees about prohibited personnel practices, the Hatch Act, and other matters under the jurisdiction of the office. We also make presentations to state and local government employees concerning provisions of the Hatch Act. Attorneys from OSC speak at numerous conferences and other gatherings sponsored by federal, state and local organizations having an interest in protecting and understanding the rights of employees. In addition, this educational effort also is intended to discourage prohibited personnel practices and other violations by giving employees, supervisors, managers and others in the public workplace a greater awareness of the law.

We have also published a number of booklets that address subjects such as the role of the Special Counsel, prohibited personnel practices, and provisions of the Hatch Act applicable to federal, state and local government employees. These booklets have been widely distributed and are made available to agencies through the Government Printing Office.

5. WHEN AN EMPLOYEE INSTITUTES A CASE AS A WHISTLE-BLOWER, WHAT SUPPORT DOES OSC PROVIDE THE EMPLOYEE IF HE OR SHE CONTINUES TO ENCOUNTER RETALIATION FROM HIS OR HER EMPLOYER?

Answer: It is a prohibited personnel practice to take a personnel action against a federal employee because of whistleblowing. If OSC determines that a personnel action has been taken, proposed or threatened because of whistleblowing, then OSC can support the whistleblower by petitioning the MSPB for a stay of that action and the Board has the authority to order the agency to stay the action. OSC can also notify the head of the agency concerning the

retaliation and seek to have the agency head take corrective action. As mentioned in answer to question 3, if the agency refuses to take corrective action, then the matter may be referred to MSPB which can order such action. It is also a prohibited personnel practice to take a personnel action against an employee for filing a complaint with OSC, or for exercising any other lawful appeal, complaint or grievance. The same remedies, i.e., stays, and corrective action, can be obtained on behalf of an employee who suffers retaliation for filing a complaint of whistleblower reprisal as for the original reprisal.

6. IN YOUR STATEMENT YOU PREDICT THAT IN FISCAL YEAR 1994 A LARGER WORKLOAD IS EXPECTED. TO WHAT DOES OSC ATTRIBUTE THAT INCREASE?

Answer: We have no verifiable data to prove specific cause and effect relationships and therefore must attribute increases based on "educated speculation." Each year we, and many agencies, increase outreach and educational programs explaining to federal employees their rights and responsibilities under our statute. Increased awareness and the knowledge that OSC is actively enforcing the law can only be expected to cause more employees to seek OSC's assistance. Additionally, we have noted an increase in the number of complaints received from civilian employees adversely affected by the downsizing of the military, a trend expected to continue into Fiscal Year 1994. We also expect the downsizing and reorganization of some civilian federal agencies, if these actions proceed as announced, will also contribute to an increase in the number of complaints we receive in FY 1994.

Questions for the Office of Special Counsel
Hon. Frank R. Wolf
Subcommittee on Treasury, Postal Service and General Government
February 25, 1993

1) Number and Administration of Cases Since 1988

A) How many alleged Hatch Act violations have been brought to the Special Counsel's attention since 1988?

ANSWER: The Office of Special Counsel (OSC) has received Hatch Act matters alleging violations as follows:

	FEDERAL	STATE/LOCAL
FY 88	40	41
FY 89	63	39
FY 90	55	97
FY 91	43	48
FY 92	57	80
FY 93 (to date)	36	27

B) Of the alleged violations reported to the Office of Special Counsel since 1988, how many were determined to be actual violations of the act?

ANSWER: In the following Hatch Act matters OSC found violations:

	FEDERAL	STATE/LOCAL
FY 88	17	33
FY 89	11	14
FY 90	15	24
FY 91	12	16
FY 92	26	46
FY 93 (to date)	4	4

C) In how many of the actual violations which occurred since 1988, how many required some sort of disciplinary action?

ANSWER: In the following number of matters OSC instituted disciplinary actions against individuals for violating the Hatch Act:

	FEDERAL	STATE/LOCAL
FY 88	1	9
FY 89	1	4
FY 90	1	0
FY 91	1	2
FY 92	6	7
FY 93 (to date)	1	2

D) What was the range of disciplinary actions that were taken against persons in violation of the Hatch Act? Please provide the range of disciplinary actions, and, if available, the number of each disciplinary action.

ANSWER: The penalties ordered by the Merit Systems Protection Board (Board or MSPB) for federal employees who violated the Act ranged from 30 days suspension without pay to removal from federal employment. As to one of the federal employees charged by OSC the Board found no violation. With respect to the state or local employees who were found to have violated the Act, the Board found that all of their violations warranted their removal from employment.

E) How many cases were refered to the Justice Department for criminal investigations of violations of the Hatch Act since 1988?

ANSWER: No referrals were made for criminal investigation of violations of the Hatch Act.

F) How many cases were appealed to the United States District Court of Appeals and how many appeals were heard?

ANSWER: A federal employee found by the Board to have violated the Act has the right to appeal to the U.S. Court of Appeals for the Federal Circuit. A state or local government employee has the right to appeal to U.S. District Court. The MSPB is the respondent in all of these cases. OSC is not aware of any federal employee who has appealed a Hatch Act case to the Court of Appeals since FY 88. OSC is aware of three cases which were appealed to the District Courts by state or local employees. The Board prevailed in one of these cases and the other two are pending.

2) Office Operation

How many people are employed by the Office of Special Counsel and how many people are specifically assigned to Hatch Act cases? Of those assigned to Hatch Act cases, how many are attorneys?

ANSWER: As of March 8, 1993, OSC had 98 employees. Two attorneys are assigned full time and another two attorneys spend part of their time processing Hatch Act matters and issuing advisory opinions. If a Hatch Act matter receives a full field investigation, then OSC investigators are assigned to the matter and other OSC attorneys are assigned to provide legal analyses of the evidence and to litigate the case if prosecution is initiated.

B) What is the average time it takes to administer a Hatch Act claim?

ANSWER: Usually Hatch Act matters are initially processed within 30 days. If a matter requires full field investigation and subsequent litigation, then the matter may take many months to resolve depending upon its complexity.

C) What is the current backlog of cases pending in the unit or office that handles Hatch Act violation cases?

ANSWER: There is no backlog of Hatch Act matters and almost all initial matters are now being processed within 30 days of receipt.

D) Are more employees needed to properly dispose of the current case load?

ANSWER: No additional employees are needed at this time.

3) H.R. 20, the "Federal Employees Political Activities Act of 1993

Sec. 7324(b)(1) of H.R. 20 prohibits federal employees from soliciting, accepting, or receiving a political contribution from, or giving a political contribution to, any person who--

(A) has, or is seeking to obtain, contractual or other business or financial relations with the agency in which the employee is employed;

(B) conducts operations or activities which are regulated by that agency; or

(C) has interests which may be substantially affected by the performance or nonperformance of the employee's official duties.

Sec. 7324(b)(3) however, provides a loophole in which exceptions to the above proscriptions can be made.

A) Given that H.R. 20 will allow employees of the Office of Special Counsel to participate in partisan political activities, and given that employees of the Office of Special Counsel administer the rules regarding partisan political activity, do you have any ideas about how you will ensure that there are no conflicts of interest or violations of due process with regard to your employees' politics and the cases they are administering?

ANSWER: Civil Service Rule 4.2 forbids federal managers from inquiring into the political affiliation of any competitive service employee. Avoiding conflicts of interest will have to be left largely to the individual OSC employees. Although many OSC employees are in the excepted service there remains a question as to the propriety of federal managers monitoring permitted political activity of federal employees.

I understand that there is currently a Hatch Act case pending which involves employees of the Mayor of the District of Columbia. I also understand that someone involved with the investigation had to recuse herself because of a potential conflict of interest.

B) Could you please let me know about the circumstances in which the employee recused herself and why?

ANSWER: There have been newspaper reports to the effect that a D.C. government employee recused herself from another investigation having to do with the same or similar events. No employee of OSC has sought a recusal from the matter.

C) Even if H.R. 20 becomes law, can the Special Counsel prohibit employees from engaging in partisan politics, thereby ensuring the cases that come before the Office receive fair and impartial hearings?

ANSWER: We are unaware of any basis for OSC to prohibit its employees from engaging in activities which are permitted by statute.

5)* Interpretation of Title 5, Sec. 7324 (a)(2)

Many contend that the Hatch Act is unmanageable and confusing because it incorporates each of the several thousand adjudications of the Civil Service Commission under Civil Service Rule I. The rules have been reexamined and restated on a number of occasions. Currently, the rules to administer the Hatch Act are located in 5 CFR pt. 733. The Supreme Court in United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973) held that [t]hese regulations, 5 CFR pt. 733, are wholly legitimate descendants of the 1940 restatement adopted by Congress and were arrived at by a process that Congress necessarily anticipated would occur down through the years. We accept them as the current and, in most respects, the longstanding interpretations of the statute by the agency charged with its interpretation and enforcement. Id. at 575.

* The questions submitted to OSC contained no question 4.

A) Given the foregoing, is there any justification to the claim that there are over 3,000 rules or regulations that are utilized in the administration of Hatch Act violations? Please provide me with a short legal opinion on this matter?

Answer: There is no justification for the claim that there are 3000 rules or regulations that are used to administer the Hatch Act. In 1907 President Roosevelt amended Civil Service Rule 1 to prohibit competitive service employees from "taking an active part in political management and political campaigns." The Civil Service Commission was granted authority to adjudicate matters brought against federal employees under this amended rule. By 1939 when the Hatch Act was passed, there had been approximately 3000 cases decided by the Commission. Over the years these cases had been reduced to what was essentially a restatement of the law. This restatement was Civil Service form 1236 which was referred to by Senator Hatch and which is attached as an appendix to the Letter Carriers case. When Congress passed the Hatch Act it decided that the meaning of the phrase "taking an active part in political management and political campaigns" would be found in the Commissions adjudications over the years which had been restated in form 1236. The current regulations at 5 CFR § 733 et.seq. are the further refinement and clarifications of form 1236; these same regulations have been in effect since 1970. These regulations set forth 13 permitted and 16 prohibited activities under the Act.

THURSDAY, FEBRUARY 25, 1993.

FEDERAL LABOR RELATIONS AUTHORITY

WITNESSES

JEAN McKEE, CHAIRMAN
MICHAEL W. DOHENY, DEPUTY GENERAL COUNSEL
EDWIN D. BRUBECK, CHAIRMAN, FEDERAL SERVICE IMPASSES PANEL

Mr. HOYER. The hearing of the Treasury, Postal Subcommittee will come to order, and we are very pleased to recognize and welcome Jean McKee, the Chairman of the Federal Labor Relations Authority.

Ms. McKee, you can proceed. We will include your full statement for the record, but you can proceed in highlighting that statement or any issues you would like to bring to our attention as you best see fit, and you might want to introduce your colleagues at this time.

[The information follows:]

STATEMENT OF JEAN MCKEE

CHAIRMAN

FEDERAL LABOR RELATIONS AUTHORITY

BEFORE THE SUBCOMMITTEE ON TREASURY, POSTAL SERVICE,

AND GENERAL GOVERNMENT

COMMITTEE ON APPROPRIATIONS

U.S. HOUSE OF REPRESENTATIVES

CURRENT SERVICES BUDGET OVERVIEW HEARING

Mr. Chairman and Distinguished Members of the Committee:

I am pleased to appear before you today to provide an overview of the programs and operations of the Federal Labor Relations Authority. This is my fifth appearance before this subcommittee as Chairman of the Federal Labor Relations Authority (FLRA). I would like to take this opportunity to highlight significant program accomplishments that we have achieved in Fiscal Year 1992; to discuss our current Fiscal Year 1993 programs; and to discuss those major issues which we are currently facing in the operations and activities of the Agency.

I would like to introduce those who are with me today. Authority Members, Pamela Talkin and Tony Armendariz, are present. As you may know, the position of General Counsel of the FLRA has been vacant since January 25, 1993. Michael Doheny, the Deputy

General Counsel, will address the program and operations of the Office of the General Counsel. Edwin Brubeck, the Chairman of the Federal Service Impasses Panel, is also with us today. He will address the program and operations of the Federal Service Impasses Panel.

In testifying today, I want to emphasize at the outset that the Administration is currently formulating the President's Fiscal Year 1994 Budget. Accordingly, I am not in a position to provide you with information on funding for specific programs or activities. As soon as the President's Fiscal Year 1994 Budget is released, I would be pleased to provide that information to you and the Committee.

The FLRA is an independent agency with the responsibility for administering and carrying out the purposes of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978. In addition, the FLRA is charged with providing leadership in establishing policies relating to Federal sector labor-management relations. The FLRA also supports the Foreign Service Labor Relations Board and the Foreign Service Impasse Disputes Panel pursuant to its responsibility to administer the provisions of Chapter 10 of the Foreign Service Act of 1980.

The current Fiscal Year 1993 budget for the FLRA is $21,647,000 and 251 full-time equivalent workyears. Actual employment at the end of January 1993 was 250, including: 112 in the Authority National Office, 127 in the Office of the General Counsel, and 11 in the Federal Service Impasses Panel.

Total caseload for Fiscal Year 1993 is estimated at 16,551 cases, an increase of approximately 2,000 cases above Fiscal Year 1992 levels. This caseload is being handled with the lowest authorized staffing level in the history of the Agency. By comparison, in Fiscal Year 1981 we had a total caseload of 12,490 cases with a staff of 363.

The Office of the General Counsel has experienced increases of 19 percent in actual total caseload from Fiscal Year 1991 to Fiscal Year 1992, and estimates an increase of approximately 14 percent in Fiscal Year 1993 from the Fiscal Year 1992 levels. I am certain that the Deputy General Counsel will provide more detail on this increased workload in his prepared statement.

The Federal Service Impasses Panel (FSIP) has also experienced an increased level of caseload over the last few years. The average actual caseload from FY 1979 to FY 1987 was 192 cases, while caseload from FY 1988 to the current FY 1993 estimate averages 370 cases. The total caseload has stabilized over the last three

years at just over 400 cases. Total caseload for FY 1993 is estimated at 401 cases.

As you know, managerial actions, such as reductions-in-force, furloughs and other adverse actions which have an impact on the Federal workforce, have a direct correlation to the filing of cases with the FLRA. With the current changes taking place throughout the Defense Department and the Administration's commitment to reducing the size of the Federal workforce over the next few years, we expect the trend of increasing caseload for the FLRA to continue and, potentially, accelerate. I believe it is important that Federal employees and their unions have an effective forum for redressing their problems and concerns promptly. With our current level of resources, I believe the FLRA has been in a position to respond in a timely manner to case filings.

FLRA BUDGET STRUCTURE

Approximately 75 percent of the annual budget of the FLRA provides for personnel compensation and employee benefit costs. Rental and telecommunication costs account for approximately 15 percent of the budget each year. All other categories combined account for only about 10 percent of the budget. This 10 percent is not discretionary by nature, but rather provides for necessary expenses in support of the Agency mission, including travel to

investigate complaints, employee training, equipment repair and maintenance, transcription costs to provide a record of formal hearing proceedings, purchase of current legal research materials, printing costs associated with printing and issuing Records of Case Decisions and Bound Volumes of Authority decisions, employee health unit and employee assistance program costs, ADP and office supplies and normal equipment replacement.

As a result of the personnel intensive nature of the FLRA's budget, little flexibility exists to absorb budget reductions or mandatory cost increases, such as scheduled annual pay increases or rental payments to GSA. The only option is to reduce the number of Agency employees thus affecting our ability to fulfill our mission for an effective and efficient government through the timely response to case filings.

BUDGET OBJECT CLASS

Category	Percent of Annual Budget Request
Personnel Compensation and Benefits	75%
Rental Payments to GSA	12%
Communications, Utilities, and Other Rents	2%
All Other Categories	10%
	100%

In accordance with the Statute, the FLRA has three major components -- the Authority National Office, the General Counsel of the Authority, and the Federal Service Impasses Panel. The Chairman of the Agency is the chief executive and administrative officer of the FLRA. In this testimony, I will briefly describe the functions of each component.

AUTHORITY

The FLRA consists of three full-time Members who are appointed by the President with the advice and consent of the Senate, one of whom is designated by the President as Chairman.

The Authority Members' Offices and Chairman's Office are responsible for adjudicating all cases filed with the Authority. These cases include appeals of decisions of the Administrative Law Judges on unfair labor practice complaints, appeals of Regional Director decisions regarding representation of Federal employees by unions, negotiability disputes, and exceptions to arbitration awards. The staffs of the Chairman and the Authority Members prepare draft decisions for their review and approval. I will discuss the programs, operations and plans of the Authority later in my remarks. The Chairman's Office also provides support to the Foreign Service Labor Relations Board in resolving disputes arising under the Foreign Service Act of 1980.

Since the Chairman has dual roles -- as a Member of the Authority and the Chief Executive Officer -- the offices which provide legal and administrative services to the Agency are located within the Authority component and report to the Chairman. These offices include: the Office of the Solicitor; the Office of the Executive Director, which includes the Office of Administration and the Office of Information Resources and Research Services; the Office of Case Control; the Office of the Administrative Law Judges; and the Office of Inspector General.

GENERAL COUNSEL OF THE AUTHORITY

The General Counsel is appointed by the President with the advice and consent of the Senate. As I stated at the beginning of my testimony, the General Counsel position has been vacant since January 25, 1993. The President has not yet announced a nominee for this position.

The General Counsel has statutory responsibilities to: (1) investigate alleged unfair labor practices; and (2) file and prosecute unfair labor practice complaints. The General Counsel also has responsibility for employees in the Authority's regional offices. The Regional Directors have been delegated by the Authority Members the responsibility to decide representation cases. Applications for review of Regional Director's representation decisions may be filed with the Authority.

FEDERAL SERVICE IMPASSES PANEL

The FSIP consists of seven Presidential appointees who serve on an intermittent basis. The FSIP has the statutory responsibility to provide assistance in resolving negotiation impasses between agencies and unions which arise under the Federal Service Labor-Management Relations Statute and the Federal Employees Flexible and Compressed Work Schedules Act. The Panel's staff also supports the Foreign Service Impasse Disputes Panel in resolving impasses arising under the Foreign Service Act of 1980.

ACHIEVEMENTS AND PLANS OF THE AUTHORITY

I am very pleased with the progress that we have made throughout the Agency. We have reached important milestones in the adjudication of cases which will enable us to provide broader assistance and leadership to agencies and unions.

I am happy to report that the Authority closed 522 cases in Fiscal Year 1992 -- 11 percent more than the case intake for the year. At the end of Fiscal Year 1992, the Authority's pending case inventory was 194 cases -- 21 percent below the case inventory level that existed at the end of Fiscal Year 1991. At the end of January 1993, the number of cases pending before the Authority was reduced to 179, the lowest level in the history of the Agency. During Fiscal Year 1993, the Authority expects to

receive 566 cases and to close 547 cases. We expect our case intake to increase in Fiscal Year 1994, as the increased caseload of the General Counsel works its way through that Office and the Office of the Administrative Law Judges, and cases are appealed to the Authority for review and decision.

I previously stated before this Committee that the Authority Members expected to eliminate its backlog of overage cases during Fiscal Year 1992. We define overage cases as any case which is not adjudicated by the Authority within 6 months or less of filing. I am happy to report that we have made significant progress in attacking our backlog of overage cases, and all but 31 of our overage cases were eliminated at the end of Fiscal Year 1992. Our ability to achieve this goal within current resource levels is attributable to the teamwork and dedication of everyone in the Authority.

In addition, the parties, whether they agree with our decisions or not, seem to recognize and appreciate the increased clarity and consistency of decisions. A few examples of some of the significant cases decided during the last year are described in our current services budget submission.

While the number of cases pending before the Authority Members has been brought under control, cases of increasing complexity continue to be filed with the Authority for resolution and some

of these cases will be appealed to the Courts of Appeals. In our view, a more manageable case load will enable the Authority to provide advice, guidance, training, materials and other information to the parties so that disputes can be resolved at the local level, without the involvement of other agencies or third parties. I have attached to this testimony an example of one of our current efforts, a "Quarterly Summary of FLRA Decisions," -- a review of the most recent significant decisions.

LABOR-MANAGEMENT COOPERATION AND TRAINING

As I look to the future, I continue to believe we must seek alternatives to costly litigation. To this end, the FLRA will continue to focus on providing leadership in promoting labor-management cooperation.

In Fiscal Year 1992, we continued to expand our outreach efforts to provide the information and resources necessary to enhance labor-management cooperation. We established a clearinghouse where labor, management, and neutral representatives may acquire information and resources regarding case law developments, as well as labor-management cooperation efforts. The summaries of significant case developments, which are prepared quarterly, have been an extremely well-received part of this clearinghouse. A library of current reference materials on labor-management cooperative efforts is in development and several publications

are in production, including case studies in labor-management cooperation.

The FLRA's labor-management cooperation program also provides, upon request, assistance to the parties in order to assess their ongoing relationship and target areas where they have an opportunity to improve. This assistance has proved a valuable resource to parties who are uncertain of where to begin to improve or change their relationship.

In addition, we have increased our efforts to develop and sponsor conferences, briefings, and training seminars with labor, management, and neutrals throughout the country. Through this participation, the parties and other agencies involved in labor-management relations in the Federal sector are learning that the FLRA is available to the parties -- not just to adjudicate labor relations disputes -- but also to assist them in acquiring the necessary knowledge and skills to effectively conduct their joint relationship.

Both headquarters and field staff have responded to increased requests from across the nation for agency and union briefings on selected topics, including labor-management cooperation, the role of the agency and union in cooperative efforts, coping with reorganizations, and assessing the labor-management relationship and targeting improvement. Moreover, the FLRA has continued to

deliver, through the Office of the General Counsel, the "Knowledge, Communication and Trust" workshop at various facilities around the country. We will continue to study the long term effects of this program with the objective of developing follow-on programs and approaches to encourage continued improvement in these labor-management relationships. It should be noted in this regard that the Office of General Counsel has trained over 40 of its staff in the conduct of this workshop in order to expand its availability to the parties nationwide.

We have completed our first full year of efforts specifically aimed at fostering cooperative labor-management relationships. The results so far are very encouraging. We plan to continue to expand and revise the offerings of programs and resources now available and to develop new ones to address the needs of unions and management. In my view, this multi-faceted approach has been long-needed in the Federal labor-management program and will encourage and empower the parties to develop more stable and fruitful joint relationships to the ultimate benefit of us all.

Another Authority initiative is designed to enhance Federal sector arbitrators' knowledge of the many critical Federal statutes, rules and regulations. The first seminar will be conducted this year followed by a series of seminars, along with informational materials, in fiscal 1994.

I have been a Member of the Federal Labor Relations Authority since 1986 and I have had the honor of serving as Chairman since 1988. I remain committed to ensuring that the purposes of the Federal Service Labor-Management Relations Statute are effectuated. Accordingly, we have undertaken a review of the FLRA operations and the overall Federal labor-management relations program. I anticipate that we will identify many additional improvements both for the operation of the Agency and the total program.

ADMINISTRATIVE INITIATIVES

As we continue to look for ways to improve the labor-management program, we are also continuing to look for ways to achieve economies and efficiencies and to increase staff productivity by improving working conditions for our employees. In the past, we have been able to implement a number of employee programs within our limited resources. We have implemented a Flexi-Time Program throughout the Agency, and the Office of the General Counsel has used the Flexi-Place Program to address specific employee needs, particularly employee medical requirements. We have implemented the Sick Leave for Adoptive Parents Program and the Voluntary Leave Transfer Program to meet other specific employee needs and concerns. In addition, we use the Part-Time Employment Program to meet both employee and Agency needs.

Several other major administrative initiatives are in process which are designed to improve employee working environments as well as our computer, research and telecommunications capabilities -- which will also increase our efficiency.

In Fiscal Year 1992 and continuing into Fiscal Year 1993, we have undertaken several major initiatives to improve the work environment and working conditions for employees in both the Headquarters and regional offices. The relocation of our Headquarter's office to the Westory Building is currently scheduled for March 1993. We are also in the process of relocating three of our regional offices and one sub-regional office. Our Cleveland sub-regional office was relocated in December 1992. Two of these moves are forced moves by the General Services Administration and three moves were because leases have expired.

In conjunction with the above, we have purchased several new high density filing systems, systems furniture units and new telephone systems. These changes will enable the FLRA to achieve more efficient space utilization and, at the same time, provide an improved work environment for employees without any long term additional costs.

In addition, we have purchased and installed a new computer system for use by all Headquarter's employees and completed the

installation of computer networks in two regional offices. The new Headquarter's system is a state-of-the-art microcomputer based network which replaced our antiquated mini-computer system. One major benefit to the new system is that, for the first time, it allows for electronic communication between the Authority, the Federal Service Impasses Panel, the General Counsel, and the regional offices. This capability will eventually enable regional office employees to gain access to electronic data bases for technical assistance products previously available only to Headquarters personnel.

In conjunction with the above ADP initiative, a PC based case tracking system for use throughout the Agency is currently being developed in Fiscal Year 1993 to replace existing systems residing primarily on outdated mini-computer systems. This new system will not only use state-of-the-art technology to provide a more flexible system, but will enable us to have several compatible sub-systems in one database to track cases filed with the Authority, the Office of the Administrative Law Judges, or the Office of General Counsel, and cases pending with the Federal Service Impasses Panel.

As stated above, we have purchased new telephone systems to be installed in the new Headquarter's offices and for two of the regional offices that are relocating in Fiscal Year 1993. The

new systems, replacing antiquated telephone systems, will enhance our telecommunications capabilities, while at the same time reducing the number of telephone lines. Most importantly, it will allow the Agency to implement the full range of FTS-2000 services that are currently available.

The Federal Labor Relations Authority has also made improvements in research materials provided to the staff and the public. We have continued to publish Authority decisions, the Subject Matter Index, the Citator of Authority decisions, and case summaries. During Fiscal Year 1992, four bound volumes of Authority Decisions were published and distributed. In addition, we created a consolidated subject matter index covering the first 42 volumes of Authority decisions. As part of our automation effort, we have also created a computerized data base which enables all FLRA employees to electronically access Authority decisions, the Subject Matter Index, the Citator of Authority decisions, and case summaries.

CONCLUSION

The Federal Labor Relations Authority remains committed to providing leadership in promoting sound Federal labor-management relations. As Chairman, I am committed to accomplishing our mission in a way which uses our resources in an effective and efficient manner.

Mr. Chairman, this concludes my prepared remarks. I welcome an opportunity to answer any questions you and the Members of your Committee may have.

QUARTERLY SUMMARY OF FLRA DECISIONS

FOR THE FIRST QUARTER OF FY93

October 1, 1992 - December 31, 1992

Volume 2, No. 1

Federal Labor Relations Authority

Washington, DC 20424

(202) 382-0900

In This Issue...

This is the first issue of the Quarterly Summary for Fiscal Year 1993 and covers FLRA decisions issued between October 1 and December 31, 1992. During this period, the Authority received 103 cases and closed 119 cases, including 56 arbitration cases, 36 unfair labor practice cases, 21 negotiability cases, and 6 representation cases. Also during this period, the courts issued several significant decisions, some of which are highlighted here. The term "Statute" throughout the text refers to the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135. For copies of the cases contact the FLRA Office of Public Affairs at (202) 382-0900.

Other News...

FLRA Co-sponsors Conference

The FLRA has joined the Society of Federal Labor Relations Professionals (SFLRP) in co-sponsoring the Society's 1993 Annual Symposium which will be held March 3-5, 1993, at The Sphinx Club in Washington, DC. The Symposium will be significantly different from previous years' conferences. A number of workshops have been scheduled for 2½ hours to allow for interactive participation among the attendees and session leaders; other workshops are geared towards providing useful information on the latest developments. For more information, contact Joyce Blackwell, SFLRP Executive Secretary, 1730 Rhode Island Avenue, NW, Suite 512, Washington, DC 20036-3169, Tel. (202) 785-8529.

Labor-Management Cooperation Program at the Authority

The Authority's Labor-Management Cooperation Program is continuing to develop and disseminate information and resources to Federal sector representatives and organizations interested in developing more constructive labor-management relationships. To learn more about such resources, please contact Christina Sickles Merchant, Director of Labor-Management Cooperation, at (202) 382-0703.

FLRA Publishes Subject Matter Index

The FLRA recently published a new Subject Matter Index to the FLRA decisions. The Index, an 800 page paperback book, contains over 19,000 topics which facilitate locating very specific points in Federal labor law. In addition, 42,000 topic-to-decision citations indicate the case type, FLRA volume and page. Copies of the new Index may be purchased from the Government Printing Office for $37.00. An order form is attached to the back of the Quarterly Summary for your convenience.

Comments and Suggestions?

Comments and suggestions on improving the Quarterly Summary are always welcome. Please mail them to the FLRA Office of Public Affairs, Washington, DC 20424.

The case summaries are intended for guidance and informational purposes only, and should not be considered as a substitute for the actual decisions of the Authority.

ARBITRATION CASES

Dep't. of Defense, Defense Mapping Agency, Aerospace Center, St. Louis, MO. and Nat'l. Federation of Federal Employees, 46 FLRA 298, No. 27 (Oct. 26, 1992).

The Agency rescinded a negotiated placement program for employees who had lost or were denied security clearances. The Arbitrator concluded that the program abrogated the Agency's rights to assign employees, determine its internal security practices and the number of employees necessary to carry out its mission, fill positions, and remove employees. According to the Arbitrator, the program did not constitute an appropriate arrangement under § 7106(b)(3) of the Statute.

The Authority found that the Arbitrator incorrectly concluded, as a matter of law, that the placement program abrogated the exercise of management's rights. The Authority further found that, by refusing to enforce the provision as an appropriate arrangement, the Arbitrator's award was deficient as contrary to the Statute. The Authority set aside the award and directed the Agency to comply with the negotiated placement program.

Nat'l. Association of Government Employees, Local R5-188, and Dep't. of the Air Force, Seymour Johnson Air Force Base, 46 FLRA 458, No. 40 (Nov. 3, 1992).

The Arbitrator awarded the grievant backpay for having been assigned higher-graded duties without receiving a temporary promotion as required under the parties' collective bargaining agreement. In a supplemental award, the Arbitrator awarded the Union attorney fees in an amount that was considerably less than the amount the Union had requested. The Union filed an exception alleging that the award was contrary to law, rule and regulation because the Arbitrator failed to award reasonable attorney fees and erred in calculating the amount of fees.

The Authority held that when an arbitrator has properly found that attorney fees are warranted under the Back Pay Act and 5 U.S.C. § 7701(g)(1), but has failed to adequately explain how the fees were calculated or has made an erroneous determination as to reasonable amount of fees, the Authority will either modify the award or remand the award to the parties for resubmission to the arbitrator. Where it is apparent from the record what the amount of attorney fees would have been if the arbitrator had made a proper determination, the Authority will modify the award accordingly. Otherwise, the Authority will remand the award to the parties.

In this case, the Authority determined that the Arbitrator erred in calculating the amount of fees to be awarded and failed to fully explain the reasons for his calculation. As the Authority was unable to determine from the record what the amount of attorney fees would have been had the Arbitretor made a proper determination, the Authority remanded the award to the parties for resubmission to the Arbitrator.

Nat'l. Treasury Employees Union and Dep't. of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Washington, DC, 46 FLRA 234, No. 22 (Oct. 23, 1992).

The Agency repudiated three provisions of the parties' collective bargaining agreement which required the Agency to furnish the Union with notices of proposed disciplinary, adverse, and unacceptable performance actions. The Union filed a grievance alleging that the Agency had

unlawfully repudiated the provisions. The Arbitrator concluded that compliance with the disputed provisions would not result in disclosure of information which would constitute a clearly unwarranted invasion of personal privacy within the meaning of exemption (b)(6) of the Freedom of Information Act (FOIA) and, therefore, that the provisions were encompassed by exception (b)(2) of the Privacy Act. The Arbitrator determined also that the Union was entitled to the information under exception (b)(3) of the Privacy Act, which authorizes disclosure of records in a system of records for a routine use. The Arbitrator concluded that the Agency had violated the agreement and the Statute, and ordered the Agency to comply with the provisions.

The Authority found that disclosure of the disputed information would result in a clearly unwarrantad invasion of personal privacy under exemption (b)(6) of the FOIA, and therefore, disclosure was not authorized under exemption (b)(2) of the Privacy Act. With regard to the "routine use" issue, the Authority determined that FPM Letter 711-164, published by OPM in September, 1992, governs interpretation of the relevant routine use statement, and that previous decisions applying a different interpretation will no longer be followed. The Authority determined that two of the disputed provisions, relating to adverse and performance-based actions, required disclosure of information beyond that authorized by the applicable routine use statement and, as such, disclosure of that information was not authorized by exception (b)(3) of the Privacy Act. The Authority set aside the Arbitrator's award with regard to those two provisions. However, the Authority denied the Agency's exception to the portion of the award relating to disclosure of disciplinary actions because such information is maintained in an Agency (not OPM) system of records for which the Union is an authorized routine user.

General Services Administration and American Federation of Government Employees, Council 236, 46 FLRA 494, No. 45 (Nov. 6, 1992).

When the Agency refused to pay nightwork differential to employees in a "leave with pay" status when they took 8 or more hours of leave during a pay period, the Union filed a grievance and invoked arbitration. The Arbitrator found that the Agency had improperly denied the differential pay to the employees who were regularly scheduled for nightwork, while they were on annual leave, and sustained the grievance.

The Authority concluded that the Arbitrator's award was deficient because it was contrary to law and regulation. The Authority reviewed 5 U.S.C. § 5545, the statute that establishes eligibility for nightwork differentials, and 5 C.F.R. § 550.122, the regulation interpreting the statute. The Authority found that both the statute and the regulation make it clear that an employee may be paid night differential only when the employee has taken less than 8 hours paid leave in a pay period. The Authority concluded that the Arbitrator had erred in interpreting 5 U.S.C. § 5545 and set aside the Arbitrator's award.

UNFAIR LABOR PRACTICE CASES

American Federation of Government Employees, Local 1857, AFL-CIO and Eloise F. Holdahl, 46 FLRA 904, No. 81 (Dec. 9, 1992).

The Union refused to represent an employee, who had received a notice of proposed suspension, because she was not a member of the Union. The General Counsel of the FLRA

issued an unfair labor practice complaint alleging that the Union violated the Statute by failing to represent all unit employees.

The Authority found that the Union was not obligated under § 7114(a)(1) of the Statute to represent the employee. The Authority noted that an Air Force Regulation, which applies to all Air Force employees, provides that employees are entitled to a representative of their choice to assist in replying to proposed disciplinary actions. The Authority noted also that the master labor agreement specifically excludes proposed disciplinary actions from the negotiated grievance procedure. Accordingly, the Authority determined that the Union was not the employees' exclusive representative in such matters and dismissed the complaint.

Dep't. of Justice, Bureau of Prisons, Washington, DC and Bureau of Prisons, Federal Correctional Institution, Ray Brook, NY and American Federation of Government Employees, Local 3882, 46 FLRA 1002, No. 89 (Dec. 18, 1992).

In an earlier decision (32 FLRA 20), the Authority determined that, under the Back Pay Act, the Union was entitled to attorney fees based on a cost-plus formula for the work of two Union-employed attorneys. In addition, an attorney in private practice was entitled to attorney fees at market rates.

On remand from the U.S. Court of Appeals for the District of Columbia Circuit, the Authority decided that in this and future cases, when attorney fees are awarded under the Back Pay Act for successful representation by union attorneys and when fees are placed in an adequate legal representation fund, the Authority will use market rates to calculate the payment of attorney fees. The Authority stated that in cases arising subsequent to this decision, a party requesting an award of market rate fees must submit sufficient documentation to allow the Authority to determine the appropriate market rate. Failure to meet this requirement may result in denial of fees.

Social Security Administration, Inland Empire Area and American Federation of Government Employees, AFL-CIO, 46 FLRA 161, No. 16 (October 21, 1992).

The Agency implemented a "gainsharing" program which encompassed distribution of cash awards to Inland Empire Area employees if the Area saved a certain percentage of its budget for the fiscal year. At the end of the fiscal year, Area employees qualified for gainsharing awards. However, two full-time employees, who were Union representatives, did not receive full awards because they had spent most of the work-year on official time conducting Union activities. An unfair labor practice complaint was issued alleging that the Agency violated the Statute by discriminating against the two employees for having engaged in protected Union activity.

The Authority concluded that the Agency violated § 7116(a)(1) and (2) of the Statute by reducing the amount of the gainsharing award paid to the two affected employees. The Authority found that the Agency had not established that there was a legitimate justification for its action, and that it would have taken the same action in the absence of protected activity. The Authority adopted the Administrative Law Judge's findings, conclusions, and recommended order to make the employees whole, as modified to include the payment of interest.

NEGOTIABILITY CASE

Antilles Consolidated Education Association and Antilles Consolidated School System, Fort Buchanan, Puerto Rico, 46 FLRA 625, No. 61 (Nov. 24, 1992).

This case concerned the negotiability of a proposal to allow unit employees use to post or Navy exchange facilities. The Authority found that the proposal concerned conditions of employment of unit employees because there was a direct connection between the exchange privileges sought and the work situation of unit employees. The Authority noted that access to the exchange facilities had a direct effect on the work situation of bargaining unit employees because, among other things, providing such access would accommodate the needs of employees where the Agency routinely assigns duties that extend beyond the employees' normal work day. The Authority concluded that the proposal was negotiable.

CASES DECIDED BY THE COURTS

FLRA v. Dep't. of Defense, Dep't. of the Navy, Washington, DC, 975 F.2d 1105 (5th Cir. 1992); *FLRA v. Dep't. of Defense, Dep't. of the Navy, Pensacola Navy Exchange, Pensacola, FL*, 977 F.2d 545 (11th Cir. 1992).

During the quarter, two more courts of appeals issued decisions concerning the obligation of agencies to release bargaining unit employees' home addresses to their exclusive representatives under § 7114(b)(4) of the Statute. In a 2-1 decision, the Fifth Circuit enforced an Authority order requiring release, and subsequently denied the Agency's petition for rehearing.

In a split decision reaching the opposite result, the Eleventh Circuit denied enforcement of an Authority home address disclosure order. The Fifth Circuit joined the Third Circuit (*FLRA v. Dep't of the Navy, Navy Ship Parts Control Center*, 966 F.2d 747 (3d Cir. 1992)(en banc); and the Ninth Circuit (*FLRA v. U.S. Dep't of the Navy, Navy Resale & Services Support Office*, 958 F.2d 1490 (9th Cir. 1992)(petition for rehearing pending)) in upholding the Authority on this issue. The Eleventh Circuit joined the First, Second, Sixth, Seventh and D.C. Circuits in overturning Authority orders requiring release.

Federal Deposit Insurance Corp., Washington, DC v. FLRA, 977 F.2d 1493 (D.C. Cir. 1992).

In a case concerning changes in the health insurance plan an agency provided to its employees, the D.C. Circuit deferred to the Authority's unfair labor practice determination and upheld the Authority's imposition of a *status quo ante* remedy. The court agreed with the Authority that the agency's increase in premium charges to family-plan subscribers and changes in the plan's open season constituted changes in conditions of employment, giving rise to a bargaining obligation under the Statute. The court also found that the Authority properly ordered the Agency to reinstate the practices in effect before the changes and to make whole any employees adversely affected by the changes.

Dep't. of the Army, Red River Depot, Texarkana, TX. v. FLRA, 977 F.2d 1490 (D.C. Cir. 1992); *Dep't. of Health and Human Services, Social Security Administration, Baltimore, MD. v. FLRA*, No. 91-1781 (4th Cir. Dec. 30, 1992).

The D.C. and the Fourth Circuit Courts of Appeals reached different conclusions concerning similar proposals and an agency's right to determine its budget under § 7106(a)(1) of the Statute. Both cases involved employee gainsharing programs. In the *Red River* case, the D.C. Circuit agreed with significant aspects of the Authority's decision. However, the court remanded the case to permit the Authority to clarify "what it means to require 'inclusion of a particular program or amount in [a federal employer's] budget'" under the Authority's *Wright-Patterson* budget test (2 FLRA 604).

Reaching an opposite result, the Fourth Circuit, in a 2-1 decision, reversed in part an Authority decision applying the *Wright-Patterson* budget test. Consistent with previous circuit rulings, the court held that negotiations over the formula to be used in a gainsharing program would violate the agency's right to determine its budget under the Statute.

U.S. Department of Justice, Immigration and Naturalization Service v. FLRA, 975 F.2d 218 (5th Cir. 1992).

The Fifth Circuit reversed an Authority negotiability decision concerning consultations between employees and their union representatives. The Authority had found negotiable a proposal that employees be given up to 48 hours to consult with a union representative before being required to provide a written report or an oral statement concerning a shooting incident. The court held that the proposal was neither a negotiable procedure under § 7106(b)(2) of the Statute, nor an appropriate arrangement under § 7106(b)(3).

Department of Health and Human Services, Social Security Administration v. FLRA, 976 F.2d 1409 (D.C. Cir. 1992).

The D.C. Circuit enforced an Authority order in an unfair labor practice case requiring an agency to comply with an arbitrator's award. The court agreed with the Authority that an agency subject to an award may not assert as a defense to an unfair labor practice complaint of noncompliance that the Arbitrator lacked contractual jurisdiction in the original proceeding. The court held that the bar on challenging the merits of an award in an unfair labor practice compliance proceeding properly extends to awards in removal cases which, under § 7121(f) of the Statute, can only be appealed by OPM to the Federal Circuit, rather than to the FLRA.

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Description

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- Supplements to this new index will be published periodically in the *FLRA Reports of Case Decisions and FSIP Releases*. However, that service does not include this bound edition which has new information and which supercedes previous loose-leaf versions for volume 42 and prior volumes.

SUBJECT MATTER INDEX

to the Decisions of the

FEDERAL LABOR RELATIONS AUTHORITY

for Decisions Issued

January 1, 1979 through October 31, 1991

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JEAN MCKEE
CHAIRMAN
FEDERAL LABOR RELATIONS AUTHORITY

Ms. Jean McKee was sworn in to a 5-year term as Chairman of the Federal Labor Relations Authority on November 21, 1989 after appointment by the President and confirmation by the Senate. She joined the Authority as a Member on August 20, 1986, and became Acting Chairman on December 13, 1988. The Authority resolves labor-management disputes between Federal agencies and unions.

Ms. McKee came to the Authority from the Federal Mediation and Conciliation Service where she served as the Executive Director from March 1983 to August 20, 1986. In this position she was responsible for the Arbitration Services Division and Labor-Management Grants Program, as well as directing the agency's overall management functions.

Ms. McKee entered Federal public service in 1967 when she joined the staff of the late Senator Jacob K. Javits, becoming his Administrative Assistant in 1973 and remaining until 1975. In 1976, she received her first Presidential appointment from President Ford to serve as the Deputy Administrator of the American Revolution Bicentennial Administration, later succeeding the Honorable John W. Warner as Administrator until the conclusion of the program on June 30, 1977. During 1978 Ms. McKee was Chief of Staff to the Minority Leader of the New York State Assembly. In 1979 she received her second Presidential appointment from President Carter to serve a 3-year term on the Advisory Commission on Public Diplomacy which had oversight of the United States Information Agency.

In the private sector, she was Director of Government Relations for the General Mills Restaurant Group from 1980 through 1983. She also has been a board member of a major life insurance company; partner and treasurer of a public relations and public opinion polling firm, and has performed a variety of research for major corporate clientele.

Ms. McKee earned her degree in Political Science at Vassar College and completed the Graduate School of Business Winter Executive Program of the University of Southern California. Ms. McKee was born in Connecticut and currently resides in Washington, D.C.

BIOGRAPHICAL DATA FOR MICHAEL W. DOHENY
DEPUTY GENERAL COUNSEL AND DIRECTOR OF OPERATIONS
OFFICE OF THE GENERAL COUNSEL
FEDERAL LABOR RELATIONS AUTHORITY

Michael Doheny has been the Deputy General Counsel of the Federal Labor Relations Authority since December, 1989. He joined the Office of the General Counsel in December 1988 on detail assignment from the U.S. Merit Systems Protection Board.

Prior to appointment to his present position, Mr. Doheny spent several years at the U.S. Merit Systems Protection Board and its predecessor, the U.S. Civil Service Commission. He began Federal employment as an appeals officer with the former Federal Employee Appeals Authority of the Civil Service Commission. He continued in that capacity with the Merit Systems Protection Board until January, 1981 when he became a senior attorney-advisor to the Director of Regional Operations at MSPB. He later served as Acting Director of Regional Operations from 1985-1987; he served as Acting Regional Director of MSPB's New York Regional Office for several months; and he was Legal Counsel for MSPB when he accepted the detail to the Federal Labor Relations Authority.

Mr. Doheny received his undergraduate degree at St. Francis DeSales College in Milwaukee, Wisconsin in 1966 and his law degree from Catholic University in 1973. He is a member of the Virginia and District of Columbia Bars. Mr. Doheny is also very active in community affairs in Arlington, Virginia where he serves on the Washington-Lee High School PTA and as past-president of the Arlington Youth Soccer Club.

EDWIN D. BRUBECK
CHAIRMAN
FEDERAL SERVICE IMPASSES PANEL

Edwin D. Brubeck was sworn in as Chairman of the Federal Service Impasses Panel on January 7, 1992. Prior to that he had served as a Member of the Panel since March 1990, having been appointed by President Bush for a term expiring January 10, 1995.

Mr. Brubeck comes to the field of labor-management dispute resolution from a lifetime of association with the labor movement and civic affairs. He has served as the Business Representative for the Indiana State Building Trades Council and the Central Indiana Building and Construction Trades Council. He has had a long and active interest in training and health and safety programs as well as pensions and health and welfare.

A lifelong resident of Indianapolis, Indiana, Mr. Brubeck attended Indiana University/Purdue University and has lectured at Purdue University, Indiana University, and Indiana Central University. He is married and has three children.

UNITED STATES

FEDERAL LABOR RELATIONS AUTHORITY

CURRENT SERVICES BUDGET OVERVIEW

CONGRESSIONAL BUDGET SUBMISSION

FEBRUARY 1993

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OVERVIEW OF FLRA FUNCTIONS

The current budget for the Federal Labor Relations Authority (FLRA) is $21,647,000 and 251 full-time equivalent workyears in Fiscal Year 1993. These resources are used to administer the statutory requirements of Title VII of the Civil Service Reform Act of 1978, the Federal Service Labor-Management Relations Statute. 5 U.S.C. §§ 7101-7135. In addition, the FLRA must provide full support to the Foreign Service Labor Relations Board and the Foreign Service Impasse Disputes Panel in connection with the implementation of Chapter 10 of the Foreign Service Act of 1980.

The FLRA was established to administer Title VII of the Civil Service Reform Act of 1978 and to serve as a third-party neutral in the resolution of labor-management disputes arising among unions, employees and Federal agencies. The effective resolution of these labor-management disputes has an important impact on the efficient operations of the Government. In order to encourage the effective resolution of such disputes, the FLRA exercises a leadership role by providing information and, in some cases, direct assistance to both agencies and unions engaged in cooperative efforts in the context of the statutory rights and duties of labor and management. Labor-management disputes arise in nearly all agencies of the Executive branch, the Library of Congress and the Government Printing Office. These agencies are located throughout the U.S. and overseas. Further, the FLRA is charged with resolution of labor-management disputes among all employees, both U.S. citizens and foreign nationals, of the Panama Canal Area.

The Authority Members provide leadership in establishing policies and guidance relating to matters under Title VII of the Civil Service Reform Act of 1978. Specifically, the Authority is empowered to: (1) determine the appropriateness of units for labor organization representation; (2) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit; (3) otherwise administer the provisions relating to the according of exclusive recognition to labor organizations; (4) prescribe criteria and resolve issues relating to the granting of national consultation rights; (5) resolve issues relating to determining compelling need for agency rules and regulations; (6) resolve issues relating to the duty to bargain in good faith; (7) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment; (8) conduct hearings and resolve complaints of unfair labor practices; (9) resolve exceptions to arbitrators' awards; and (10) take such other actions as necessary and appropriate to effectively administer the provisions of Title VII of the Civil Service Reform Act of 1978.

The General Counsel and the Regional Directors have responsibilities which are set forth in the Federal Service Labor-Management Relations Statute and additional responsibilities which have been delegated by the Authority. The General Counsel has statutory responsibility to: (1) investigate alleged unfair labor practices arising under the Statute and the Foreign Service Act of 1980; and (2) file and prosecute unfair labor practice complaints arising under those statutes. The General Counsel reviews and decides all appeals of decisions of Regional Directors not to issue unfair labor practice complaints. The Statute also provides the General Counsel with direct authority over, and responsibility for, all employees in the Office of the General Counsel

including employees of the General Counsel in the Authority's regional offices. Regional offices are located in Boston, Washington, D.C., Atlanta, Chicago, Dallas, Denver and San Francisco. Subregional offices are located in New York, Philadelphia, Cleveland and Los Angeles.

Regional Directors are appointed by the Authority. In addition to their responsibilities to investigate and prosecute unfair labor practice complaints, Regional Directors have been delegated authority by the Authority to: (1) determine whether a group of employees constitutes an appropriate bargaining unit; (2) conduct investigations and provide hearings in representation matters; (3) determine whether a question of representation exists and direct elections; and (4) supervise or conduct secret ballot elections and certify the results of those elections. Applications for review of Regional Director decisions in representation matters may be filed with the Authority.

The Federal Service Impasses Panel (FSIP), an entity within the Authority, assists Federal agencies and unions representing Federal employees in resolving impasses which arise in labor negotiations. The FSIP assists the parties through informal meetings, factfinding and, if necessary, arbitration. The professional staff aids the FSIP members by promptly investigating requests for assistance, bringing about informal settlements, conducting factfinding and arbitration hearings, and drafting reports and recommendations as well as binding decisions for the FSIP members. Further, the staff supports the Foreign Service Impasse Disputes Panel in resolving negotiation impasses arising under the Foreign Service Act of 1980.

LEGAL AUTHORITIES

The legal authorities of the Federal Labor Relations Authority are set forth in the following:

Reorganization Plan No. 2 of 1978, consolidated the central policy-making functions in Federal labor-management relations under the Federal Labor Relations Authority, an independent agency. Previously, these functions had been divided between the Federal Labor Relations Council and the Assistant Secretary of Labor for Labor-Management Relations.

Civil Service Reform Act of 1978, as amended by the Civil Service Miscellaneous Amendments Act of 1983, established the Federal labor-management relations program under a statute administered by the Federal Labor Relations Authority.

Panama Canal Act of 1979, expanded the jurisdiction of the Federal Labor Relations Authority to employees, including foreign nationals, of the Panama Canal Area and U.S. agencies in the Panama Canal Area.

Foreign Service Act of 1980, established a labor-management relations program for the members of the Foreign Service and established the Foreign Service Labor Relations Board and the Foreign Service Impasse Disputes Panel, which are supported by the Federal Labor Relations Authority.

Federal Employees Flexible and Compressed Work Schedules Act of 1982, as converted into permanent authority by the Act to Convert the Temporary Authority to Allow Federal Employees to Work on a Flexible or Compressed Schedule under Title 5, U.S. Code, into Permanent Authority, granted the Federal Service Impasses Panel jurisdiction over negotiation impasses regarding alternative work schedules.

FEDERAL LABOR RELATIONS AUTHORITY
PERSONNEL SUMMARY

	FY 1992 Actual	FY 1993 Estimate
Total Number of Full-time permanent positions	258	256
Total compensable work years: Full-time equivalent employment	245	251
Average ES salary	$99,620	$102,820
Average GS grade	11.56	11.67
Average GS salary	$48,304	$51,303

DISTRIBUTION OF PERMANENT POSITIONS BY PROGRAM UNIT

Program Unit	FY 1992 Staffing	FY 1993 Staffing
Authority	115	112
Office of the General Counsel	133	133
Federal Service Impasses Panel	10	11
Total FLRA	258	256

DETAIL OF FULL-TIME PERMANENT POSITIONS

	FY 1992 Actual	FY 1993 Estimate
Executive Level IV	1	1
Executive Level V	3	3
Subtotal	4	4
ES-6	1	1
ES-5	1	1
ES-4	5	5
ES-3	8	8
ES-2	3	3
ES-1	2	2
Subtotal	20	20
AL-2	1	1
AL-3F	5	3
AL-3E	2	2
AL-3C	1	0
Subtotal	9	6
GG	1	1
Subtotal	1	1
GS/GM-15	25	26
GS/GM-14	41	42
GS/GM-13	66	67
GS-12	15	16
GS-11	12	12
GS-9	16	14
GS-8	17	17
GS-7	14	14
GS-6	9	11
GS-5	9	6
GS-4	0	0
GS-3	0	0
GS-2	0	0
GS-1	0	0
Subtotal	224	225
Total Permanent Positions	258	256
Unfilled Positions (end of year lapse)	-13	-5
Total Permanent Employment (Full-time equivalent workyears)	245	251

FY 1993 CURRENT SERVICES BUDGET
OBJECT CLASSIFICATION BY FLRA COMPONENT

(in thousands of dollars)

	Authority	OGC	FSIP	Total	%
Total personnel compensation	$6,538	$7,117	$629	$14,284	66.0
Personnel benefits: civilian	979	1,135	120	2,234	10.3
Benefits for former personnel	6	---	---	6	---
Travel and transportation of persons	122	414	43	579	2.7
Transportation of things	1	1	---	2	---
Rental Payments to GSA	2,524	---	---	2,524	11.7
Communications, utilities and miscellaneous charges	466	15	---	481	2.2
Printing and reproduction	218	25	9	252	1.2
Consulting Services	10	---	---	10	---
Other services	350	150	6	506	2.3
Supplies and materials	86	100	4	190	.9
Equipment	486	90	3	579	2.7
TOTAL	$11,786	$ 9,047	$814	$21,647	100.0

SUMMARY OF OBLIGATIONS BY OBJECT CLASSIFICATION

(in thousands of dollars)

	FY 1992 Actual	FY 1993 Estimate
Direct Program:		
Personnel Compensation:		
Full-time permanent	$12,869	$13,315
Other than full-time permanent	703	812
Other personnel compensation	218	157
Special personal services payments	12	---
Total personnel compensation	13,802	14,284
Personnel benefits: Civilian	2,084	2,234
Benefits for former personnel	18	6
Travel and transportation of persons	541	579
Transportation of things	1	2
Rental payments to GSA	2,108	2,524
Communications, utilities, and miscellaneous charges	462	481
Printing and reproduction	194	252
Consulting Services	10	10
Other services	590	506
Supplies and materials	182	190
Equipment	732	579
Total direct program	$20,724	$21,647
Reimbursable program	5	15
Total obligations	$20,729	$21,662

FEDERAL LABOR RELATIONS AUTHORITY

DETAILED COST EXPLANATION BY OBJECT CLASSIFICATION

CURRENT SERVICES - FY 1993 BUDGET

PERSONNEL COMPENSATION (Object Classification 11), $14,284,000

The current FY 1993 Budget Estimate fully funds 251 full-time equivalent workyears, a net decrease of two from the FY 1992 Estimate. A reduction of three Administrative Law Judge positions is partially offset by an additional position authorized in the Federal Service Impasses Panel.

	FY 1992 Actual	FY 1993 Estimate
Full-time permanent	$12,869,000	$13,315,000
Other Than Full-time	703,000	812,000
Other Personnel Compensation	218,000	157,000
Special Personal Services Payments	12,000	---
Total Personnel Compensation	$13,802,000	$14,284,000

PERSONNEL BENEFITS (Object Classification 12), $2,234,000

This is for the FLRA's mandatory contributions to the Civil Service Retirement System (CSRS), the Federal Employees Retirement System (FERS), the Social Security program, the Federal Employees' Group Life Insurance program, the Federal Employees Health Benefits program, the Federal Employees Workers' Compensation Program and the mandatory contributions to the Medicare Health Insurance program.

BENEFITS FOR FORMER PERSONNEL (Object Classification 13), $6,000

This estimate reflects Agency reimbursement to the Department of Labor Unemployment Compensation Fund for unemployment payments to former agency personnel.

TRAVEL AND TRANSPORTATION OF PERSONS (Object Classification 21), $579,000

The FY 1993 travel estimate provides funds to each of FLRA's decision units. FLRA travel is related to, and in furtherance of, the processing and resolution of labor-management disputes arising among unions, employees and Federal agencies.

The nature of the operations of the Federal Labor Relations Authority requires that employees travel in order to effectively accomplish program objectives. Travel may be performed for a variety of reasons including: travel to the worksite involved in a dispute; travel to other locations to investigate or prosecute a case, to conduct a hearing, hold an election or represent the FLRA in litigation; and travel to train labor and management in more effective dispute resolution, and to train FLRA personnel in case processing and dispute resolution skills to further program objectives.

The Federal Labor Relations Authority has seven regional offices and four subregional offices located throughout the country. The existence of these regional offices reduces travel costs. The caseload of the Federal Labor Relations Authority is spread throughout the country.

TRANSPORTATION OF THINGS (Object Classification 22), $2,000

This estimate covers the cost of shipment of supplies and materials.

RENTAL PAYMENTS TO GSA (Object Classification 23.1), $2,524,000

This estimate represents payments made to the General Services Administration for the rental of office space. Also included in this amount is $104,000 in rent payments for dual occupancy of office space related to the relocation of Headquarters offices in March 1993.

COMMUNICATIONS, UTILITIES AND MISCELLANEOUS CHARGES (Object Classification 23.2), $481,000

This estimate includes payment to the General Services Administration (GSA) for the Federal Telecommunications System (FTS-2000) as well as local telephone services ($336,000). Also, included in this estimate are costs associated with the rental of office equipment, parking spaces and non-GSA space rentals ($30,000) and payments to the United States Postal Service ($115,000).

PRINTING AND REPRODUCTION (Object Classification 24), $252,000

This covers the cost of work performed by the Government Printing Office (GPO) including: the printing of case decisions, ballots and related election materials, printed forms, and other materials requiring professional printing. This request also covers costs related to the publishing of items in the Federal Register which are mandated by statute.

CONSULTING SERVICES (Object Classification 25.1), $10,000

This estimate includes obligations for consulting services in accordance with the definition prescribed in Section 38.4 of Revisions to OMB Circular A-11, dated October 23, 1992. The primary use of consulting services at the FLRA is for financial audit services performed on a contractual basis.

OTHER SERVICES (Object Classification 25.2), $506,000

Major items of expenditure in this area include: (1) maintenance contracts ($133,000); (2) the FLRA's share of maintaining an employee health program ($31,000); (3) court reporting services ($70,000); (4) employee/client training ($73,000; (5) automated accounting/payroll/personnel services ($90,000); and (6) other miscellaneous services ($119,000) such as attorney fees, research services, personnel security investigations, and custodial/building maintenance.

SUPPLIES AND MATERIALS (Object Classification 26), $190,000

This estimate is for the purchase of normal office supplies and work materials, including subscriptions, periodicals, labor-management related training materials, and additions or supplements necessary to keep the FLRA law libraries up-to-date.

EQUIPMENT (Object Classification 31), $579,000

This estimate provides for the normal and essential replacement of miscellaneous office equipment ($39,000) and ADP equipment purchases in the Office of the General Counsel ($65,000) and the Authority ($35,000). In addition $440,000, is included to provide for FY 1993 expenses associated with the Agency Headquarters relocation to a new Headquarters facility in March 1993.

PROGRAM AND FINANCING

Salaries and Expenses: 54-0100-0-1-805

(in thousands of dollars)

	FY 1992 Actual	FY 1993 Estimate
Program by activities:		
Direct Program		
Authority	11,325	11,786
Office of the General Counsel	8,667	9,047
Federal Service Impasses Panel	732	814
Total direct program	20,724	21,647
Reimbursable program	5	15
Total obligations	20,729	21,662
Financing:		
Unobligated balance lapsing	45	---
Budget authority (gross)	20,774	21,662
Budget authority		
Current:		
Appropriation	20,769	21,647
Permanent:		
Spending authority from offsetting collections	5	15
Relation of obligations to outlays:		
Total obligations	20,729	21,662
Obligated balance, start of year	2,257	2,517
Obligated balance, end of year	- 2,517	- 2,160
Adjustment in expired accounts	-132	---
Outlays (gross)	20,337	22,019
Adjustments to budget authority and outlays		
Deductions for offsetting collections		
Federal Funds	- 5	- 15
Total offsetting collections	- 5	- 15
Budget authority (net)	20,769	21,647
Outlays (net)	20,332	22,004

DECISION UNIT OVERVIEW

AUTHORITY

Introduction: The mission of the Federal Labor Relations Authority is to provide leadership in establishing policies and guidance relating to labor-management relations in the Federal sector. The major responsibilities of the Chairman and Authority Members are to decide cases which arise under the Federal Service Labor-Management Relations Statute, resolve major policy issues, prescribe regulations governing labor-management relations and the processing of cases before the Authority, and disseminate information through publications, seminars, and training conferences. The Authority decision unit includes: the Offices of the Chairman and Members, the Office of the Solicitor, the Office of Case Control, the Office of Executive Director, the Office of Information Resources and Research Services, the Office of Administration, the Office of the Administrative Law Judges, and the Office of Inspector General.

Resource Summary: (in thousands of dollars)

	FY 1992 Actual	FY 1993 Estimate
Budget Authority	$11,331	$11,786
Total Permanent Positions	115	112
Full-time Equivalent Employment	109	109

Summary of FY 1993 Budget:

The current FY 1993 Budget Estimate for the Authority totals $11,786,000 and 109 FTE's for 112 authorized positions. Current on-board employment is 112 as of January 31, 1993.

This budget includes a reduction in the number of Administrative Law Judge positions from the FY 1992 Budget level, based on a decline in the number of unfair labor practice hearings over the last several years. Three Administrative Law Judge positions were eliminated at the beginning of the year, with the reductions-in-force accomplished at the end of Fiscal Year 1992.

Also included in the above amount is approximately $500,000 in funds to provide for the one-time expenses associated with relocating the Headquarter's Offices this fiscal year. The relocation is currently scheduled for the beginning of March 1993.

Approximately 75 percent of the total annual budget for the Federal Labor Relations Authority provides for personnel compensation and employee benefit costs for the authorized staff. GSA space rental and telecommunications payments account for approximately 15 percent of the budget each year. All other categories combined account for only about 10 percent of the budget. This 10 percent is not discretionary by nature, it provides for necessary expenses in support of the Agency mission, including; travel to investigate complaints, employee training, equipment repair and maintenance, transcription costs to provide a record of formal hearing proceedings, purchase of current legal research materials, printing costs associated with printing and issuing Records of Case Decisions and Bound Volumes of Authority decisions, employee health unit and employee assistance program costs, ADP and office supplies, and normal equipment replacement.

Functions: The Offices of the Chairman and Members are responsible for the preparation of decisions in four principal subject matter areas: representation, negotiability, arbitration, and unfair labor practices. The attorneys and labor relations professionals who are assigned to these staffs review case filings, research relevant issues, and draft decisions for review by the Chairman and Members.

The Office of the Solicitor represents the Agency in judicial proceedings (except some proceedings before the United States Supreme Court) as authorized by the Statute. The Office of the Solicitor also provides legal advice to the Chairman, Members, General Counsel and the FSIP on administrative and other matters.

The Office of Case Control manages the Authority's docket, receiving all case related filings, preparing the official Authority record, assigning cases to the Members and issuing all decisions and orders for the Authority. The Office conducts the procedural review of all appeals and submissions filed before the Authority, prepares orders and/or dismisses procedurally deficient filings, and adopts findings, conclusions and recommendations of Administrative Law Judges in unfair labor practice cases in which exceptions are not filed. The Office of Case Control also rules on motions filed before the Authority.

The Office of Case Control is the official custodian of the Authority's records and certifies records to the Court. The Office also provides technical assistance to the parties and the general public on procedures relating to the filing of appeals before the Authority.

The Office of the Executive Director is composed of the Executive Director's immediate office, the Office of Administration and the Office of Information Resources and Research Services. The functions of the Office of the Executive Director include: planning; budget formulation and execution; personnel management; equal employment opportunity; security; accounting; payroll; procurement; printing; driving; mail management; space management; forms management; records management; occupational safety and health; automated data processing, including maintenance of the computerized case tracking system; publishing the

Authority's subject matter indices, digests, and citators, and bound volumes of case decisions; managing the Agency's law library; and performing internal control reviews to ensure fiscal integrity, regulatory compliance, and efficient operations.

The Office of the Administrative Law Judge's function is to hear unfair labor practice cases prosecuted by the FLRA's General Counsel and to render timely decisions.

The FLRA's Office of the Inspector General (OIG) was established in March 1989 pursuant to the 1988 amendments to the Inspector General Act of 1978. Under the authorizing legislation, the OIG is to conduct and supervise audits and investigations relating to the programs and operations of the FLRA; to provide leadership and coordination, and recommend policies which promote economy, efficiency, and effectiveness in FLRA programs and operations; to prevent and detect fraud, waste, and abuse in agency programs and operations; and to keep the Chairman and the Congress fully informed regarding problems and deficiencies as well as the necessity for, and the progress of, corrective action.

Rationale for Federal Role: The Federal Labor Relations Authority was established as an independent agency by Reorganization Plan No. 2 of 1978. The Authority administers the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978 (the Statute), which became effective January 11, 1979.

Section 7101 of the Statute contains the Congressional finding that labor organizations and collective bargaining in the Federal civil service are in the public interest. 5 U.S.C. § 7101. Congress found that providing statutory protection to employees' rights to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them: (a) safeguards the public interest, (b) contributes to the effective conduct of public business, and (c) encourages the amicable settlement of disputes between employees and employers involving conditions of employment.

Also, Section 7101 provides that: (1) the purpose of the Statute is to prescribe the rights and obligations of Federal employees and to establish procedures which are designed to meet the special requirements and needs of the Federal Government, and (2) the Statute should be interpreted in a manner which is consistent with the requirement of an effective and efficient Government. The Authority is charged with carrying out these purposes.

Section 7118 of the Federal Service Labor-Management Relations Statute, provides a process for the hearing and disposition of unfair labor practice complaints. These hearings are conducted and recommended decisions are issued by Administrative Law Judges in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. § 551, et seq.

The Office of Inspector General was established by the Inspector General Act Amendments of 1988, Public Law 100-504. The activities of this Office are directed toward identifying any waste, fraud or misuse of Federal funds and improving the effectiveness and efficiency of the Agency's programs and operations.

Objectives and Impact Statements:

1. **The Authority will continue to decide all arbitration cases within 120 days of receipt, unfair labor practice cases within 150 days of receipt, and all other cases within 180 days of receipt.**

   Impact: The Federal Service Labor-Management Relations Statute provides that the Authority is responsible for resolving labor-management disputes involving Federal agencies and unions that represent Federal employees. In fulfilling this mission, the Authority resolves, among other cases, exceptions to arbitration awards, unfair labor practice complaints, negotiability appeals, and representation cases.

   Effective and efficient operations of the Federal Government and the vitality of labor-management relations in the Federal sector require the timely adjudication of these disputes. To that end, the Authority remains committed to issuing timely decisions in all cases. Specifically, the Authority is committed to deciding exceptions to arbitration awards within 120 days of receipt, unfair labor practice cases within 150 days of receipt, and other cases within 180 days of receipt.

   Portions of the Federal Government, including, particularly, the Department of Defense and its constituent agencies, currently are experiencing or planning major reorganizations as a result of downsizing. Among other things, these reorganizations result in increased unfair labor practice and representation case activity as groups of employees who were formerly represented by various labor organizations in separate agencies or components of DOD are combined to form new entities. Under the existing statutory and regulatory scheme, representation cases must be decided, with exceptions not relevant here, within 60 days of the Authority's receipt of a party's appeal of a decision by a Regional Director. In addition to the commitment to deciding other cases in a timely manner, the Authority fully intends to issue timely decisions in representation cases.

   The Authority also remains committed to sustaining the quality and consistency of its case decisions. In particular, decisions that fully address all relevant issues in a manner that is understandable to the parties facilitates the amicable resolution of disputes and may reduce the number of Authority decisions that are appealed to the courts. Achieving these goals, in turn, should enable the Authority to carry out its statutory responsibility to provide leadership in establishing policies under the Statute.

2. **The Authority will provide assistance to enable parties in selected cases to resolve disputes through alternative means.**

   Impact: In addition to resolving arbitration, unfair labor practice, negotiability, and representation disputes through the issuance of written decisions, the Authority intends to facilitate parties' abilities to resolve disputes through use of alternative dispute resolution techniques.

For example, there now is no statutory obligation that parties attempt to resolve negotiability disputes bilaterally. Put simply, negotiability disputes, which can involve many proposals, may be referred to the Authority even though the agency and union have never met in face-to-face bargaining. As such, there is some likelihood that the Authority's and the parties' resources are expended in litigating negotiability issues concerning proposals that would be substantially modified or withdrawn entirely during actual bargaining. In addition, proposals may be submitted to the Authority for a negotiability decision even though the parties' real dispute centers on the meaning (as opposed to the negotiability) of the proposals or the relevant issues are covered by long-standing Authority precedent.

In situations such as these, affected parties would benefit more from informal, on-site assistance from the Authority than from formal, written Authority decisions. In particular, direct assistance from Authority employees would facilitate both union and management abilities to resolve their disputes without the need for formal adjudication and, thereby, conserve their resources as well as the Authority's resources.

The Authority will provide such assistance in selected cases. Although the most likely candidates for this assistance would appear to be negotiability cases, other types of cases, including arbitration and representation cases, may be susceptible to alternative techniques as well.

3. **The Authority will continue to participate in and sponsor meetings, training events, and conferences among representatives of Federal agencies and unions to promote and support cooperative efforts in labor-management relations.**

Impact: The Statute requires the FLRA to facilitate and encourage the amicable settlement of disputes. Cooperative efforts increase employee morale and productivity, reduce litigation, and, in general, promote the amicable, nonadversarial, expeditious resolution of disputes.

We believe that the future of Federal labor relations will be enhanced through encouraging parties to better understand each others positions and to attempt to settle their differences themselves rather than pursuing adjudicatory proceedings before the Authority and the Courts. In order to achieve this result, the FLRA must continue to exercise a leadership role in this area.

The Authority intends to continue to assist both agencies and unions in their cooperative efforts and to promote cooperative efforts where they do not currently exist. For example, the need to continue to provide agencies and unions with adequate dispute case handling information to enhance their collective abilities is imperative. Despite the vast number of decisions issued by the Authority, cases are still filed regularly with us on matters that are fairly well settled. In addition, agencies and unions are surprisingly unaware of the choices available to them in the conduct of their joint relationship. Despite the availability of a multitude of training opportunities, awareness of and utilization of these resources is far too limited among agencies and unions.

The Authority will provide assistance in the above program areas through meetings, training, and conference offerings which utilize state-of-the-art training devices, e.g., experiential case studies and role-playing, in order to maximize participant learning and course material retention. Such joint training opportunities will have the additional benefit of providing informal forums for discussion of areas of mutual concern to agency and union representatives. In addition, we will continue to train others to instruct agency and union representatives in more cooperative approaches to dispute resolution in order to expand the universe of people reached. A pilot project using regional conference approaches to the provision of such information and resources will be initiated and assessed.

4. **The Authority will continue to initiate and participate in training events designed to clarify the rights and responsibilities of Federal agencies, unions, the Authority, and other neutrals under the Federal Service Labor-Management Relations Statute.**

Impact: Federal agencies and unions now have over 10 years' experience under the Statute. During that time, numerous changes have occurred in both the Authority's case law and in its regulations. In addition, Federal courts have issued over 500 decisions involving the Statute.

Many of the Authority and court decisions which have the most far-reaching implications for Federal sector labor relations have been issued during the past two fiscal years. Although the decisions have been published and are available to the parties, cases which clearly are covered by Authority precedent continue to be submitted by the parties to the Authority Members for decision. In addition, parties continue to file cases over which the Authority has no jurisdiction.

The recent changes in the Authority's case law and the number and importance of recent court decisions, coupled with the apparent continuing need for basic information concerning the parties' rights and responsibilities under the Statute, create a need for the Authority to conduct training for agency and union representatives, as well as for arbitrators and other neutrals working with the Statute. To be most useful, this training should be developed to discuss both the basic statutory scheme for the resolution of various disputes and particular case law in various subject matter areas.

Providing training to agency and union representatives would likely decrease the number and complexity of disputes, enhance the parties' abilities to reach amicable settlements of disputes, and improve the quality of the parties' submissions to the Authority. The benefits of this program objective would, in turn, decrease the number of cases filed with the Authority and provide better records for the Authority to adjudicate the cases which are filed. Providing information and training to arbitrators and other neutrals charged with the responsibility to assist Federal service parties in the resolution of disputes will further the objectives of the Statute, as well as decrease the number of arbitration and negotiation appeals filed with the Authority. Furthermore, achievement of these results could lead to fewer resources being devoted at the agency, union, Authority and court levels to matters on which there is sufficient guidance.

Training events must be designed carefully to both reach the necessary parties and to provide the information which is most useful to those parties. In addition, many of the representatives who most need training in resolving and, if necessary, litigating labor disputes are not located in Washington, D.C. Therefore, to yield the most benefits, training will be conducted throughout the United States, including the Washington, D.C. area.

5. **The Authority will continue to develop and publish informational resources designed to keep union and agency officials, as well as arbitrators and other neutrals, informed of recent developments in Federal labor law and to complement the training efforts developed by the Authority.**

   Impact: In order to provide the parties with information on the work of the Authority, recent FLRA and court decisions, and training opportunities, the Authority plans to continue issuing its "Quarterly Summary of FLRA Decisions." The Summary is distributed to over 1,500 labor-relations specialists and neutrals around the country, and has become an important source of timely information for Federal union and agency practitioners, particularly in outlying areas where reasonable access to FLRA bound volumes or local depository libraries may not exist. In addition, the Authority continues to receive requests for the Statute, the Guide to the Statute, and general informational brochures used by managers and union stewards in their day-to-day labor relations responsibilities. Such valuable resources will continue to be published by the Authority.

   As the Authority continues to develop its training capabilities in order to provide parties with the tools needed for a more effective relationship, the Authority will develop additional written materials to complement such training efforts. Such materials will target increased understanding of the law, the rights and obligations of the parties, the processes which enhance the parties relationship, and of procedures for more effective resolution of disputes. A brochure outlining the various training programs will also be offered to inform the parties of opportunities in this area.

6. **The Office of Administrative Law Judges will render quality decisions within a median time of 180 days or less from the issuance of a complaint.**

   Impact: In FY 1993 the ALJ's will close approximately 330 cases by settlement at hearing or through the issuance of a decision. The ALJ's, therefore, should be able to meet the objective of rendering quality decisions within a median time of 180 days from issuance of a complaint.

7. **During the next three to five years, the Office of the Inspector General (OIG), will continue to develop programs and operations designed to meet the mandate of the IG Act and its amendments.**

   Impact: In accomplishing its statutory mission, the OIG will provide the Chairman and the Congress with objective evaluations of FLRA programs and operations. Through

appropriate processes, the OIG will review and determine those FLRA programs and operations vulnerable to fraud, waste, and abuse, and will develop and suggest ways for management to overcome any such problems.

In order for the OIG to achieve this goal, it is critical to have a well publicized and properly functioning Hotline; proactive investigative programs; a realistic audit program with a tested and frequently reviewed audit universe; an objective cyclical inspection program; and most importantly, a professionally trained, equipped and supported OIG staff.

8. **The Office of the Executive Director will develop and implement a microcomputer based procurement/property system to provide for automation of the procurement and property management processes in the Office of Administration.**

Impact: Consistent with the installation of the fully integrated microcomputer based local area network in Agency Headquarter's Offices in FY 1993, the Office of the Executive Director will automate various administrative processes which previously, due to lack of available technology or ADP system capability, have been performed on a manual basis.

Available resources will be used to provide for development of ADP software applications to automate the procurement process and integrate it with the property management function. This will result in more timely procurement processing, and improved efficiency and accuracy in addressing the Agency's property management responsibilities in accordance with current Federal Property Management guidelines.

In FY 1992, an Office of the Inspector General financial audit identified certain deficiencies in the Agency's property management system, including inaccuracies regarding data reflected in the property inventory. The development and implementation of an automated procurement/property system will correct identified deficiencies.

9. **The Office of the Executive Director will provide all planning and coordination with regard to the implementation of the new Federal Personnel Payroll System (FPPS) in the Office of Administration.**

Impact: The Office of the Executive Director will continue to provide all planning and coordination with regard to the phased implementation of the new Federal Personnel Payroll System (FPPS) in the Office of Administration.

The Federal Labor Relations Authority is currently supported by the Department of Interior's automated Payroll and Personnel System (PAY/PERS). This includes the use of the PAY/PERS for maintaining automated personnel information for all FLRA employees, generation of personnel actions and reports, maintaining payroll records for all FLRA employees, the generation of payroll and wage and earnings reports, and the actual processing of the payroll.

The need for replacing the current PAY/PERS System was identified by the Department of Interior in May 1986. A system being developed for the Federal Bureau of Investigation was selected as the design model for development of the FPPS by the Department of Interior. System development was initiated in October 1990 and full implementation is scheduled to be completed in October 1996.

When completed, the transition to FPPS will provide for full automation of functions performed in the personnel/payroll area including: preparation of personnel, position, payroll and training actions; performing retirement calculations; security administration; obtaining queries or reports related to EEO, payroll, labor cost or other information; and interfacing with the FFS accounting system for generation of financial reports. The system will also have the capability to interface and exchange information with certain external entities including: the Treasury, OPM, OMB, NFC, unemployment contractors and taxing authorities.

10. **The Office of Executive Director will continue to conduct comprehensive reviews and analysis of current and future Authority case information needs and requirements.**

Impact: This review will enable the Authority to ascertain the effectiveness of continuing to disseminate the information by publication to the parties, including the kind of information that the parties might find most beneficial; the accuracy of its distribution lists used to disseminate information to the parties; and the most cost effective method of developing its publications. The Agency will review its case publishing process -- in particular the Bound Volumes and the Reports of Case Decisions -- to ensure that the parties are receiving up-to-date notification of Authority decisions in a manner that is cost effective to the Authority and timely for the parties. We believe that this initiative can be accomplished with the installation of our new computer system, and will provide the parties with more useful and timely information related to Authority cases.

FY 1992 Accomplishments:

Authority Case Processing

1. The Authority has made significant progress in meeting its goals of reducing its case inventory, and its inventory of overage cases, that is, cases pending more than six months from date of filing. At the conclusion of FY 1991, the Authority had a case inventory of 247 cases, 92 of which were over six months old. At the conclusion of FY 1992, the Authority had closed 522 cases, the total inventory was down to 194 cases, and only 31 cases were over six months old.

During the past year, the Authority has issued a number of significant cases addressing major issues in the program. Examples of these are as follows:

Exceptions to Arbitration Awards

NFFE, Local 1263, and DOD, Defense Language Institute, Monterey, California, 43 FLRA 791, No. 64. The Authority reexamined the role of arbitrators in resolving grievances disputing determinations by agencies to contract out work.

NTEU, Chapter 33, and IRS, Phoenix District, 44 FLRA 252, No. 22. The Authority addressed arbitrators' authority to withdraw or rescind awards.

National Labor Relations Board and NLRB Union, 44 FLRA 1223, No. 100. The Authority reviewed the analytical standard used to allocate burdens of proof in cases alleging unlawful discrimination under Title VII of the Civil Rights Act of 1964.

Negotiability Determinations

NFFE, Local 2119 and Dept. of the Army, Rock Island Arsenal, Rock Island, Illinois, 42 FLRA 993, No. 70. The Authority found negotiable a proposal that would require the Agency to place employees affected by a holiday shutdown on administrative leave.

AFGE, Local 3295 and Dept. of the Treasury, Office of Thrift Supervision, 44 FLRA 63, No. 5. The Authority found negotiable as an appropriate arrangement a proposal prohibiting the Agency from using information to adversely affect a performance rating if the information was not furnished to the affected employee at the first performance progress review meeting after the information became available.

AFGE, Local 1857 and Dept. of the Air Force, McClellan Air Force Base, California, 44 FLRA 98, No. 8. The Authority found nonnegotiable a proposal which required certain employees to pay a fee to the Union to cover all Union expenses directly associated with the Union's representational obligations.

Unfair Labor Practices

Dept. of the Army, Defense Language Institute, Presidio of Monterey, California and NFFE, Local 1263, 43 FLRA 974, No. 79. The Authority found that there is no obligation under the Statute to stay a management action during the pendency of an arbitration proceeding contesting that action.

Dept. of Labor, Employment and Training Administration, San Francisco, California and Lou Ann Bassan, 43 FLRA 1036, No. 86. The Authority decided that the assertion of a right set forth in a collective bargaining agreement by an employee constitutes protected activity under section 7102 of the Statute.

AFGE, Local 2391, AFL-CIO and Robert M. Wangeman, 44 FLRA 1084, No. 87. The Authority determined that attorney fees may be awarded at market rates under the Equal Access to Justice Act to union-employed attorneys.

Representation

Dept. of Health and Human Services, SSA and AFGE and NFFE, 44 FLRA 230, No. 20. The Authority defined what constitutes a collective bargaining agreement for purposes of section 7111(f)(3) of the Statute.

Court Litigation

2. As in past years the Authority continued to be involved in court litigation. One of the more significant cases resulted in the Third Circuit, sitting en banc, affirming and enforcing an Authority decision directing an agency employer to provide a union with the names and home addresses of employees represented by the union. The Authority had rejected the agency employer claim that disclosure would violate the Privacy Act. FLRA v. Dep't of the Navy, Nos. 90-3690 and 90-3674 (3d Cir., May 26, 1992) (en banc).

Labor-Management Cooperation Program

3. With respect to labor-management cooperation, the Authority's policy and role in this area include, in part, working closely with other agencies involved in workplace dispute resolution such as the Merit Systems Protection Board, the Equal Employment Opportunity Commission, and the Federal Mediation and Conciliation Service. To that end, the FLRA co-sponsored the Federal Dispute Resolution (FDR) Conference in September 1991 and again in August 1992. Major themes addressed in 1992 were "Revitalizing the Grievance/Arbitration Procedure" and "Federal Sector Negotiations: Blind Alleys or Bridges to Agreement" through a total of twelve hours of training for labor, management, and neutral participants. Plans are proceeding with the development of the FLRA's track of workshops for the FDR Conference scheduled for August 1993.

   The Authority plans to continue using these types of training conferences to inform and to guide Federal sector agencies and unions on how to achieve more informed, effective, and cooperative labor relations. To date in FY 1993, the FLRA has participated in several other labor relations and dispute resolution conferences, including the Office of Personnel Management's (OPM) Symposium on Employee and Labor Relations and the Society of Professionals in Dispute Resolution's (SPIDR) National Conference. In addition, the FLRA is currently co-sponsoring the annual Symposium of the Society of Federal Labor Relations Professionals (SFLRP), held in Washington, D.C. Conferences such as these attract the national leadership from the labor, management, and neutral communities. Further, local and regional presentations and training programs on improving labor-management relations continue to be developed and delivered by the FLRA, often in conjunction with such professional associations as the Industrial Relations Research Association (IRRA). The FLRA has responded as well to specific requests for targeted presentations on various aspects of labor-management cooperation to audiences of labor and management representatives from a variety of unions and agencies.

   With the above outreach efforts, the specific needs of labor and management parties attempting to develop more constructive relations have been identified. As a result, the

FLRA has established a clearinghouse of information and resources about a variety of timely subjects, including various aspects of the process of establishing collaborative relations between labor and management. Additionally, written materials continue to be developed to respond to the parties' expressions of need and interest.

Lastly, through the FLRA's public programs, labor and management representatives' have enjoyed increased access to staff expertise on the collaborative structures and processes which may enhance the conduct of labor relations. As a result, requests have been received for assistance in assessing the joint relationship of specific parties and in targeting areas for improvement. Such assistance has been provided to the extent possible by FLRA staff, particularly in the area of referral of the parties to programs and providers who can assist them with specific needs. Overall, the FLRA's progress in FY 1993 toward further development of its labor-management cooperation program has been praised by the Federal sector labor-management community as both timely and useful.

4. During the fiscal year, the Authority continued to provide unions and agencies with informational materials and resources. The Authority began publishing a "Quarterly Summary of FLRA Decisions" which provides the parties with up-to-date information on the most significant cases decided by the Authority and the courts. The summaries are distributed to over 1300 union and agency representatives, particularly those in areas where FLRA decisions are not easily accessible. Over 400 arbitrators who hear Federal sector cases are also included in the distribution.

Inspector General Activities

5. During FY 1992, the Office of the Inspector General (OIG) completed and issued four (4) audit reports and two (2) informal management letters. Two additional audits were initiated. In addition, an automated audit recommendation tracking system was established, and an audit manual was completed. The OIG also assisted the Executive Director in establishing audit follow-up procedures for the agency.

Two important areas audited during the year were the agency's financial statements and its conversion from a main-frame computer system to a personal computer network system. Several audit recommendations were made to improve accounting procedures, including documenting fund balance reconciliations with U.S. Treasury figures, in order to achieve unqualified opinions of the financial statements in the future. Important recommendations were also made regarding the computer system conversion so that the agency could meet the necessary federal regulatory requirements. A follow-up management letter alerted the agency of a conversion oversight that allowed "write to" access to "read-only" network program files.

6. A number of tasks have also been completed in the OIG investigative area. All statutory requirements for a separate system of investigative records within the OIG were satisfied and such a system was established late in FY 1991. An investigative manual setting forth OIG policy and procedure was completed and put into use in March 1992. During

FY 1992, seven (7) investigations were initiated, four (4) were completed and closed, one was transferred to another Inspector General, and two remain open under active investigation.

7. In other OIG activity, a cyclical inspection program is in its preliminary stages. Certain "test" inspections will take place in late FY 1993 with visits to both Regional and Headquarter's offices targeted. A "Hot Line" is in operation, but has not been widely publicized. Part of this limited progress is deliberate, part is due to higher priorities of investigation and other matters. A problem with the "Hot Line" has been created by the switch to the FTS 2000 system. Both the calling long distance phone number and the number called are identified on the billing statement for the "long distance" type communications. Such calls are then reviewed by management to ensure the FTS system is only being used for official long distance calls. However, this review negatively affects the IG's ability to guarantee anonymity to employees reporting matters of fraud, waste, and abuse to the OIG. The OIG will overcome this obstacle by establishing an 800 "Hot Line" and P.O. Box. These procedures will be in place at the time of the relocation of the Headquarter's offices in FY 1993. The new number and P.O. Box will be published throughout the Agency and other appropriate venues.

8. A financial management audit by an independent auditor of the FLRA's financial statements for FY 1990 was completed in FY 1992. The audit was conducted in accordance with the General Accounting Office's Government accounting standards. The final audit report has been issued which identifies only one significant deficiency -- the FLRA's property management system, where the property inventory is currently updated on a manual basis. In response to this finding, the current plan is to provide for the development and implementation of a microcomputer based procurement/property management system when funds are available, which will serve to improve the effectiveness and efficiency of the current process and correct the deficiency identified in this area.

Relocation of Headquarter's Offices

9. The Office of Executive Director has served as the focal point on all planning design, and coordination matters related to the relocation of the Agency's Headquarter's Offices to suitable space in Washington, D.C. planned for March 1993. The FLRA's lease on its current Headquarter's office space expired on August 16, 1991. The Agency has been working with the General Services Administration to procure suitable office space in the downtown area to ensure our new Headquarter's offices are within close proximity to the Courts and our clientele. Specific building specifications were developed to ensure that the FLRA obtains the type and quality of space necessary to support its mission requirements. Based upon those specifications and the Agency's Request for Space, an Acquisition Plan and Solicitation For Offers were developed as part of the process for acquiring new space. As a result of our efforts, a ten year lease for space at our new location at the Westory Building was signed by the GSA in late July. The physical move is scheduled to take place in March 1993.

Headquarter's Telecommunications System

10. The Office of Executive Director identified all technical requirements, and made final recommendations for the acquisition of a new telecommunications system for Headquarter's Offices. The system has been purchased and will be installed in the Agency's new Headquarter's Offices prior to the relocation.

    The telecommunications system is state-of-the-art to allow for the use of sophisticated conference calling techniques, message waiting, voice mail and programmable memory buttons -- all of which will enhance FLRA daily operations and allow for the maximum effective use of Agency resources. The new system will allow FLRA to fully implement the full range of FTS-2000 services and those services available through the Washington Interagency Telecommunications System (WITS).

Headquarter's ADP Initiative

11. The Office of Executive Director completed all related planning and procurement of a fully-integrated microcomputer based Local Area Network for installation in the Agency's Headquarter's offices. While most of the system was purchased in FY 1992, some follow-up purchases were required to complete the system in FY 1993. Based upon information gathered by an Agency-wide task force, the Authority tested several pilot applications regarding hardware configuration, network operating system and software applications in FY 1992 and FY 1993. Training has been provided to all participants. Full implementation will be accomplished in all Headquarter's offices in early FY 1993.

    A personal computer has been provided to every employee to enable employees to communicate with other system users on a fully integrated Local and Wide Area Networks. Also, funds are included in FY 1993 to purchase software to facilitate conversion of Agency operations that were not funded in FY 1992. The completion of the installation of this new system will enable the Agency to improve its case tracking, electronic mail, word and data processing and research capabilities. The enhanced electronic research allows for word search capability and the accessing of Authority decisions, citator and case summaries by all employees on the network. Additionally, this system will enable the Agency to seek creative and innovative methods for accomplishing its work more cost effectively and to implement automated administrative improvements. Equally important, this plan provides that for the first time Agency Headquarter's and Regional Offices will be linked electronically on the same computer network.

OUTPUT/WORKLOAD MEASURES FOR AUTHORITY CASE PROCESSING

FY 1991 - 1993

Workload Projections:

	FY 1991 Actual	FY 1992 Actual	FY 1993 Estimate
New Case Intake			
Arbitration	203	188	195
Negotiability	128	115	137
Representation	23	25	30
Unfair Labor Practice	145	139	200
Miscellaneous	3	2	4
Total Intake	502	469	566
Cases Closed			
Arbitration	268	201	208
Negotiability	196	148	137
Representation	28	21	30
Unfair Labor Practice	213	151	169
Miscellaneous	7	1	3
Total Closed	712	522	547
Cases Pending at End of Year			
Arbitration	93	80	67
Negotiability	83	50	50
Representation	2	6	6
Unfair Labor Practice	69	57	88
Miscellaneous	0	1	2
Total Pending	247	194	213

OFFICE OF THE ADMINISTRATIVE LAW JUDGES CASE PROCESSING

FY 1991 - 1993

Workload Projections:

	FY 1991 Actual	FY 1992 Actual	FY 1993 Estimate
Cases Carried Over From Prior Year	259	277	260
Cases Opened	955	723	1,245
Total Caseload	1,214	1,000	1,505
Cases Closed Before Hearing	649	448	572
Cases Closed At Hearing	170	173	224
Cases Closed By Decision	118	119	106
Total Cases Closed	937	740	902
Cases Pending At End of Year	277	260	603
Awaiting Hearing	231	207	446
Awaiting Decision	46	53	157

DECISION UNIT OVERVIEW

OFFICE OF THE GENERAL COUNSEL

Introduction: The Office of the General Counsel is responsible for investigating all allegations of unfair labor practices filed with the Federal Labor Relations Authority under Title VII of the Federal Service Labor-Management Relations Statute and the Foreign Service Act of 1980. This office has final authority over the issuance and prosecution of all complaints and unfair labor practice charges. The General Counsel is responsible for managing, directing, and supervising all employees in the Regional Offices. The General Counsel reviews all appeals of decisions where Regional Directors refused to issue complaints.

In 1983, pursuant to 5 U.S.C. 7105(e) (1) and (f), the Authority delegated to the Regional Directors the responsibility for conducting all representation case elections and certifying the results to the parties. Further, the Regional Directors have the delegated responsibility for conducting hearings in all representation cases and for issuing final Decisions and Orders based on the records established in these hearings.

The Office of the General Counsel currently manages a total caseload of approximately 15,000 cases annually. Most cases are resolved to final disposition at the level of the Office of the General Counsel. Less than 3 percent of the total caseload is referred to other components of the FLRA for final disposition.

Resource Summary: (in thousands of dollars)

	FY 1992 Actual	FY 1993 Estimate
Budget Authority	$ 8,673	$ 9,047
Total Permanent Positions	133	133
Full-time Equivalent Employment	126	131

Summary of FY 1993 Budget:

The current FY 1993 Budget Estimate for the Office of the General Counsel (OGC) totals $9,047,000 and 131 FTE's for 133 authorized positions. Current on-board employment was 127 as of January 31, 1993. Due to funding considerations the OGC currently expects to lapse the equivalent of approximately 5 FTE's from the FY 1993 authorized position level of 133. The current estimate is that a total of 128 FTE's will be funded in FY 1993, 3 FTE's below the authorized FTE ceiling level of 131.

The General Counsel position is currently vacant. Mr. Alan R. Swendiman vacated that position on January 25, 1993. The President has not yet nominated a candidate to fill this position.

For reasons not entirely within the control of the OGC, the Office began FY 1993 with an identified shortfall of approximately $380,000 in the salary and benefits area. In order to continue operations without resorting to a reduction in force or furloughs, it was necessary to redirect funds from other budget categories, where possible, to cover salary and benefit costs for current staff. Consequently, the Office has only allocated $300,000, or 63 percent of the total $475,000 travel budget to date, and only $15,000, or 17 percent of the total equipment budget. The OGC has also experienced a large increase in transcript costs, caused by contract rates that have more than doubled in the past year, and a 60 percent increase in the number of hearings in representation cases. As the Office begins to achieve some savings in salary and benefit costs from lapsing vacant positions, additional funds will be allocated to address travel and equipment needs.

Programmatic Objectives:

1. Provide advice, assistance and review of all phases of field office performance to ensure adherence to case handling standards; ensure that complex cases are dealt with on a uniform basis throughout the country and in conformance with general policies; and ensure that the decisions in these cases are rendered expeditiously.

2. Investigate and take dispositive action on all allegations of unfair labor practices under the Federal Service Labor-Management Relations Statute and under the Foreign Service Labor Management Relations Statute.

3. Where voluntary settlement cannot be obtained, issue complaints in meritorious unfair labor practice charges, performing research required to ensure that the factual and legal standards of the General Counsel are being applied.

4. When requested, conduct complete reviews of appeals from refusals of Regional Directors to issue complaints on ULP charges. The review will include assurance that the factual and legal standards of the OGC are being uniformly applied in all Regions.

5. Investigate and take initial dispositive action on all petitions involving questions of representation. Supervise or conduct all elections and certify the results of elections to the parties. Conduct all hearings necessary in representation petitions, and issue final Decisions and Orders in a timely and efficient manner.

Long-Range Goals:

1. To complete the plan for implementation of state-of-the-art technology, including installation of the remaining local area networks and a wide area network that connects all regions to each other and Headquarter's.

2. To promote more cooperative relationships between labor and management and, thereby, decrease reliance on litigation to achieve objectives in a changing federal workplace.

3. To improve the quality of case handling in representation cases by making the process more accessible and efficient for the parties, and more responsive to changes brought about by the restructuring and downsizing of the Department of Defense and other executive agencies.

4. To improve the quality of investigations, resolutions and prosecutions of meritorious unfair labor practice charges.

5. To improve the awareness of people in the public sector of the purposes, policies, rights and responsibilities under the Federal Service Labor-Management Relations Statute and to make the process more easily understood and easier to use by the parties to whom the statute is designed to serve.

PROGRAM HIGHLIGHTS

Workload

Total Available Workload has increased more than 50 percent over the past 10 years (1983-1992). (TABLE 1) The workload has increased 7 percent or more per annum in all but one year since FY 1987. In FY 1992, total workload increased by 19 percent over the previous year.[1] The OGC projects annual increases in new ULP charges of 8 percent per year for FY 1993 and FY 1994. In anticipation of the effects of DOD reorganizations and base closures, the OGC projects increases in new representation petitions of 25 percent for each year.

[1] Productivity projections for FY 1993 take into consideration the identified shortfall in salary and benefit costs of approximately $380,000. To cover this shortfall, funds will need to be transferred from other categories and curtailment of certain activities is necessary. Nevertheless, the OGC estimates that it will be necessary to lapse several positions. Productivity calculations are based on 128 FTE.

During the same 10 year period, total authorized staff have decreased from 171 to 133, a reduction of 22 percent. Thus, the Office of General Counsel has worked with a 50 percent increase in workload with a 22 percent decrease in staff. The number of dispositive actions per authorized FTE has increased from 44 in FY 1983 to 77 in FY 1992, an increase of 75 percent. (TABLE 2) However, the increase in workload per authorized FTE has increased from 52 in FY 1983 to 102 in FY 1992 - an increase of 94 percent. (TABLE 3) The OGC's ability to meet the demands of the workload is outpaced by the cumulative effects of the increase in workload and decrease in staff.

Assuming the workload continues to increase 8 percent in ULP's and 25 percent in representation cases in FY 1993, then OGC faces an increase to 116 cases per authorized FTE. This is the average workload per authorized FTE. If you examine the average workload only for agents assigned full-time to processing cases, the increases will be even more dramatic. For example, based on current staff, total workload per agent will exceed 260 cases.

Representation Caseload

The workload projections set forth are not unrealistic. Based on the experience of the past several years, the OGC's projections in fact may be on the low side. Several ongoing and pending activities give rise to concern. The OGC has already experienced a 50 percent increase in representation cases in FY 1992 and Department of Defense reorganizations and downsizing will result in large increases in workload for this office. The intake of representation petitions in the first quarter of FY 1993 increased 60 percent over the same period of FY 1992. The planned based closures have not even begun to go into effect.

The representation workload is more than simply larger numbers. It also presents some of the most complicated and novel representation issues seen in this agency's experience. Representation (RO) petitions are being filed from facilities which have had no previous activity. A Clarification of Unit (CU) petition involving SSA sought to clarify the status of more than 700 positions. The transfer of all DOD supply functions to the Defense Logistics Agency (DLA), the creation of the Defense Commissary Agency (DeCA) and the establishment of the Defense Printing Service (DPS) have had a major impact on representation case processing on the OGC.

The DLA, DeCA and DPS reorganizations are just the beginning. The Defense Finance and Accounting Service is beginning its second reorganization in three years that will affect 50,000 employees. The Air Force is reorganizing its major commands, such as the Air Logistics Command, the Air Force Systems Command and the Strategic Air Command. The case work resulting from these reorganizations will be as complicated as those now pending.

Ultimately any delays in the OGC's ability to process its cases efficiently has a concomitant effect on the affected agencies' operations. Where the representation cases present questions concerning which if any of the affected unions appropriately represent the employees of the newly formed organization, the case law requires that the agency not make any changes except those necessary for the continued functioning of the agency. Agencies such as DLA

DeCA and DPS are essentially precluded from making any changes in personnel practices and policies. Thus, the longer the delay in processing the DOD representation cases, the less effective the agency is at achieving the objectives intended by the reorganization.

Unfair Labor Practice Cases

In FY 1992, the OGC received more than a 20 percent increase in new unfair labor practice (ULP) charges. It was the sixth consecutive year of increased filings. In every year but one the increase has been at least 8 percent higher than the previous year. OGC believes that this trend will continue over the next two years. For the first quarter of FY 1993, ULP charges were up 15 percent over the first quarter of FY 1992. The increase in ULP's is in large part a result of reorganizations and downsizing within other agencies. As stated above, agencies involved in representation cases that raise questions concerning representation must maintain existing conditions of employment to the maximum extent possible during the pendency of the question concerning representation, unless such changes are necessary to ensure the efficient functioning of the agency. Several charges have been filed alleging changes in working conditions in circumstances related to reorganizations involving several bargaining units.

Additionally, certain types of ULP's that may directly affect the results of an election have the effect of staying the processing of the petition pending resolution of the ULP charges. Such charges are given priority and require immediate investigation and resolution. These charges constitute additional work and, if filed in quantity, will have the effect of impeding all other work in the OGC. It is reasonable to expect many such charges where more than one union seeks to represent new organizations formed from many bargaining units.

Management Initiatives

The problem created by increasing workload and diminishing resources has magnified and intensified each year. In response, OGC has taken several initiatives over the past few years including downsizing the headquarter's operations, reducing the total regional management staff through regional reorganization, and changing the methods and means of performing the work to increase productivity and efficiency (e.g., greater reliance on conducting investigations by telephone, increased efforts in obtaining settlements regardless of the merits of the charges, liberal exercise of prosecutorial discretion by placing more efforts and energies on cases having a greater impact upon the labor-management relations program and procurement of computers for all members of the regional staffs). OGC believes that it has exhausted attempts at maximizing the existing resources. In our opinion, increased productivity cannot be expected from the agents at the levels necessary to keep up with the increasing workload.

With increasing workloads, moreover, the benchmark for determining which cases are of sufficient importance to warrant full scale investigations continues to rise. The effect is that each year a smaller percentage of cases receive adequate scrutiny on which to make sound decisions.

Labor-Management Cooperation

As great as the workload increase has been, its effect has been somewhat ameliorated through interventions by regional directors and the Counsel for Special Outreach. In these interventions, an OGC representative meets with management and unions within agencies or activities from which large numbers of cases are generated. Attempts are made, through training or mediation, to help the parties reach agreement on a procedure for resolving potential unfair labor practice issues. The program developed by the Counsel for Special Outreach, known as "Knowledge, Communication and Trust", is designed to combine instruction on the rights and responsibilities under the Statute with teaching skills on improving communications and achieving more cooperative relationships. In virtually every one of the 12 agencies where this program has been provided, charges and complaints have been resolved. The program has received singularly high praise for its effectiveness from persons within and outside the agency.

Travel

It has been several years since the OGC received an increase in the travel budget. For the OGC this area has experienced the biggest reduction over time. In FY 1980, the OGC had a budget for travel in excess of $1,000,000. At that time OGC had a total workload of approximately 8,000 cases compared to over 15,000 cases today. Allowing for inflation during the last 12 years, the OGC travel budget is reduced about 75 percent to 80 percent. As stated previously, the OGC has allocated approximately $300,000 for travel at this point in FY 1993 because of the need to cover a shortfall of approximately $380,000 in salaries and benefits. Given its existing procedures for investigating cases, OGC does not believe in returning to the FY 1981 level of funding for travel. It is essential, however, that OGC agents conduct more thorough investigations on a larger percentage of the total caseload than the current practice allows.

Equipment

The OGC is committed to completing the initiative begun three years ago toward full implementation of technology, including installation of local area networks in each regional office and a wide area network which will tie all the regional offices and headquarter's together. In addition, existing equipment must be replaced due to normal wear and tear. Finally, the OGC is planning to obtain high density file systems in all regional offices to offset continued reductions in space and to procure new telephone systems in each region to facilitate the practice of investigating and mediating cases by telephone.

Transcription Services

Increased numbers of hearings are certain to occur in the future, especially among the representation workload. Hearings in representation cases are often lengthy. For example, a hearing in San Francisco in connection with a Representation (RA) petition in a DOD reorganization ran for six days and 3,000 pages of transcription were made. To compound the increased costs, the Agency's contract with Heritage Reporting Company expired in July

1992. Based on current market rates, the cost of transcripts is expected to increase more than 100 percent above the former contract rate. Additionally, because of increased numbers of hearings in representation cases, the cost of transcripts is currently at 110 percent of total FY 1992 expenditures in this area.

Conclusion

The OGC has continued to work with reduced resources and a very large and growing workload. It has met the challenge by making significant changes in its operating procedures and by cutting spending in virtually every category. There is a limit to how far we can cut and how much more we can ask of the employees. There is also a limit on how far we can go in reducing the level of service and the amount of attention that is given to cases. The OGC has reached those limits.

Office of the General Counsel

Total Available Workload - Total Dispositions

FY	Total Avail.	Change from Prior Yr	% Change from Prior Yr	Cum. % from FY 83	Total Dispos.	Change from Prior Yr.	% Change from Prior Yr	Cum. % from FY 83
83	8,951				7,525			
84	8,521	- 430	- 5%	- 5%	7,239	- 286	- 4%	- 4%
85	8,328	- 193	- 2%	- 7%	7,212	- 27	0%	- 4%
86	7,808	- 520	- 6%	- 13%	6,534	- 678	- 9%	- 13%
87	8,975	1,167	15%	0%	7,410	876	13%	- 2%
88	9,567	592	7%	7%	7,755	345	5%	3%
89	10,205	638	7%	14%	8,223	468	6%	9%
90	10,957	752	7%	22%	8,791	568	7%	17%
91	11,355	398	4%	27%	8,914	123	1%	18%
92	13,520	2,165	19%	51%	10,279	1,365	15%	37%
93	15,394	1,874	14%	72%	10,142	- 137	- 1%	35%

TABLE I

Office of the General Counsel

Dispositions Per FTE

Fiscal Year	Total Dispositions	Authorized Staff	Dispositions Per FTE	Cumulative % Change from FY 1983*
83	7,525	171	44	
84	7,239	169	43	- 2%
85	7,212	165	44	--
86	6,534	152	43	- 2%
87	7,410	145	51	16%
88	7,755	143	54	23%
89	8,223	138	60	36%
90	8,791	133	66	50%
91	8,914	133	67	52%
92	10,279	133	77	75%
93	10,142	133	76	73%

TABLE 2

*Reflects the cumulative percent change in the average number of dispositions per FTE, using FY 1983 as the base year.

Office of the General Counsel

Authorized Staff - Workload Per FTE

Fiscal Year	Total Available Workload	Authorized Staff	Available Workload per FTE	Cumulative % Change from FY 1983*
83	8,951	171	52	
84	8,521	169	50	-4%
85	8,328	165	50	-4%
86	7,808	152	51	-2%
87	8,975	145	62	18%
88	9,567	143	67	28%
89	10,205	138	74	41%
90	10,957	133	82	57%
91	11,355	133	85	63%
92	13,520	133	102	94%
93	15,394	133	116	121%

TABLE 3

*Reflects the cumulative percent change as the average available workload per FTE, using FY 1983 as the base year.

OFFICE OF THE GENERAL COUNSEL

TOTAL WORKLOAD

Workload Projections:

	FY 1991 Actual	FY 1992 Actual	FY 1993 Estimate
Cases Pending at Start of Year			
Total ULP	1,998	2,179	2,755
Total REP	136	143	256
Total Appeals	146	119	230
	2,280	2,441	3,241
New Cases			
Total ULP	8,182	9,777	10,805
Total REP	507	769	814
Total Appeals	386	533	530
	9,075	11,079	12,149
Total Available Workload	11,355	13,520	15,390
Case Dispositions			
Total ULP	8,001	9,201	9,100
Total REP	500	656	565
Total Appeals	413	422	477
	8,914	10,279	10,142
Cases Pending at End of Year			
Total ULP	2,179	2,755	4,460
Total REP	143	256	505
Total Appeals	119	230	283
	2,441	3,241	5,248

OFFICE OF THE GENERAL COUNSEL

UNFAIR LABOR PRACTICE CASELOAD

Workload Projections:

	FY 1991 Actual	FY 1992 Actual	FY 1993 Estimate
Cases Pending at Start of Year			
Initial - Investigations	1,761	1,863	2,293
Secondary - Complaints	237	316	462
New Cases			
Initial - Investigations	7,327	8,851	9,560
Secondary - Complaints	855	926	1,245
Case Dispositions			
Initial - Investigations	7,225	8,421	8,200
Secondary - Complaints	776	780	900
Cases Pending at End of Year			
Initial - Investigations	1,863	2,293	3,653
Secondary - Complaints	316	462	807

OFFICE OF THE GENERAL COUNSEL

UNFAIR LABOR PRACTICE CASELOAD

APPEALS

Workload Projections:

	FY 1991 Actual	FY 1992 Actual	FY 1993 Estimate
Cases Pending at Start of Year			
Appeals	146	119	230
New Cases			
Appeals	386	533	530
Case Dispositions			
Appeals	413	422	477
Cases Pending at End of Year			
Appeals	119	230	283

OFFICE OF THE GENERAL COUNSEL

REPRESENTATION CASELOAD

Workload Projections:

	FY 1991 Actual	FY 1992 Actual	FY 1993 Estimate
Cases Pending at Start of Year			
Initial - Investigations	54	82	123
Secondary - Elections/Hearings Scheduled	82	61	133
New Cases			
Initial - Investigations	333	501	590
Secondary - Elections/Hearings Scheduled	174	268	224
Case Dispositions			
Initial - Investigations	305	460	385
Secondary - Elections/Hearings Scheduled	195	196	180
Cases Pending at End of Year			
Initial - Investigations	82	123	328
Secondary - Elections/Hearings Scheduled	61	133	177

DECISION UNIT OVERVIEW

FEDERAL SERVICE IMPASSES PANEL

Introduction: The Federal Service Impasses Panel (FSIP) is an entity within the Authority that resolves collective bargaining impasses between Federal agencies and unions representing Federal employees. The Panel uses an array of procedures, including: written submissions, factfinding, informal conferences, and mediation-arbitration. During the process voluntary settlements often result. If the issues remain unresolved, the Panel may designate a representative, or may order the parties to select a private arbitrator or factfinder who may issue an arbitration award or factfinder's report with or without recommendations. At other times, the Panel takes "final action" through the issuance of a Decision and Order. The Panel members are assisted by the professional staff which: promptly investigates requests for assistance in order to recommend whether the Panel has jurisdiction, brings about informal settlements, conducts factfinding and arbitration hearings, and drafts reports and recommendations as well as binding decisions for the FSIP. Further, the staff supports the Foreign Service Impasse Disputes Panel in resolving negotiation impasses arising under the Foreign Service Act of 1980.

Rationale for Federal Role: Congress, in the Civil Service Reform Act of 1978, enunciated the policy that collective bargaining between Federal employees and their employers is in the public interest. In the private sector, the strike and lock-out (or threat thereof) put pressures on the parties to resolve impasses. Since strikes are prohibited in the Federal sector, a mechanism must exist to conclude negotiations when collective bargaining fails to result in agreement. Congress has assigned to the Federal Service Impasses Panel the role of resolving collective bargaining impasses.

Resource Summary: (in thousands of dollars)

	FY 1992 Actual	FY 1993 Estimate
Budget Authority	$ 732	$ 814
Total Permanent Positions	10	11
Full-time Equivalent Employment	11	11

Summary of FY 1993 Budget: The current FY 1993 Budget Estimate for the FSIP totals $814,000 and 11 FTE's for 11 authorized positions. The seven Panel Members, working on an intermittent basis comprise one of these FTE's. Current on-board employment is 11 as of January 31, 1993, counting the Panel Members as one position.

Major Objective: Improve case processing time to a median of 100 days by completing investigations within 75 median days.

Impact: The Panel began FY 1992 with a backlog of 4 months, it was reduced to 2.5 months at the end of FY 1992. This is an aberration, however, because of the closing of an inordinate number of consolidated cases. It may be reduced to 2 months by the end of FY 1993 unless the projected number of cases as well as their complexity thwart our projection. Investigations into requests for assistance are conducted to determine (1) whether the Panel should assert jurisdiction over the case and (2) if so, what procedure is best suited to assist the parties in resolving the dispute. The foregoing projections reflect the results of the Panel's minimal staffing levels. That is, priorities have shifted away from investigations towards the more labor-intensive aspects of impasse resolution: conducting hearings, reviewing written submissions and parties' responses to private factfinders' recommendations in preparation for final Panel action, and composing the results of such decision-making for the parties involved. The resultant delays are unfortunate in several respects. Employers are required by statute to maintain the status quo while a matter is pending before the Panel. Yet, where the Panel eventually declines to assert jurisdiction filing deadlines may have passed for timely initiation of actions to resolve the threshold dispute. Where the determination is ultimately made to assert jurisdiction, the Panel is delayed in scheduling and completing subsequent proceedings. Protracted case processing times foster deteriorating morale and labor-management relationships -- both affect the efficiency of Government operations. Moreover, in certain instances direct economic costs can result such as where a decision requires reconstruction of a space that could have been altered at considerably less expense, had the decision been rendered earlier. Where less than thorough investigations result in the Panel prematurely declining jurisdiction or failing to suggest alternative means of settlement, the emphasis on voluntary resolution of collective bargaining impasses is undercut; third-party litigation is often initiated -- counter to the Administration's focus on labor-management cooperation.

While the budget for FY 1993 reflected a "realignment of 1 FTE", it did not provide an actual increase in staff years to handle the complex case inventory. As of the end of FY 1992, the median time for all case closings was up 38 percent, to 167 days, over the same time for the prior year and the median time for completion of initial investigations was up 59 percent to 94 days. While the established goal is longer than set out for FY 1993, it is an improvement over the current situation with which our clients and the Panel are dissatisfied, and will be difficult to achieve with turnover and no real increase in staffing. We have realized our objective of having a personal computer for each staff person coupled with customized training. We are currently amidst a learning curve, that, with the leveling off of case intake this fiscal year, and projected increases in intake of 10 percent each of the subsequent fiscal years, will contribute to achieving the stated goal. These projections are based on several factors including a continuing resumption of negotiations and the gradual extension of the scope of bargaining. Other contributing factors include: increases in cases involving health and safety issues; negotiation of wages for employees, where pay and benefits are left to agency discretion (FT. Stewart Schools v. FLRA, 110 S. Ct. 2043 (1991)); technological changes; and agency downsizing and reorganizations.

Of note is the fact that the most prevalent issues during FY 1992 were competitive areas, reassignments and details, training, facilities, compensation, compressed work schedules, and reassignments. Agency downsizing has already produced many cases where questions concerning representation present impediments to the Panel's final disposition of the negotiation impasse and a lengthening of median times. The Panel made a request to the Authority for a Major Policy Ruling to help ameliorate the serious situation. That request was denied, however, earlier this month. Order Denying Request for Major Policy Ruling, 46 FLRA No. 129, February 5, 1993.

The Panel will continue to focus on its goals of: (1) avoiding delays in resolving impasses by issuing decisions more promptly, thus alleviating hardship on agencies and employees alike (for example, reductions in force and terminations of Alternative Work Schedules); (2) deciding procedural issues, especially those resulting from the continuing rejection by the parties to use a private arbitrator or travel to D.C.; (3) carefully considering requests for policy decisions; (4) allowing participation by Panel members to provide face-to-face assistance in order to bring about voluntary resolution as well as to enhance their understanding of workplace issues at the site of Federal sector disputes; and (5) considering presentations in cases involving policy matters or issues of first impression. There is a continuing need to discuss an increasing number of "normal disputes" arising from resumption of negotiations following the issuance of related court, negotiability, and unfair labor practice decisions.

We were able to reduce our case handling backlog to 2.5 months by the end of FY 1992. In spite of the changing characteristics of disputes being presented, necessitating more labor intensive investigations and assistance, the Panel expects to control the backlog and try to further reduce it to 2 months by the end of FY 1993, by closing 4 percent more cases than were closed in FY 1992.

FY 1992 Accomplishments: In FY 1992, the Panel (including the Foreign Service Impasse Disputes Panel) received 253 cases, down 15 percent from the intake level of FY 1991 where the influx of disputes over proposed furloughs influenced the numbers. Settlements of related unfair labor practice charges continue to form the basis of negotiations culminating in impasses. Median times for dispositions have grown due to the increasing frequency of multi-issue disputes, involving issues of first impression and great complexity necessitating extensive research and analysis, following receipt of the parties' written statements. Also, where parties utilize private factfinders the times are usually extended moreso than if the Panel itself conducted the proceeding. Illustrative issues are wages and fringe benefits where they are not established by statute, termination of alternative work schedules due to alleged adverse agency impact, discontinuance of environmental differential pay and procedures for personnel reassignments. Needless to say, smoking disputes continue to require Panel final action.

Diversity of dispute resolution procedures employed by the Panel continued in order to maximize the Panel's effectiveness in conjunction with its scarce resources. Among such, tailored to the specific circumstances of given disputes were: Orders to Show Cause as to why a given contract provision should not be imposed upon the particular parties, written

submissions of limited pages as well as number of exchanges, and informal conferences between the parties and a Panel representative. All of the foregoing were often followed by a Decision and Order. In fact, the Panel imposed terms by Decisions and Orders 16 percent more often in FY 1992 than the previous year. For the first time, the Panel directed parties in several disputes to select and share the expenses of a private factfinder to develop a record, including a transcript. In certain instances the factfinder was to make recommendations to the parties for settlement, in others such authority was not delegated. Where the recommendations were not accepted, the Panel took final action in Department of Defense, Department of Defense Stateside Dependents Schools, Quantico Dependents School System, Quantico, Virginia and Quantico Education Association, (Case Nos. 91 FSIP 246 and 250, August 10, 1992). The Panel also selected from among numerous issues, those which it would address on the merits while directing any others to other forums for resolution. This has the undesirable concomitant of piecemeal and protracted dispute resolution. Where face-to-face assistance was provided -- even under protest where the parties were directed to meet away from the site of the dispute -- the prospects for voluntary resolutions in narrowing of the issues was markedly enhanced although the disposition times were not necessarily shortened. In that regard, such opportunities were enhanced through increased availability of funds for this purpose, due to a lag in the reappointment of two members from January 10th to May 13, 1992.

The use of telephonic mediation-arbitration and informal conferences continued. An Arbitrator's Opinion and Decision was issued following med-arb by a Panel representative regarding a holiday shutdown in Department of the Navy, Mare Island Naval Shipyard, Vallejo, California and Local No. 5, PEPS, (Case No. 91 FSIP 252, November 27, 1991). A Panel Decision and Order, following abbreviated written submissions concerning another holiday shutdown, was issued in Department of the Navy, Mare Island Naval Shipyard, Vallejo, California and Local 5, Planners, Estimators, Progressmen, and Schedulers; Federal Employees Metal Trades council; Local 25, International Federation of Professional and Technical Engineers, AFL-CIO; and Local 11, International Federation of Professional and Technical engineers, ALF-CIO, (Case Nos. 92 FSIP 147, 150, 151 and 159, June 25, 1992) and three further requests involving the same topic were held in abeyance due to questions concerning representation. Another arbitrator's award was issued concerning fringe benefits where the Panel's designee had retained jurisdiction pending the Authority's resolution of a negotiability appeal in Department of the Navy, Marine Corps Combat Development and Education Command, Quantico, Virginia and Local 1786, American Federation of Government Employees, AFL-CIO, (Case No. 87 FSIP 83, November 20, 1991).

The Foreign Service Impasse Disputes Panel imposed terms concerning official time for Union representation and Union-initiated mid-term bargaining in U.S. Agency for International Development, Washington, D.C. and American Foreign Service Association, (Case No. 91 FSIDP 03, July 31, 1992). Two other cases were closed based on voluntary agreements following staff assistance and a decision concerning a negotiability appeal from the Foreign Service Labor Relations Board.

In Fiscal Year 1992, the Panel closed 268 cases in a median time of 167 days. The Panel's focus on providing face-to-face assistance will continue in support of its long-held preference for voluntary, rather than imposed contract terms. As mentioned earlier, however, coordination of schedules to maximize economy of resources frequently does not shorten disposition times. Department of Housing and Urban Development, Region IX, San Francisco, California and Local 1450, National Federation of Federal Employees (Case Nos. 91 FSIP 95 and 92 FSIP 20, May 27, 1992). Our case inventory as of the end of FY 1992, including the Foreign Service Impasse Disputes Panel, stood at 123. Our current pending caseload as of January 31, 1993, is 83.

FEDERAL SERVICE IMPASSES PANEL

Workload Projections:

	FY 1991 Actual	FY 1992 Actual	FY 1993 Estimate
Impasses Received	297	253	278
Carryover from Prior Year	116	138	123
Total Caseload	413	391	401
Impasses Resolutions	275	268	279
Total Pending	138	123	122

FEDERAL LABOR RELATIONS AUTHORITY

Exhibit on Inspector General Information for Designated Federal Entities

(in thousands of dollars)

Resources:	FY 1992 Actual	FY 1993 Estimate
Budget Authority	$ 226	$ 277
FTE Workyears	3	4

The Office of Inspector General was established in FY 1989 at the Federal Labor Relations Authority pursuant to the provisions of the Inspector General Act of 1988, Public Law 100-504, funded within the Authority Decision Unit. The resources to provide for establishment of the Office were re-directed from within funds available to the Authority and provided for an initial complement of two staff members. During FY 1991, the Authority re-directed additional resources to provide for establishment of an audit staff position within the Office. In FY 1992 resources were provided for an additional FTE for an audit/investigative position and other support funds for travel, printing, contract audits and equipment.

FEDERAL LABOR RELATIONS AUTHORITY

Report on Metric System Conversion

This report is submitted to the Congress in compliance with the requirements of Section 12(a) of Public Law 100-418, The Omnibus Trade and Competitiveness Act of 1988.

The Federal Labor Relations Authority (FLRA) is a highly personnel intensive, independent Federal agency which spends over 90 percent of its annual budget for employee salaries and benefits, General Services Administration rent payments, and communications costs. This leaves less than 10 percent of the budget for all other areas of expenditure, including: travel, Government Printing Office printing, subscriptions, supplies, and office equipment.

The primary output measures used by the FLRA relate to the processing of different types of labor relations cases. The operations of the FLRA do not involve any commercial or business type activities other than for miscellaneous procurement of supplies, materials and office equipment. The predominant measure used for procurement of items is units of quantity, rather than measures of area, length, volume, capacity or weight.

In light of the above, there is a minimum level of application for the metric system of measurement in the FLRA. In order to implement the metric system, the FLRA drafted an instruction which primarily effects the procurement area where metric units of measurement can be used for certain small purchases and procurement, in lieu of the U.S. equivalent measurement.

This instruction designates an agency official to coordinate with other agencies and be responsible for the implementation of metric system conversion, developing agency guidelines to carry out the policy set forth in Public Law 100-418, and providing adequate employee awareness and understanding of agency metric policies in order to encourage and support an environment which can accommodate metrication.

SCHEDULE OF CONSULTING SERVICES

FEDERAL LABOR RELATIONS AUTHORITY

(Obligations in thousands of dollars)

Account Title and Symbol	FY 1992 Actual	FY 1993 Estimate
Salaries and Expenses: Account No. 54-0100-0-1-805		
I. Management & Professional Support Services	$10	$10
II. Studies, Analysis & Evaluations	--	--
III. Engineering & Technical Services	--	--
TOTALS	$10	$10
Memorandum (non-add) entry: Amounts included in the categories listed above for R&D activities....	(--)	(--)

- This report is submitted in compliance with the requirements of 31 U.S.C. § 1114, 10 U.S.C. § 2212 and Public Law 102-394.

- Obligations for consulting services are being reported in accordance with the definition prescribed in Section 38-4 of Revisions to OMB Circular A-11, dated October 23, 1992.

- The primary use of consulting services at the FLRA is for financial audit services performed on a contractual basis.

Introductory Remarks of Chairman McKee

Ms. McKee. Yes, thank you. I am pleased to be here.

This is my fifth appearance before this subcommittee as Chairman of the agency. First, I wish to introduce our Members. They are Pamela Talkin and Tony Armendariz, who are the two other Members of the Authority with me. Thanks to them and their staffs, we have made great strides within the agency, which I will tell you a little bit about later.

On my right—the General Counsel, as you know, is vacant—so our Deputy General Counsel is here representing that part of the agency; and on my other side is the Chairman of the Federal Service Impasses Panel, Edwin Brubeck.

I thought I would just make a few remarks. Since we cannot talk about the 1994 budget in numbers, I will tell you a little about 1993. Our current budget is $21,647,000, and 251 FTE's. Our current staffing level is 250.

Our caseload in the total agency is 16,551. That is an increase of 2,000 over last year, and we are operating at the lowest staff level in the agency's history with the highest caseload in the agency's history.

I can contrast 1993 with 1981, when we had 12,490 cases with 363 staff. So we have seen about a 30 percent reduction in staff and a 30 percent increase in cases over that period of time.

AGENCY BUDGET STRUCTURE

Our budget breaks down into, 75 to 80 percent goes for personnel and benefits; 10 to 15 percent for rents and communications; and 10 percent for all other categories. That does not include unessential categories, it is travel for investigating and holding hearings on unfair labor practice charges, printing of our cases, court reporting at the unfair labor practice hearings, computer equipment, and other such essentials. So we have very little flexibility within that budget.

AUTHORITY CASE INVENTORY

For the program of the agency, the Authority activity is now at its lowest inventory of cases in its history. We have 179 cases as of January 31. We closed 522 cases in 1992.

Mr. Hoyer. What was that inventory?

Ms. McKee. One hundred and seventy-nine as of January 31 and we closed 522 cases last year. That is a great achievement since the year 1988–1989, when I was the only member. We had no quorum. And so we accumulated a backlog of close to 600 cases, and that is now mostly gone. We have a few cases left, but some of them are difficult and others are awaiting court decisions.

LABOR MANAGEMENT COOPERATION PROGRAM

In the last year I instituted a labor-management cooperation effort within the Authority which serves as a clearinghouse for agencies and unions to come and find where they can receive help, whether it is within the government or without, depending upon their needs. We give direct assistance as well to agencies and

unions, and we attend a lot of conferences that are directed towards encouraging the agencies and unions to work on labor-management cooperation; understand how to communicate with each other; and the General Counsel's office has an additional program in this area.

So we have tried to step out and see if there are ways for unions and management to settle their disputes without litigating, and, thus, reduce the number of cases that we see, and also enhance the parties' relationships and the effectiveness of the operation of the government.

ADMINISTRATIVE INITIATIVES

We have put in a new computer system, so we can do a whole lot of things that we could not do before with really outdated equipment and a program that was not readily accessible. I have a great wish that we would be able to have the parties come into our system on a read-only basis in the future so they can check on what the latest cases are and what our decisions are. But, we will worry about that in the future once we all know how to use the computer system to its fullest extent within our agency.

PROGRAM INITIATIVES

We have also initiated a review of the total program within the agency. We went out through the Federal Register with a query on suggestions for the unfair labor practice program. We have had a lot of answers and suggestions. An agency task force is working on draft proposals.

We have done something similar with a task force on the representation cases. The General Counsel's office is seeing some very unique situations, predominantly because of the downsizing and reorganizations in the Defense Department. I am sure Mike will talk to that. So we are seeing if there are better ways for us to do things, whether we can shorten processes or make them less complicated for the parties.

We have a program underway with the arbitrators as well. Many of the arbitrators in the Federal sector only handle one or two cases a year that are in our area. They work mostly in the private sector, so they are very poorly informed on government rules and regulations that apply. So we are having our first conference for arbitrators.

I think we will probably try to do some more next year. It will be on a trial basis to help them be much better informed on our program and on critical things that we see arbitrators are not analyzing correctly. And, we will develop an arbitrator handbook. Member Talkin and her staff are working on that. So it is an agency-wide program of trying to improve what we do within the agency itself and trying to help management and labor develop a better way to resolve disputes.

We are very proud of our accomplishments, but we do see the rosy scenario of a low-case inventory may be drastically changed with the reorganizations and downsizing in the government, because the more that occurs, the more cases we see. So there is a fairly direct correlation between reorganizations and downsizing

and the number of cases we see, and a lot of them are on very complex issues now. The routine has been pretty well spelled out by the Authority and the General Counsel's office. I think that now the agencies and unions are much better informed.

We also have instituted a quarterly summary of cases that goes out regularly to the parties and to the arbitrators. There are 1,500 people on that list now, so we are trying to keep them informed, but it is not easy with the reduced staff.

Now, if you wish, I will answer any questions or you can hear from Mike.

Mr. HOYER. We will hear from the two of you briefly.

DEPUTY GENERAL COUNSEL DOHENY'S OPENING REMARKS

Mr. DOHENY. I will just summarize.

As Chairman McKee pointed out, out of 16,000 cases, we are dealing in the General Counsel's office with about 15,000 of those cases. That is more than a 50 percent increase in a 10-year period on an annual basis.

Mr. HOYER. Let me clarify. You mentioned a case figure of 16,551.

Ms. MCKEE. Yes.

Mr. HOYER. Which is a 2,000 case increase.

Ms. MCKEE. Most of that is in the General Counsel's office.

Mr. DOHENY. We are getting about 15,000, we project for this year. And at this point in the fiscal year we are probably going to exceed our projections because of the rate of intake we are experiencing.

In the same 10-year period, our staffing level has decreased by 22 percent. So at this time an agent in the regional office is working with approximately 200 cases per agent. And I think a way of putting that in perspective is that an NLRB agent averages about 40 to 50 cases a year. So we are dealing with four times those numbers.

To deal with that, we have had to make a number of changes over the four-year period that I have been at the agency, and that includes not traveling to conduct on-site investigations. For a couple of reasons: One, we don't have many funds to travel with; secondly, with the large intake of cases, we don't have the time to spend traveling on-site to do investigations.

Most of the investigations are done by telephone with the parties, and we reserve our traveling to prosecute and try the cases in which we find merit.

REPRESENTATION CASELOAD

Chairman McKee mentioned the representation cases. This is small in total percentage of our cases, actually probably less than 600 or 700 a year this last year, out of several thousand ULPs, but they take a lot of time and are very complex cases.

The reorganizations in DOD are unquestionably the cause of the huge increase of representation cases. The Department of Defense is now consolidating a number of military components; the Army, Navy and Air Force, into single DOD agencies. As an example,

commissary agencies are all consolidating into a new agency called the Defense Commissary Agency.

What happens is that many bargaining units represented by several unions are now all in one agency, and issues arise as to the appropriate bargaining unit under the new agency. And once that determination is made, which of many competing unions will represent the bargaining units results.

It gets very complex, and, of course, they are very passionate; a lot of emotions working here, because you have competing interests among the unions.

KNOWLEDGE, COMMUNICATION AND TRUST PROGRAM

We, too, have tried to deal with this proactively, and we have developed something called the "Knowledge, Communication and Trust" program. We have one person right now who is the developer of the program; designed it and does all the training. We have tried to train others so that we could broaden the program. We gave 40 people some training.

Unfortunately, the program is very complex and it takes some excellent skills to do the program. It requires working with the union and management together in trying to get them to come up with cooperative programs. The skills are such that we probably now have two, maybe three, people who can do it, and the demand has gotten more than we can handle. So we are not able to meet the demand we have for the KCT program.

We will continue to do the KCT program. KCT, by the way, is "Knowledge, Communication and Trust," and it involves three days: One day meeting separately with the union and management to get their views on the issues in the agency; the next day is a seminar for management and union, who sit in the same room together and we provide training on the laws and the responsibilities and rights under the statute; the third day is a roundtable where the parties are—actually, almost a sensitivity session—where the parties take and lay out their problems on the table with one another and then, gradually, through the day, we work to try to develop a cooperative agreement with them.

During that KCT program, wherever it has been done, we have been fortunate in settling hundreds, in some places, hundreds of outstanding issues. It hasn't been the total solution. We have found we can not change behavior in one three-day session. What often happens is that charges do not come out of that agency for a few months after the KCT program is done, but then the charges come up again.

What we eventally need to do is come up with a follow-up procedure to keep the parties working at cooperative relationships.

That summarizes my testimony.

Mr. HOYER. Thank you.

[The information follows:]

STATEMENT OF MICHAEL W. DOHENY

DEPUTY GENERAL COUNSEL

FEDERAL LABOR RELATIONS AUTHORITY

BEFORE THE SUBCOMMITTEE ON TREASURY, POSTAL SERVICE

AND GENERAL GOVERNMENT

COMMITTEE ON APPROPRIATIONS

U.S. HOUSE OF REPRESENTATIVES

CURRENT SERVICES BUDGET OVERVIEW HEARING

Mr. Chairman and Distinguished Members of the Committee:

It is my pleasure to appear before you once again. I am testifying on behalf of the Office of the General Counsel (OGC) because, for the second time in less than a year, the position of General Counsel has become vacant. Former General Counsel Alan R. Swendiman resigned, effective January 25, 1993, after only eight months in office. As you know, the vacancy in the position adversely affects our ability to resolve charges in an efficient manner. In the absence of a General Counsel, the regional offices may not issue complaints on unfair labor practice charges that are found to have merit. During the last hiatus, which lasted slightly less than five months, we had prepared

approximately 500 complaints for issuance while awaiting appointment of a General Counsel. We were just beginning to work ourselves out of the backlog from that period when Mr. Swendiman resigned.

The story of the OGC to the present time is one of dealing with ever increasing caseloads in the face of decreasing resources. The total annual workload has increased almost 50 percent over the past ten years (1983-1992). During the same ten year period, total authorized positions have decreased from 171 to 133, a reduction of 22 percent. The workload per authorized position has increased 94 percent. In FY 1992, the OGC had an increase in workload of 19 percent over the prior year. Based on intake for the first quarter of FY 1993, the OGC projects that it will again have an increase of approximately 14 percent over FY 1992. This will be the seventh consecutive year of increased case intake.

We do not see a leveling of case intake for the next few years. This is because reduced appropriations in defense and domestic programs and the concomitant reorganizations and military base closures result in increases in unfair labor practice and representation cases. The regional offices received a 50 percent increase in representation cases in FY 1992. This increase can be attributed to Department of Defense reorganizations which resulted in assimilation of functions performed by the separate branches of the military into single agencies of the Department of Defense. For example, the Department of Defense transferred

all supply functions into the Defense Logistics Agency and all responsibilities for management of commissaries among the separate branches were consolidated under the new Defense Commissary Agency. Moreover, the representation workload is more than simply larger numbers. It also presents some of the most complicated and novel representation issues seen in the Agency's experience.

The challenges created by increasing workload and diminishing resources have magnified and intensified each year. In response, the OGC has taken several initiatives over the past few years, including downsizing the headquarters operations, reducing the total regional management staff through regional reorganization, and changing the methods and means of performing the work to increase productivity and efficiency (e.g., greater reliance on conducting investigations by telephone, increased efforts in obtaining settlements regardless of the merits of the charges, liberal exercise of prosecutorial discretion by placing more efforts and energies on cases having a greater impact on the labor-management relations program, and procurement of computers for all members of the regional staffs).

Currently, the regional offices are conducting virtually all investigations by interviewing witnesses telephonically. This is because we began the fiscal year with a shortfall of approximately $380,000 and were able to allocate only a fraction of the normal amount of funds for travel at the outset of the

fiscal year. By contrast, our sister agency, the National Labor Relations Board, conducts on-site investigations in virtually every case.

As great as the workload increase has been, its effect has been somewhat ameliorated through interventions by regional directors and their staffs. In these interventions, an OGC representative meets with management and unions within agencies or activities from which large numbers of cases are generated. Attempts are made, through training and/or mediation, to help the parties reach agreement on a procedure for resolving potential unfair labor practice issues. Additionally, a program developed by the Counsel for Special Outreach, known as "Knowledge, Communication and Trust", is designed to combine instruction on the rights and responsibilities under the Statute with teaching skills on improving communications and achieving more cooperative relationships. In virtually all of the agencies where this program has been provided, pending charges and complaints have been resolved. The program has received singularly high praise for its effectiveness from persons within and outside the agency.

The achievements of the OGC in meeting the challenges presented by the workload increases did not result solely from management initiatives. The willingness of a dedicated staff to work hard and without complaint to accomplish the mission of the OGC is the largest single reason that the OGC has been able to get the job done with only a minimal increase in backlog. While caseload per

FTE increased 94 percent, productivity per FTE increased 75 percent over the past ten years.

I look forward to working with you this year in supporting our budget request for FY 1994, after the President submits the budget. In the meantime, I will be pleased to respond to any questions you may have regarding our current programs.

Mr. HOYER. Mr. Brubeck?

FEDERAL SERVICE IMPASSSES PANEL—CHAIRMAN BRUBECK'S OPENING REMARKS

Mr. BRUBECK. Thank you, Mr. Chairman. My name is Ed Brubeck, and this is the second opportunity I have had to appear before the committee.

As Chairman McKee has said, the new budget has not been prepared yet and it is hard to give you all the details. As soon as we get it, we will try to provide you with the details.

We are a very, very small agency, an entity within the Federal Labor Relations Authority, and we are, obviously, like everybody else, understaffed. We are turning out cases, some of them very, very difficult, and our current pending caseload as of January 31 was 83. In fiscal year 1992, we had 268 dispositions and 123 cases pending at its close. We anticipate those numbers to be 279 and 122, respectively, this fiscal year.

While the focus is on dispute resolution, we also support and cooperate with the Authority's leadership in the labor-management cooperative spirit. It is essential that the parties within our jurisdiction have information with which they can make informed choices as to how effectively to resolve their disputes. To the extent we can respond to requests for such assistance from the parties without putting undue strain on resources, we try to respond in the affirmative.

I would be pleased to respond to any questions you might have, either now, or later in writing.

Mr. HOYER. All right, sir. Thank you very much.

[The information follows:]

STATEMENT OF MR. EDWIN D. BRUBECK

CHAIRMAN

FEDERAL SERVICE IMPASSES PANEL

FEDERAL LABOR RELATIONS AUTHORITY

BEFORE THE SUBCOMMITTEE ON TREASURY, POSTAL SERVICE,

AND GENERAL GOVERNMENT

COMMITTEE ON APPROPRIATIONS

U.S. HOUSE OF REPRESENTATIVES

CURRENT SERVICES BUDGET OVERVIEW HEARING

Mr. Chairman and Distinguished Members of the Committee:
My name is Edwin D. Brubeck and this is the second opportunity I have had to appear before you as Chairman of the Federal Service Impasses Panel, a position to which I was appointed in December 1991. I was originally appointed in March 1990 by President Bush to be one of seven Panel Members provided for in § 7119 of the Federal Labor-Management Relations Statute. The current Panel Members are: Mr. Roy M. Brewer, Mr. N. Victor Goodman, Mr. Charles A. Kothe, Mr. Daniel H. Kruger, Ms. Susan S. Robfogel and Mr. John R. Van de Water.

In testifying today, I want to emphasize at the outset that the Administration is currently formulating the President's FY 1994 Budget. Accordingly, I am not yet in a position to provide you with information on funding for specific programs or activities. As soon as the President's 1994 Budget is released, I would be pleased to provide that information to you.

As my statement of last year indicated, we are seeing more cases of first impression as the parties attempt to break new ground. This, of course, entails increased staff time to investigate and analyze the matters prior to presenting the cases for the Panel's consideration. Illustrative of such are wages and fringe benefits for overseas teachers, e.g. Department of Defense, Department of Defense Dependents Schools, Alexandria, Virginia and Overseas Education Association, (Case Nos. 92 FSIP 17 and 103, December 18, 1992), Panel Release No. 339. Others include environmental differential pay for employees working around asbestos and attempts to change competitive areas in contemplation of a reduction in force. We currently have pending for Panel action a dispute over the competitive area for teachers facing a reduction in force, Department of Defense, Department of Defense Dependents Schools, Alexandria, Virginia and Overseas Edcuation Association, Case No. 92 FSIP 247.

Smoking issues continue to arise, but I am pleased to report that we have been somewhat more successful in getting voluntary resolutions. We have continued our search for innovative procedures to promote settlements. For example, parties have been directed to select a private factfinder to make a record upon which the Panel can base its final action, if no settlement results from the parties working with the factfinder who, in some instances, has been delegated recommendation-making powers. While there has been limited success with settlements, most often the Panel has been

called upon to impose terms in at least some of the issues in dispute.

We continue to focus on decreasing the time for disposition of disputes brought before us. Balancing our resources to maximize face-to-face assistance, in pursuit of enhanced understanding of the workplace problems and negotiated settlements, often tends to prolong the time a given case is before us, however. Nevertheless, last fiscal year we began with a backlog of 4 months and ended with one of 2.5 months. This could be accomplished only with a committed staff effort. The median time for all dispositions was 167 days. Our goal for this fiscal year is to shorten that time to 86 days by completing investigations in 30 median days. This is perhaps overly ambitious since we have experienced some staff turnover that will have a tendency to be a drag on timeliness, but we will keep a careful eye on our target. In any case this is what not only the Panel under my leadership holds to be a prime focus, it is also that of our clients. Our current pending caseload as of January 31, 1993, is 83. In FY 1992 we had 268 dispositions and 123 cases pending at its close. We anticipate those numbers to be 279 and 122, respectively, this fiscal year.

While the focus is on dispute resolution, we also support and cooperate with the Authority's leadership in the labor-management cooperation sphere. It is essential that the parties within our jurisdiction have information with which they can make informed

choices as to how most effectively to resolve their disputes. To the extent we can respond to requests for such assistance from the parties, without putting undue strain on resources, we try to respond in the affirmative.

I would be pleased to respond to any questions you may have, either now or later in writing.

Mr. HOYER. Let me start with you, Mr. Brubeck. Ms. McKee went through her status of employees. What is your budget now? Is that included within the $21,647,000?

Ms. MCKEE. Yes.

Mr. HOYER. The FTEs are also included?

Ms. MCKEE. Yes.

Mr. HOYER. I just wanted to make that clear.

Specifically, Ms. McKee what has the FLRA done to provide leadership, I think you have answered that pretty extensively let us continue.

Ms. MCKEE. I think we are trying our best, let's put it that way, within the limited resources to do that.

Mr. HOYER. Good, you anticipated the question I planned to ask. You did a terrific job. No point in my asking them twice.

Ms. MCKEE. Having been an AA up here in the past, I know how many subject areas you are running across.

Mr. HOYER. You have the questions, would you submit answers to these questions so that we will have them for the record. We are in a unique situation because the President himself is in a unique situation. We have no budget, essentially. The President's budget will not be up until the first week of April. As soon as we receive it, we will be in contact with each of the agencies for whom we have responsibility and ask for your comments.

It does not mean we are going to have another hearing, it does mean we will give you an opportunity to comment on that budget. Our staff will work with you and your staff to at least make sure that we understand what we are doing as it relates to your budget.

Quite clearly I am pleased by the fact that you have the lowest inventory in your history, notwithstanding the fact your caseload has risen and your resources in terms of personnel has decreased. You have, nevertheless, been able to increase your productivity and your resolution rate.

Rather than asking any further questions, let me thank you for being here and assure you we look forward to working with you in this somewhat unusual budget year. Thank you very much.

Ms. MCKEE. Thank you.

[Whereupon, at 2:30 p.m., the subcommittee was adjourned.]

[The questions from Mr. Hoyer for the record follow:]

ADDITIONAL QUESTIONS

QUESTION. Specifically what has the FLRA done to provide leadership in promoting Labor-Management Cooperation?

ANSWER. The FLRA has provided assistance to the Federal sector labor-management community by expanding its outreach efforts to provide information and resources necessary to encourage more constructive labor relations and to enhance labor-management cooperation. The Authority has established a clearinghouse of information where agencies, unions and neutrals may acquire resources and materials on case law developments and labor-management cooperation efforts in the Federal sector. The program also provides, upon request, assistance to the parties in the assessment of their relationship, targeting areas for improvement, and linkage with providers of initial programs, if necessary.

The Authority has also increased its efforts to develop, conduct, and sponsor conferences, briefings, and training sessions with labor, management and neutrals throughout the country. Both Authority and field staff have responded to increased requests for agency and union briefings on selected topics, including labor-management cooperation, the role of agency and union in cooperative efforts, coping with reorganizations, and assessing the parties' relationship. Through the General Counsel's efforts, the FLRA has continued to provide the parties with a specialized workshop known as "Knowledge, Communication and Trust" at various facilities around the country.

With respect to its leadership role among the neutral community, the Authority has begun an initiative designed to enhance the knowledge of arbitrators who hear Federal sector cases. A workshop developed specifically for such arbitrators will review the critical Federal statutes, rules, and regulations which distinguish the Federal sector labor cases from the more commonly understood private sector arena. A pilot workshop is planned for the end of summer 1993.

QUESTION. Will you briefly explain for the benefit of our new members, the process which the FLRA follows once an allegation of an unfair labor practice charge has been filed with your office?

ANSWER. As outlined on the attached charts, there are several steps involved in resolving unfair labor practice (ULP) charges. The General Counsel investigates, settles and prosecutes ULP charges. An investigation is initiated only when an unfair labor practice charge is filed with the appropriate Regional Director by either an agency, a labor organization, or an individual. Normally, charges must be filed within 6 months from the date the alleged unfair labor practice occurred. The Regional Directors, on behalf of the General Counsel, have

discretion to conduct any necessary investigation of the charge. During the investigation, all parties involved are given an opportunity to present their views to the Regional Director, who encourages settlement at all stages of the proceedings.

If a charge is not resolved, the Regional Director makes a determination on the merits of the charge. If the Regional Director determines that the charge is without merit and the charge is not withdrawn, the Regional Director issues a letter dismissing the charge. The charging party may appeal the Regional Director's dismissal to the General Counsel. If the Regional Director determines that the charge has merit and the dispute is not resolved, the Regional Director issues a complaint, on behalf of the General Counsel, setting forth the allegations of the unfair labor practice and a time, date and location for a hearing.

Hearings are conducted before ALJ's who are appointed by the Authority. Parties are encouraged to resolve ULP cases prior to the institution of the hearing and even during the course of the hearing. Decisions of the ALJ's are transmitted to the Authority and, if no exceptions are filed, the decisions become final after 30 days. If a party excepts to an ALJ decision, that decision may be affirmed, modified or reversed in whole or in part by the Authority. Aggrieved parties may appeal an Authority decision to the appropriate United States Court of Appeals. The Authority also may seek enforcement of its order in the appropriate Court of Appeals.

Appendix Q

UNFAIR LABOR PRACTICE CASES
Charge filed with Regional Office by an agency, labor organization, or an individual
Investigation by the Office of the General Counsel
Charging Party withdraws charge
Regional Director approves withdrawal
Regional Director declines to issue a complaint
Appeal to the General Counsel
Appeal denied by the General Counsel
Appeal granted by the General Counsel
Remanded to Regional Director for appropriate further action
Regional Director issues complaint
TO APPENDIX R
Informal settlement between
(Bilateral)
Charged & Charging Parties
Regional Director approves settlement agreement
Compliance
(Unilateral)
Charged Party & Regional Director
Regional Director approves settlement agreement
Appeal to the General Counsel
Appeal denied by the General Counsel
Appeal granted by the General Counsel
Compliance
Remanded to Regional Director for appropriate further action

Appendix R

UNFAIR LABOR PRACTICE CASES
Regional Director issues complaint
Appropriate temporary relief may be sought by General Counsel
Stipulation of facts transferred to FLRA
Informal Settlement between
Formal hearing by Administrative Law Judge
Formal Settlement to FLRA
Charging Party withdraws charge
FLRA issues decision on the matter
(Bilateral)
(Unilateral)
Judge's Decision and Order to FLRA
FLRA approves/disapproves formal settlement agreement
Regional Director approves withdrawal of charge and withdraws complaint
Judicial Review
Compliance
Charged Party & Charging Party
Charged Party & Regional Director
FLRA issues decision
(approval)
(disapproval)
Regional Director approves settlement
Regional Director approves settlement
Judicial Review
Compliance
Compliance
Remanded to Regional Director
Appeal to General Counsel
Appeal denied by the General Counsel
Appeal granted by the General Counsel
Compliance
Remanded to Regional Director for appropriate further action

QUESTION. How does the Authority clearly notify both labor and management about information and resources regarding case law development in federal agencies?

ANSWER. In Fiscal Year 1992, the Authority began publishing a "Quarterly Summary of FLRA Decisions" intended to provide the parties with current information on the most significant cases decided by the Authority. Since then, a mailing list which began with only 300 names has grown to over 1,500 interested practitioners, many of whom are mediators and arbitrators whose practice includes Federal sector cases. Additionally, the Quarterly Summary has become a popular vehicle for useful information to the parties, such as the latest developments in labor-management cooperation and training efforts.

The Office of the General Counsel also provides current information by publishing a quarterly report on significant advice and appeals cases.

In addition, the Authority continues to publish its Report of Case Decisions (RCD), which is published by the Government Printing Office. The RCDs include a summary of all cases issued and are forwarded to nearly 300 parties and to over 400 depository libraries throughout the country.

QUESTION. What is the average length of time between the filing of an unfair labor practice with the Authority and final determination?

ANSWER. Processing of an unfair labor practice at the Authority level ordinarily begins when the Authority receives a recommended decision of an Administrative Law Judge. (A statistically small number of unfair labor practice cases come to the Authority as direct stipulations from the parties, without a hearing and Administrative Law Judge decision.) Following Authority receipt of the Administrative Law Judge decision, the parties have 25 days to file exceptions to the recommended decision. Authority staff work on the case cannot begin until all of these papers are received.

It is the Authority's case handling goal to close all cases within six months (180 days) of receipt. During FY 1992, the Authority closed 151 unfair labor practice cases, with the average length of time between receipt and issuance of the Authority's decision being 163 days.

QUESTION. Of the cases brought before you, what percentage do you find in favor of labor, of management, and what percent are compromised?

ANSWER. The Authority does not maintain records or other data concerning the percentage of cases decided in favor of labor or management. As an independent, adjudicatory agency, it would

be awkward, if not inappropriate, for the agency to categorize and count decisions as "wins" or "losses" for either side of a labor-management dispute. In addition, as Authority cases frequently involve numerous, unrelated issues, it would be difficult to properly categorize decisions in this manner.

With respect to the latter point, the Authority also does not maintain records or other data concerning cases that are "compromised," insofar as that term is intended to encompass decisions that are not identified as "wins" or losses." However, the Authority and the Office of the General Counsel maintain statistics concerning the number of cases that are withdrawn or settled at various stages of Authority proceedings and which, as a result, do not require a decision.

QUESTION. When your decisions are appealed to the courts, what percentage are upheld?

ANSWER. Generally, a party may appeal an Authority decision to a U.S. Court of Appeals. However, two categories of Authority decisions may not be appealed: (1) arbitration decisions that do not involve an unfair labor practice; and, (2) representation decisions involving an appropriate unit determination.

A statistical analysis of litigation involving Authority decisions for the period 1987 through 1992 is attached. It shows that the Authority was affirmed in 50 percent of the cases and reversed in 42 percent, excluding settlements, remands without decision, and other mixed results. The analysis also shows that the Authority is affirmed more frequently when a union or individual, as opposed to any agency, appeals the decision. It should also be noted that agencies appeal Authority decisions more frequently than do unions.

FLRA LITIGATION RESULTS
WINS, LOSSES, & MIXED RESULTS
BY YEAR

Year	W	L	M	Total
1987	33 (61%)	19 (35%)	2 (4%)	54
1988	38 (52%)	31 (42%)	4 (5%)	73
1990	21 (62%)	12 (35%)	1 (3%)	34
1991	14 (61%)	6 (26%)	3 (13%)	23
1992	19 (37%)	24 (46%)	9 (17%)	52
6-year Total	139 (50%)	117 (42%)	22 (8%)	278

FLRA LITIGATION RESULTS
WINS, LOSSES, & MIXED RESULTS
BY PARTIES AND YEAR

1987	W	L	M	Total
Agencies	8 (67%)	4 (33%)	0	12
Unions	22 (56%)	15 (38%)	2(5%)	39
Individuals	3 (100%)	0	0	3

1988	W	L	M	Total
Agencies	18 (43%)	23 (55%)	1 (2%)	42
Unions	17 (61%)	8 (29%)	3 (11%)	28
Individuals	3 (100%)	0	0	3

1989	W	L	M	Total
Agencies	3 (12%)	20 (80%)	2 (8%)	25
Unions	10 (63%)	5 (31%)	1 (6%)	16
Individuals	1 (100%)	0	0	1

1990	W	L	M	Total
Agencies	17 (59%)	11 (38%)	1 (3%)	29
Unions	3 (75%)	1 (25%)	0	4
Individuals	1 (100%)	0	0	1

1991	W	L	M	Total
Agencies	9 (60%)	5 (33%)	1 (7%)	15
Unions	4 (57%)	1 (14%)	2 (28%)	7
Individuals	1 (100%)	0	0	1

(Continued)

1992	W	L	M	Total
Agencies	11 (26%)	24 (56%)	8 (19%)	43
Unions	7 (88%)	0	1 (12%)	8
Individuals	1 (100%)	0	0	1

6-year Total	W	L	M	Total
Agencies	66 (40%)	87 (52%)	13 (8%)	166
Unions	63 (62%)	30 (29%)	9 (9%)	102
Individuals	10 (100%)	0	0	10

Source: Office of the Solicitor
FLRA, March 1993

QUESTION. Generally speaking, how much preparation for investigation can be performed in-house prior to having to travel to the site of the violation? Have you explored the use of the FTS2000 video conferencing capability?

ANSWER. Virtually all investigations are currently being conducted over the telephone. On site investigations are almost never conducted anymore. Affidavits are taken over the telephone and mailed or faxed to the affiants for their signatures and then mailed by the affiant back to the regional office. We frequently conduct telephonic conference calls with union and management officials when we are attempting to get the parties to settle cases.

We briefly explored FTS2000 video conferencing during the past year, but dropped the matter after hearing the estimate of hourly conferencing costs and because the costs for purchase or lease of the video equipment was prohibitive. Further, even if the FLRA had access to video equipment, many of the parties do not.

QUESTION. If a staff increase is not made in fiscal year 1994, what impact would that have on both the Authority and federal agencies?

ANSWER. Managerial actions, such as reductions-in-force, furloughs and other adverse actions which have an impact on the Federal workforce, have a direct correlation to the filing of cases with the FLRA. With the current changes taking place in the Defense Department and the Administration's commitment to reducing the size of the Federal workforce over the next few years, we expect the trend of increasing workload for the FLRA to continue and, potentially, accelerate. We feel it is important that Federal employees and their unions have an effective forum for redressing their problems and concerns promptly.

With the current level of staff resources, the FLRA has generally been in a position to respond in a timely manner to case filings over the past few years.

As significant increases in case filings are realized as a result of adverse managerial actions as outlined above, backlogs will almost certainly exist with current staffing levels.

QUESTION. Does the Authority establish an on-going working relationship with an agency before or after a labor-management dispute has occurred?

ANSWER. The Authority works with agencies and unions both after a dispute and when there is no specific dispute, but a general desire between labor and management to foster a less adversarial relationship. The latter approach most likely occurs at the request of the parties for assistance and may come to

either the Director of Labor-Management Cooperation at the Authority level or to the General Counsel's staff. Most activity after a dispute has arisen occurs through the Regional offices.

Regional Directors and their staffs have had unique opportunities to develop on-going relationships with agency and union personnel. Because of frequent personal contact they have come to know the major players very well. Thus, it has been and continues to be possible for the Regional Director or a Regional Attorney to simply pick up the telephone and call a party at anytime. Regional Directors are frequently called upon by agencies and unions to present training to supervisors, labor relations specialists and union stewards.

In addition, the OGC has developed a program in the regions for interventions at facilities in which we detect unusual labor-management problems. When a pattern of unusually large number of charges are filed over a period of time from a single facility, the Regional Director will often call the union president and the agency head and ask for an opportunity to visit the facility and sit down with them to assist in working on whatever is causing the problem in the relationship. Thus, for example, last summer the Regional Director in the Atlanta Regional Office called a Marine Corps General at a major Marine Corps Base to arrange a meeting with him and the union president. The base has been a source of hundreds of charges over the years and a place where the labor-management relationship had been very adversarial. As a result of her meeting with the agency and union heads, the Regional Director obtained their agreement to have the OGC's "Knowledge, Communication and Trust" (KCT) seminar presented at the base. The KCT seminar was presented and over 100 ULP charges and grievances was resolved. The parties also agreed to a pre-charge procedure which precludes filing an unfair labor practice charge until after the other party has received notice and an opportunity to resolve the matter.

However, as was stated in testimony at this hearing, the OGC needs to obtain resources and develop a program for regular follow-up with agencies and unions that have had the KCT seminar to keep them on the right path. The greatest disadvantage to OGC's inability to travel to conduct investigations is that we have lost the opportunities that on-site investigations provided for giving assistance to the parties in working out their problems. One of the most important skills developed by our agents is the ability to mediate and facilitate resolutions of disputes. Those skills are better utilized in face-to-face meetings than in the less personal telephonic conferences.

QUESTION. What are some examples of the type of information the Authority, Federal Service Impasses Panel, and the General Counsel will be able to share with the service of the new computer network system?

ANSWER. The immediate benefit from the installation of an agency-wide computer network was providing the ability for all FLRA employees throughout the Headquarters and field offices to have access to an electronic research database which greatly assists them in processing cases. This database, constructed by FLRA employees, contains the full text of Authority decisions within days after they are issued. It also includes a key word Subject Matter Index and Citator, and case summaries of Authority decisions. Moreover, all employees on the network have the ability to perform electronic word search in the database. Prior to this development, we had no ability to provide "real time" research tools to the field because the cost of privately available tools was far too expensive.

The agency-wide network provided us with electronic mail capability throughout the Agency, dramatically improving the ability of the various components to exchange information. The network enabled the General Counsel's office to set up a new case tracking system for all field filings and will in the near future give us the capability of creating case tracking systems for all components on a shared database.

QUESTION. How will the installation of the Authority's new telecommunication system improve the service to the agencies?

ANSWER. The Agency has purchased and installed its telecommunications system, the Merlin Legend, at our new Headquarter's location at 607 14th Street, N.W. The system will be available for all employees to use on March 15 -- our first work day at that location. This state-of-the art system will allow the Agency to essentially provide 24 hour service to our clientele by the use of its voice mail feature. Since the Agency's mission affects Federal activities worldwide, this feature will improve our ability to respond to issues raised by management, unions and our own employees. Additionally, the use of sophisticated conference calling techniques will enhance our ability to resolve some types of issues telephonically, as well as allowing Agency management to improve our internal communication abilities. Finally, other features -- such as programmable memory buttons and message waiting -- will enhance the Agency's ability to more rapidly respond to issues by pressing a single button for frequently called numbers and ensuring that messages are quickly and accurately received.

QUESTION. Unfortunately you are without a General Counsel once again. What is your current backlog of complaints that have been found to have merit?

ANSWER. At the present time we have 463 cases in which complaints were issued that are still awaiting hearings. These are cases in which the complaints were issued while General Counsel Swendiman was serving. Since his departure on January 25, 1993, approximately 87 complaints have been drafted and are ready to be issued following the appointment of someone to the

position of General Counsel. We estimate that between 80 and 100 complaints per month will be deferred until appointment of a General Counsel.

QUESTION. Of the cases filed with you, how many do you find are meritorious?

ANSWER. Our Regional Directors make determinations of the merits of cases after an investigation is completed. Upon completion of an investigation, a Regional Director will decide to dismiss, if he or she concludes there is no merit to the charge, or issue a complaint, if he or she concludes that the charge is meritorious. At that point, however, the charging party is given an opportunity to withdraw the charge in lieu of having it withdrawn. On cases having merit, the charged party is given the opportunity to settle with the OGC, in lieu of having a complaint issued. Thus, a determination of merit was made on every case in which a complaint was issued. In 1992 that number totalled 909 cases. In addition, settlements were obtained in another 127 cases after a determination of merit had been made, but before a complaint had issued.

The problem of identifying the total cases that truly have merit is in distinguishing meritorious and non-meritorious cases among the 3880 cases that are settled. In past years, the regional offices would attempt to settle only those cases in which a determination was made that the charge had merit. This policy required that an investigation be conducted in all of those cases. With the large increase of workload and simultaneous decrease of staff, it became necessary to change our practices. Under current practice, regional personnel initiate discussions with both agency and union officials immediately after a charge is filed in an attempt to resolve the problem that generated the charge. We have been very successful in settling many of those cases without the need for investigations. We cannot say, however, that those cases had merit because they are often settled solely for the benefit of the parties' relationship without regard to the merits of the charges.

Although the practice precludes an approximation of the settled cases which were meritorious, it facilitates quick and amicable resolution of charges and eliminates the need to conduct lengthy and time-consuming investigations in every case.

QUESTION. With the magnitude of cases appearing before the Counsel and the limited resources available, are cases being pursued according to seriousness of the charge?

ANSWER. Very definitely. The emphasis has been on maximizing efforts on the charges which are more serious and which have greater impact on the labor-management relationship within the agency or the Federal government. For example, charges alleging discrimination against individuals because of their activities as union members or officers or their activities

in support of unionization will always receive maximum attention.

The problem, as we stated in our written submission, is that the definition of what constitutes a serious charge necessarily changes as the workload increases and the staff continues to decrease. Some cases that fell within the parameters of "serious charge" when we had 10,000 cases may not be within those parameters today.

QUESTION. Before taking steps such as downsizing your Headquarters in an attempt to address the diminishing resource problem, was a thorough analysis conducted to determine that the cuts could be made there without sacrificing service?

ANSWER. Yes, such an analysis was made. The major reorganization in the OGC headquarters was made in late 1989. We were allowed no alternative to downsizing as we had been informed that our total FTE allowance was to be reduced by five positions for FY 1990. The choice was to eliminate positions in the OGC headquarters or in the regional offices where the charges and petitions are received and the investigations are conducted. Although it was clear that the headquarters' operations would be adversely affected, that consequence had to be balanced against the adverse consequence to the program, if additional resources were taken from the regional offices.

Since the reorganization and downsizing of the headquarters, several matters requiring attention have had to be postponed or have been delayed. For example, OGC published a notice in the Federal Register in December 1990, announcing our intention of reviewing the regulations concerning the processing of unfair labor practice cases and inviting the public, agencies and unions to submit suggestions and recommendations for changes. After two years, the proposed regulations have not been published - largely because the task has fallen on one person who has many other responsibilities. Additionally, we have planned, but have been unable to complete several other matters such as a revision of the ULP Case Processing Manual to capture and reflect all the many changes in policy and practice that have taken place in the past five years; revision of the Representation Case Processing Manual for the same reason; and development of an Office Managers Handbook which will provide the procedures for accomplishing the multitude of administrative matters that must be done in each regional office. Performance elements and standards are obsolete because of the changes in practices and procedures and caseload requirements and must be amended. Annual visits by headquarters staff to regional offices for program review have been decreased by half.

QUESTION. Does the Authority categorize the Unfair Labor Practice charge and assign them to particular specialists, therefore expediting the process?

ANSWER. Charges are not assigned according to type and we do not develop areas of specialization among the agents in the various types of ULP's. Because of the magnitude of the caseload, each agent is assigned approximately 180 to 200 cases during the year and is expected to have a good working knowledge of the law for every type of ULP. Although virtually all investigations are currently conducted over the telephone, when on-site investigations are planned, ULP charges will be categorized according to geographic area and assigned to a person responsible for covering that area of the region. The agent will then travel to investigate several cases on a single trip. Areas or cities within regions were rotated among the agents during the year in order to eliminate the over familiarity that results from an agent always working with the same parties. These considerations have become less important now that agents only occasionally conduct on-site investigations.

QUESTION. Exactly what types of disputes does your Panel resolve and what relationship do you have with the FLRA?

ANSWER. The Federal Service Impasses Panel is responsible for resolving collective bargaining disputes between Federal employers and unions representing their employees which remain after mediation assistance. The Panel was originally created under Executive Order 11491 to bring finality to negotiations. (Its jurisdiction is now found in Section 7119 of the statute.) Such negotiations arise both during the term of agreements, for instance, over the impact and implementation of an office relocation, changes in terms and conditions of employment, and at their termination. Subject matter is as diverse as the constituency: wages and fringe benefits, electronic funds transfer, smoking in the workplace, parking, transportation subsidies, official time for union representation, and competitive areas for job retention in a reduction-in-force.

Parties within the Panel's jurisdiction may take their disputes to a private third party for arbitration only if the Panel approves of the procedure.

As an entity within the FLRA, the Panel is bound by the decisions of the FLRA. The Panel also gets its budget from the FLRA as well as administrative support. Decisions of the Panel are reviewed by the FLRA if either party fails to implement a final order of the Panel via an unfair labor practice proceeding, or as a result of the agency head disapproval, alleging conflict with law, of a final order of the Panel.

QUESTION. How have you been able to be successful in resolving pending issues?

ANSWER. We have been able to resolve pending issues by initially having a complete grasp of the context out of which the dispute arises. Our focus is on helping the parties to fashion a workable accommodation to the workplace problems presented, short

of imposing a contract provision for the term of their agreement. Wherever possible, we try to meet at the site to gain a fuller understanding and take advantage of the interpersonal dynamics of dispute resolution. We continue to be chary of asserting jurisdiction, however, where there is doubt as to whether the parties have truly done all they can to narrow the issues that divide them. We utilize a variety of procedures including factfinding with and without recommendations, and in certain cases the parties are required to select and share the costs of such a procedure. We also use the informal conference, both face-to-face and telephonic. We have even engaged in telephonic arbitration and mediation-arbitration.

QUESTION. Has the Panel considered options which would decrease the need for face-to-face assistance, which according to your statement this process prolong's the length of time a case is before you?

ANSWER. As stated above, we are constantly balancing the desirability of voluntary settlements, face-to-face assistance, and the need to more quickly resolve cases. With our Panel Members serving as Special Government Employees, and residing from Alaska to New York, we must coordinate assignments, and travel very carefully. We rely on written submissions -- at times abbreviated -- but this is generally agreed to be less satisfactory and is labor intensive. Moreover, it is also time consuming. As always, we are sensitive to the parties' mutual preferences; they must be balanced within available resources -- both personnel and funds. Show Cause Orders have been employed, in select instances, where we think a solution devised in another context may have utility for other situations. On balance, we evaluate a host of considerations prior to recommending or imposing a procedure on parties. In one instance we even ordered parties with a history of repeatedly presenting disputes for the Panel's consideration to undertake labor-management cooperation training. In all candor, however, we have not yet noted much improvement.

WEDNESDAY, FEBRUARY 24, 1993.

FEDERAL ELECTION COMMISSION

WITNESSES

TREVOR POTTER, VICE CHAIRMAN AND CHAIRMAN, FINANCE COMMITTEE

SCOTT THOMAS, CHAIRMAN, COMMISSION

DANNY LEE McDONALD, COMMISSIONER

JOHN SURINA, STAFF DIRECTOR

LOIS LERNER, ASSOCIATE GENERAL COUNSEL FOR ENFORCEMENT

INTRODUCTION

Mr. HOYER. The Committee will come to order. This morning we will be hearing from the Federal Election Commission. Mr. Trevor Potter, the vice chairman, will be presenting the testimony of the Commission. We welcome you to the Committee and look forward to hearing from you.

Mr. POTTER. Thank you, Mr. Chairman. I am here with several of my colleagues, Scott Thomas, who is the Chairman of the Commission, and Commissioner Danny McDonald, who is Vice Chairman of the Budget Committee, and also present are several members of our staff, including John Surina, the staff director, and Lois Lerner, the associate general counsel for enforcement. I have a full statement which, if I may, I will put into the record.

Mr. HOYER. Without objection, your full statement will be included at the appropriate place in the record.

Mr. POTTER. I have a short opening statement if I may, Mr. Chairman.

Mr. HOYER. All right.

STATEMENT OF MR. POTTER

Mr. POTTER. It is a pleasure to be before you here today to testify only one week after President Clinton addressed the Congress on the State of the Union and identified campaign finance as one of his top priorities. We appear as Congress is in the midst of consideration of Motor Voter legislation which would require new initiatives from the FEC. Congress is also revisiting campaign finance reform proposals, many of which would mandate new enforcement and disclosure responsibilities for the Commission.

As you know, the Federal Election Commission is the only Federal agency charged with the civil enforcement of the Federal election laws and charged with the accurate and swift dissemination of information on campaign contributions and expenditures. Regrettably, Mr. Chairman, I have to report to you this morning that the Commission is now virtually overwhelmed by a rapidly growing

enforcement caseload and by the wave of data flowing from the 1992 elections.

At the outset, I would like to note that the FEC, as a concurrent submission agency, has the authority to submit our budget directly to Congress. This means that in some rare instances the budget submitted by the Commission and the OMB budget figures may differ. We are currently in discussions with OMB about our fiscal year 1994 budget.

In light of the President's strong commitment to campaign finance reform, we are hopeful that the final White House budget figures will reflect the full funding the Federal Election Commission needs. Under any circumstances, the current imbalance between the Commission's resources and its work load would need to be addressed, but this takes on new urgency in light of current events and the administration's priorities.

The FEC cannot meet the expectations of any new legislation if it remains overwhelmed by our current responsibilities.

Today we present a budget request for $23.654 million, and 320 FTEs. This includes the FEC's estimated increased expenditures required by the Motor Voter legislation now before Congress, and the decrease resulting from President Clinton's proposed freeze on Federal salaries for 1994. If this freeze is not enacted by Congress, then this figure would need to be readjusted. This budget does not include funds for any new responsibilities which may result from the various campaign finance reform proposals currently being considered by Congress.

Mr. Chairman, this figure of $23.654 million represents an increase of $2.623 million over the Commission's 1993 appropriation, approximately 10 percent. These additional funds will be used almost entirely to pay for the costs associated with additional staff for the Commission's enforcement and disclosure responsibilities. It is the unanimous view of the Commission that these resources are urgently required and that they are the bare minimum needed for the acceptable functioning of the FEC, given its current responsibilities.

Our problems stem from the enormous explosion in political spending and candidate activity in the 1992 campaign cycle. In enforcement, for instance, we have jumped from 198 cases at the end of 1991 to 328 cases as of today, with complaints from the 1992 election still arriving at the Commission. Our enforcement caseload just four years ago had 711 respondents under investigation; today we have 2,432. Further, the Commission is deeply concerned that there are entire areas of the election laws that we currently lack the resources to monitor or enforce effectively.

Our data entry and public disclosure functions are also in danger of being overwhelmed by the sheer volume of reports, including all the new non-Federal reports for national party committees and State parties. Itemized transactions are up 194 percent in the last decade and we estimate that reportable activity for the 1994 mid-term elections will exceed the last mid-term election's cycle by 60 percent. The amount of money tracked by the FEC has grown from $750 million in 1980 to $1.75 billion today. The Commission staff has not grown at all in those 12 years.

With the support and encouragement of this Committee, the FEC has undertaken a number of important internal initiatives in the past year to speed enforcement cases and the presidential audit process. We have undergone a rigorous retraining of our general counsel staff through the Total Quality Management program, have reexamined our case procedures and streamlined many of them, and have carefully reviewed the prioritization of our entire enforcement caseload. We have demonstrated significant advances in productivity, particularly in our public disclosure functions.

Specifically, we are now entering more reports with more entries at a lower cost per entry than ever before; yet, we are still falling behind. The rise in our enforcement caseload and in reportable election spending currently outpaces the productivity benefits from these internal reforms. For instance, we have already entered more than 1 million contributions of $200 or more from the 1992 election into our computer database. We still have over 10,000 documents to enter. By contrast, the entire 1990 cycle had only 750,000 such itemized transactions.

Mr. Chairman, for all of these reasons, the Commission regards the 1994 budget as perhaps the most important of its entire 18 year existence. We realize this is a difficult time for Congress and the President to provide the FEC with the necessary enforcement and disclosure resources. However, campaign finance issues are at the top of the agenda set by Congress and President Clinton, clearly reflecting the concerns of the American public.

Accordingly, we believe this is the time to invest the necessary resources in election law enforcement and disclosure. The very existence of a credible enforcement and disclosure process is at stake. If Congress and the President are serious about wanting us to do the job, then we ask that we be given the tools. Thank you, Mr. Chairman.

[The information follows:]

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FOR IMMEDIATE RELEASE:
JANUARY, 1993

CONTACT: FRED EILAND
SHARON SNYDER
SCOTT MOXLEY

SCOTT E. THOMAS
Chairman

Scott Thomas, a second-term Commissioner, was elected Chairman of the Federal Election Commission for 1993.

The Wyoming native was nominated by President Bush on November 21, 1991, and confirmed the next day by the U.S. Senate to his second term on the Commission.

Mr. Thomas, a Democrat, was originally nominated by President Reagan on September 26, 1986, and confirmed on October 3, 1986, by the U.S. Senate to a term that expired on April 30, 1991. He also aerved as FEC Chairman in 1987.

Prior to his appointment, Mr. Thomas was Executive Assistant to former FEC Commissioner Thomas E. Harris. He previously worked as an attorney and later as an Assistant General Counsel for Enforcement in the FEC's Office of General Counsel.

Mr. Thomas is a member of the District of Columbia Bar, the U.S. District Court for D.C., the U.S. Court of Appeals for the 9th Circuit and the U.S. Supreme Court.

A 1974 graduate of Stanford University, Mr. Thomas received his J.D. Degree from Georgetown Law Center in 1977. He and his wife, Elena W. King, make their home in Washington, D.C.

TERMS SUMMARY

CURRENT APPOINTMENT:	November 21, 1991, by President Bush
SENATE CONFIRMATION:	November 22, 1991
TERM:	April 30, 1997
SWORN IN:	December 17, 1991
ORIGINAL APPOINTMENT:	September 26, 1986, by President Reagan
TERM:	April 30, 1991
CONFIRMED:	October 3, 1986
SWORN IN:	October 7, 1986
PARTY AFFILIATION:	Democratic

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FOR IMMEDIATE RELEASE:
JANUARY, 1993

CONTACT: FRED EILAND
SHARON SNYDER
SCOTT MOXLEY

TREVOR POTTER
Vice Chairman

Trevor Potter, the Federal Election Commission's newest and youngest member, was elected to serve as Vice Chairman of the independent executive agency for 1993.

Mr. Potter was confirmed by the United States Senate on November 22, 1991, to serve as a Member of the FEC. He will serve a term of six years, ending in April 30, 1997.

Prior to his appointment, Mr. Potter was a partner in a Washington, D.C. law firm where for six years he practiced in the fields of campaign and election law and federal ethics regulation. During his years in private law practice, he advised U.S. Presidential campaign committees and other federal committees and candidates on various election-related questions.

Mr. Potter's previous experience in government includes serving as an Assistant General Counsel at the Federal Communications Commission from 1984-1985, and as a Department of Justice official from 1982-1984.

A graduate of Harvard College and of the University of Virginia School of Law, Mr. Potter was Editor-in-Chief of the Virginia Journal of International Law from 1981-1982. He is currently a Vice Chairman of the American Bar Association's Election Law Committee, Administrative Law Section.

In 1991, Mr. Potter served as a member of the International Observer Delegation of the Parliamentary and Municipal Elections in Bulgaria, sponsored by the International Republican Institute and the National Democratic Institute for International Affairs. In 1992, he served as a member of an American Council of Young Political Leaders delegation to Japan.

# # #

FEDERAL ELECTION COMMISSION

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FOR IMMEDIATE RELEASE:
JANUARY, 1992

CONTACT: FRED EILAND
SHARON SNYDER
SCOTT MOXLEY

DANNY LEE MCDONALD
Commissioner

Danny Lee McDonald of Oklahoma served as Chairman of the Federal Election Commission during 1989. He was also Chairman in 1988 and Vice Chairman in 1983.

Commissioner McDonald was originally nominated by President Ronald Reagan in December 1981, and confirmed by the U.S. Senate in July 1982. In 1987, President Reagan re-nominated and the U.S. Senate re-confirmed Mr. McDonald to a second, six-year term which expires April 30, 1993.

Prior to his initial appointment in 1991, the Sand Springs, Oklahoma native served as General Administrator of the Oklahoma Corporation Commission. Additionally, he served as Secretary of the Tulsa County Election Board and as Chief Clerk of that Board. Mr. McDonald was a member of the Advisory Panel to the FEC's National Clearinghouse on Election Administration. The Commissioner is currently a member of the Board of Trustees of the American Council of Young Political Leaders.

Mr. McDonald received a B.A. Degree from Oklahoma State University. He attended the John F. Kennedy School of Government at Harvard University and has served as a member of the JFK School Advisory Board for State and Local Govenment.

The Commissioner resides in Fort Washington, Maryland with his wife.

TERMS SUMMARY

FIRST NOMINATED:	December 14, 1981, by President Reagan
TERM:	April 30, 1987
RECESS APPOINTMENT:	December 17, 1981
SWORN IN:	December 23, 1981
CONFIRMED:	July 1, 1982
RE-NOMINATED:	June 16, 1987
TERM:	April 30, 1993
CONFIRMED:	July 24, 1987
SWORN IN:	August 3, 1987
PARTY AFFILIATION:	Democratic

STATEMENT
O F

TREVOR POTTER
VICE-CHAIRMAN

AND

CHAIRMAN OF THE
FINANCE COMMITTEE

FEDERAL ELECTION COMMISSION

BEFORE THE

SUBCOMMITTEE ON TREASURY, POSTAL SERVICE
AND GENERAL GOVERNMENT

COMMITTEE ON APPROPRIATIONS

UNITED STATES HOUSE of REPRESENTATIVES

FEBRUARY 24, 1993

IN SUPPORT OF THE

FISCAL YEAR **1994** APPROPRIATIONS REQUEST

Mr. Chairman, as Chairman of our Finance Committee, it is my responsibility to represent the Commission before its authorization and appropriations committees in support of our fiscal year 1994 Budget Request. Last Thursday we received a passback from OMB that the Commission believes is inadequate to the task at hand. We have initiated discussions with OMB on this issue. We originally had submitted a request for $23,964,000 and 319 FTE (full time equivalents or staff years) to OMB in September of 1992. Because we concurrently submit our request to the Congress and the OMB, you have seen that original request. Since September, the imminent enactment of the National Voter Registration Act has forced us to amend our original FY 1994 Budget Request, and to request a Supplemental appropriation for FY 1993 to enable the Commission to meet its new statutory duties with regard to the "Motor Voter" legislation. Furthermore, the President's Budget released February 17th removed the FY 1994 COLA for federal employees, which represents a reduction of $565,000 from our original request.

As a result, we are amending the Commission's request for FY 1994 to a total of $23,654,000 and 320 FTE. This reflects the reduction due to the elimination of the COLA, as well as an increase of $255,000 and 1.0 FTE for the Clearinghouse on Elections Administration to successfully implement the new legislation in FY 1994. We also are requesting a FY 1993 Supplemental Appropriation of $112,000 and .5 FTE for the same purpose. I will deal with the details of these requests later in my testimony.

As of this writing, we do not know the final figure that will appear in the President's FY 1994 Budget, but are hopeful that it will be our full request. Notwithstanding the ultimate resolution of our negotiations with OMB, we intend now, and for the duration of the appropriations process, to argue for our full, amended request of $23,654,000 and 320 FTE. We at the Commission recognize that this makes our task more difficult. Nevertheless, the Commission is in dire need of additional staff given the expanding workload demands placed on us by ever increasing campaign finance activity.

The request for $23,654,000 and 320 FTE represents a level of funding which we believe is necessary to enable the FEC to fulfill promptly its responsibilities with regard to completing the work associated with the 1992 congressional and presidential elections, and to begin to process the 1994 election cycle workload. It will allow the Commission to continue the progress we have made in recent years in improving our programs, and should enable us to rectify delays we have experienced in the recent election cycles in the processing and resolution of enforcement cases. It will also provide for much needed additional staff in the disclosure and informational programs, which have been stuck at static staffing levels despite enormous increases in their workloads. The Commission must receive the staff requested, and the funds to support that staff, if we are to be successful in promoting full public disclosure of campaign finance activity in the 1994 elections and in enforcing the Federal Election Campaign Act. The staff requested are critical to our continued efforts to improve the timeliness of the presidential audits, and to accelerate the processing of enforcement matters.

Mr. Chairman, in recognition of the importance of the 1994 congressional elections and the shaky public confidence in the electoral process, this request focuses on three major areas of Commission concern:

1. The effective and timely prosecution of Commission enforcement actions in the face of high workloads, along with an increase in the number of respondents and in the number of complex, multi-faceted investigations;

2. The added burden placed on the Commission's reports review, disclosure and informational services due to the implementation of new regulations and reporting requirements and dramatically increasing amounts of money in federal elections; and

3. Timely audits of presidential campaigns that use public funds.

The Commission stresses that any serious talk of campaign finance reform requires a strong, well-funded Commission as a foundation. We must have the resources adequate to meet our statutory mission as it now exists, before any additional duties are placed upon the Commission.

We recognize that our FY 1994 budget request represents a 2.6 million dollar increase over FY 1993. I would like to take a moment and note that Appendix A of our testimony provides a brief history of past, significant requests for specific programs the Commission has made, and our success in achieving the results we strove for. We hope this demonstrates that we have delivered the products on which our budget requests were predicated, on time and within budget.

Given this record of success, we hope this Subcommittee will look favorably on our request, as it has so often for us in the past, and provide us with the staff and support funds to implement fully the disclosure

aspects of the FECA, and to enforce successfully the requirements of the law. I will now briefly review the dramatic expansion of our workload during the 1992 elections, despite static staffing levels in most Commission programs. We have met previous increases in workloads through productivity improvements which are documentable. However, the volume of work has reached the point where we must have additional resources; productivity improvements alone will not be enough to meet the volume of demands placed on the FEC.

THE 1994 ELECTIONS AND COMMISSION WORKLOADS

The 1994 primary and general elections for 34 Senate and 435 House seats will most likely result in over one million transactions, including individual and committee contributions, from about 75,000 documents being entered into the Commission's computerized database. The Commission will likely respond to over 200,000 requests for information, assistance and/or documents. The cycle will conclude with the referral of over 200 enforcement cases from the review of reports, as well as the resolution of another 200 potential external complaints filed with the Commission. Based on past experience, over 2,000 candidate committees and well over 4,000 political action committees (PACs), as well as the national, state and local party committees will be actively engaged in the electoral process.

It is important to note some special factors at play in the 1994 elections that could also drive up the amount of money expended for Federal elections, which will, of course, impact on Commission operations. These include the possible occurrence of additional Senate elections due to vacancies created by the Clinton cabinet selections.

There should also be many more competitive Congressional races in many states due to the high number of relatively vulnerable freshmen members as a continuing result of the 1992 reapportionments, as well as due to the high number of retirements in the 1992 cycle. These factors may create even larger amounts of campaign finance activity for the Commission to capture, disclose and regulate.

The Commission promulgated new regulations in FY 1991 for the disclosure and reporting of the allocation of "soft money" to federal campaigns. This is, as you know, a very controversial aspect of campaign finance. The Commission also implemented new reporting requirements for debt settlements, also a potentially controversial area of campaign finance. These two high visibility efforts generated new reporting and potentially new enforcement activity for the 1992 cycle which should continue into the 1994 cycle. Intensive educational and informational efforts have been undertaken to reduce the possible enforcement activity generated by misunderstanding of these new, complex requirements. However, these efforts which were initiated in FY 1991, and are ongoing in FY 1993, give every indication of increased workloads through the 1994 elections.

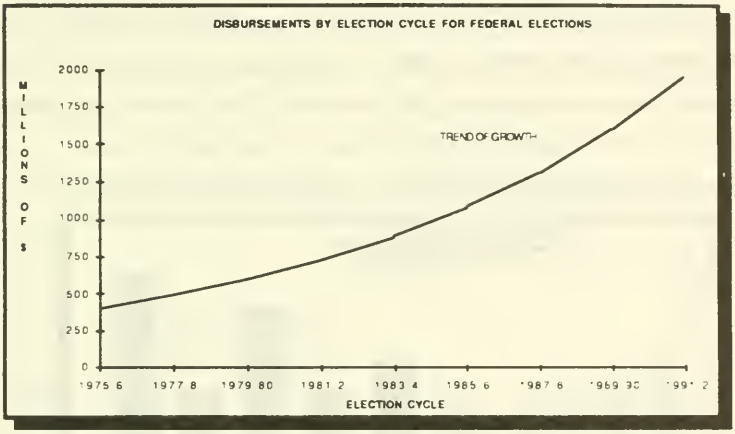
FEC WORKLOAD--FUNDS TO ACHIEVE OUR MISSION

Our written justification lays out in some detail the FY 1994 appropriations request and the challenge the Commission faces in keeping up with the well-documented growth in campaign spending. I will briefly touch upon this in my remarks today.

The overall amount of campaign finances reported to and regulated by the Commission continues to increase. The total disbursements for

Federal candidates in 1992, the last Presidential election cycle, are expected to finally total about $1.75 billion. Because most of the growth from 1990 to 1992 was in the congressional elections area, we are projecting at least $1.75 billion in federal campaign finance activity reportable to the FEC for the 1994 cycle. This would represent approximately a 60% increase from 1990.

FUNDS DISBURSED BY POLITICAL COMMITTEES BY ELECTION CYCLE
FOR FEDERAL ELECTIONS–HARD MONEY REPORTABLE TO THE FEC

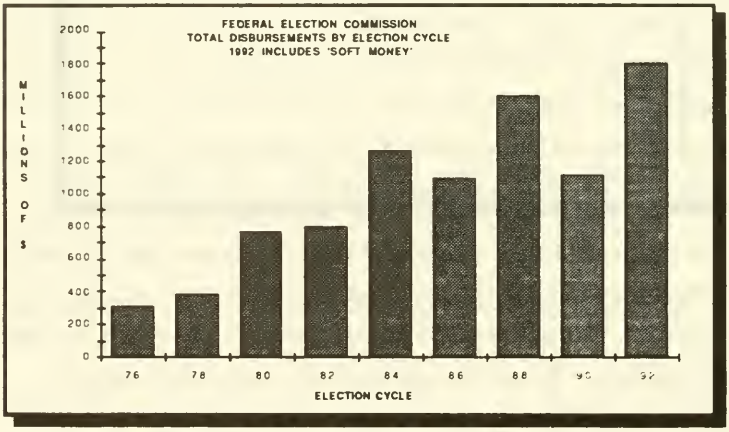


This continued overall increase in campaign finance activity means proportionate increases in the Commission's workload for all programs and components. Fiscal Year 1994 encompasses work from both the 1992 and 1994 elections. We will be concluding the enforcement actions arising from the 1992 presidential and congressional elections, while simultaneously handling the enforcement activity arising from complaints filed during the 1994 congressional elections. We must also disclose the

estimated $1.75 to $2.0 billion in disbursements for federal candidates during the 1994 elections.

Of course, overseeing a presidential election cycle has more requirements than a congressional election cycle; regardless, we expect a high level of work to continue in the 1994 election cycle. A comparison of the amount of financial activity in previous election cycles illustrates this increase. Although activity was down somewhat for the 1990 cycle, we still expect an overall high level in the total money disbursed for all federal elections in the 1994 cycle. We have seen dramatic growth in 1992 compared to past election cycles. For example, total spending on congressional races increased in 1992 to almost $700 million from about $500 million in 1990, roughly a 40% increase in one election cycle.

FUNDS DISBURSED BY ELECTION CYCLE INCLUDING "SOFT MONEY"

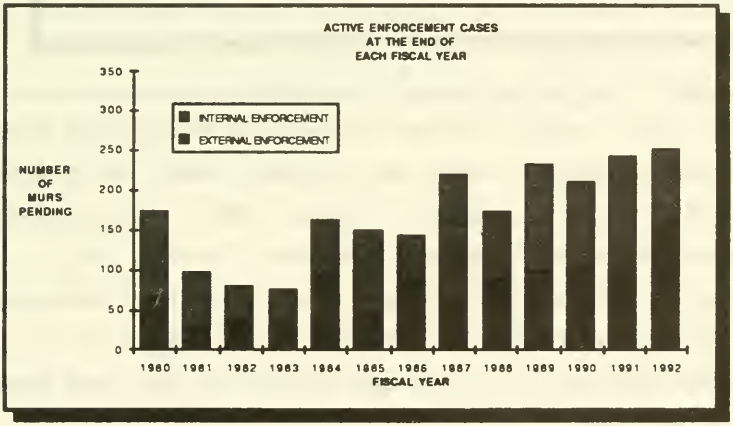


Given this context, I will now turn to our major concerns and our Budget Request.

FEC ENFORCEMENT PROGRAMS

With regard to enforcement, the workloads also show increases from one election cycle to the next. Until FY 1993, the highest active caseload occurred during FY 1987-1988 (267 open Matters Under Review or MURs). However, the Commission began the FY 1989-1990 cycle with a higher caseload than the previous three election cycles, and the active caseload remained above 185 for the entire cycle. We experienced a similarly high caseload for the 1992 cycle, with active cases not falling significantly below 200 until December 1991, and reaching 254 cases by the end of FY 1992. Thus far in FY 1993, the FEC has reached a record high of 328 active cases. The first graph below shows these growth trends by fiscal year.

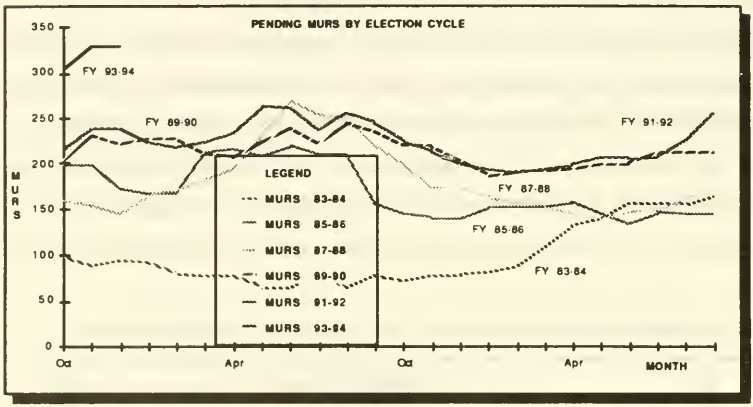
ACTIVE ENFORCEMENT CASES AT THE END OF EACH FISCAL YEAR



In order to meet the demands for timely resolution of enforcement actions and to keep control of this caseload, the Commission must receive the funds to provide for the additional sixteen FTE requested. The second

chart below depicts the active caseload each month for two-fiscal year periods.

FEC ACTIVE ENFORCEMENT CASES (MUR's) BY TWO-YEAR PERIOD



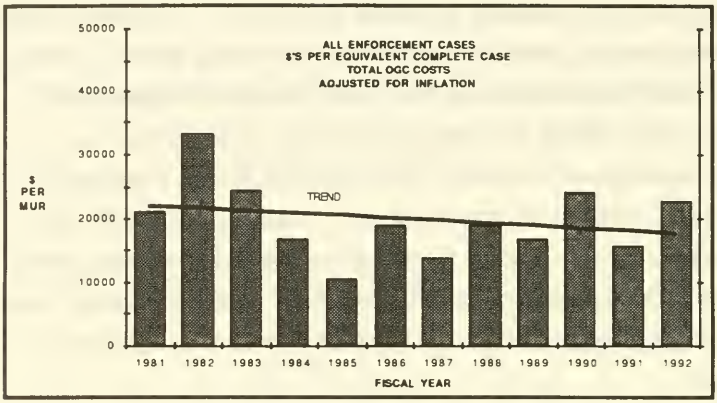
However, the real story about the enforcement workload concerns not the number of cases, but the size and complexity of cases. The number of respondents involved in active, open compliance matters has increased dramatically: from 711 respondents in October 1988 to 1,836 respondents in October 1991, a 158% increase in three years. Furthermore, as of December 31, 1992, a record 328 active cases included 2,432 respondents, for a total increase of over 240%. Meanwhile, there were only 19 non-supervisory attorneys and five paralegals assigned to enforcement teams as of the same date.

All indications are that enforcement cases are becoming more complex, often requiring numerous depositions and statements from multiple respondents. We are also experiencing an increase in the number

of cases involving organized attempts to subvert the contribution limitations and the disclosure provisions of the FECA. Therefore, cases have been requiring more staff time and are are taking longer to conclude. Unlike inadvertent violations of the FECA, conscious conspiratorial activity is very difficult and time-consuming to prove. This is a qualitative change in the nature of enforcement activity undertaken by the Commission, which is in conjunction with a quantitative growth in enforcement activity. Failure to receive the requested resource levels will lead to a degradation of the Commission's ability to maintain, much less improve, the timeliness of the resolution of the enforcement caseload.

Despite this increase in enforcement caseload, the Commission's overall productivity in enforcement has improved. On an average basis, adjusting for inflation and using total costs for the Office of General Counsel, the trend is for increased productivity. However, as in other Commission operations, productivity increases alone can not meet the rising workloads.

ENFORCEMENT PRODUCTIVITY: TOTAL OGC COSTS PER AVERAGE CASE



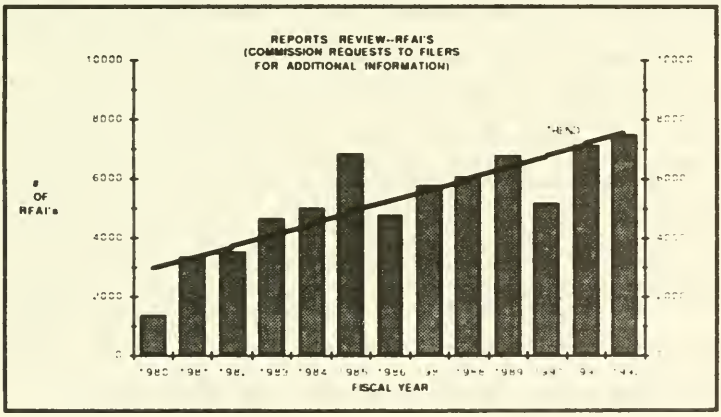
The additional staff requested are necessary to clear out the existing caseload and to improve future timeliness of the resolution of cases. Even with the additional staff projected for FY 1993, the active enforcement caseload now at a record high of 328 matters could easily reach 500 cases by the end of FY 1993. This will represent an enormous workload, and reasonable enforcement of the significant provisions of the FECA requires the additional staff requested. As noted in our justification, simply further raising the enforcement thresholds jeopardizes the ability of the Commission to effectively enforce the law.

FEC REPORTS REVIEW AND ANALYSIS PROGRAM

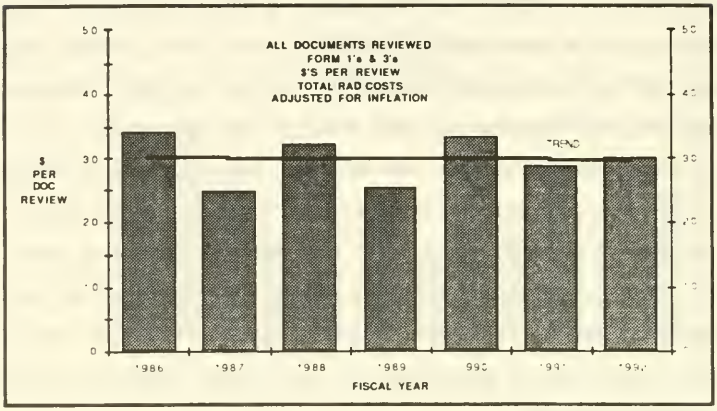
A mainstay of the Commission's disclosure and internal enforcement programs is the reports review and analysis performed by the Reports Analysis Division (RAD). The review of reports assures proper and timely disclosure (through the non-filers compliance program), and is the source

of referrals for possible audit and/or enforcement action under the 1980 amendments to the FECA. This staff, despite a small increase in FY 1993, has been held at or below previous levels in recent fiscal years to assure sufficient staffing for the Audit Division, as well as for OGC. However, new reporting requirements that took effect in the last election cycle, as well as the general increase in the workload, require additional staff for RAD in FY 1994. Productivity increases have enabled a static staff to keep up with the workload in the past. However, the increase in work involved and the number of committees and reports to be reviewed require that additional staff be provided. Otherwise, gains in the timeliness of review of reports will be jeopardized as the ability to keep up with the daily workload degrades.

NUMBER OF REQUESTS FOR ADDITIONAL INFORMATION MADE TO FILERS



AVERAGE COST OF REVIEW OF REPORTS AND STATEMENTS FILED



DISCLOSURE AND INFORMATIONAL PROGRAMS-OVERVIEW

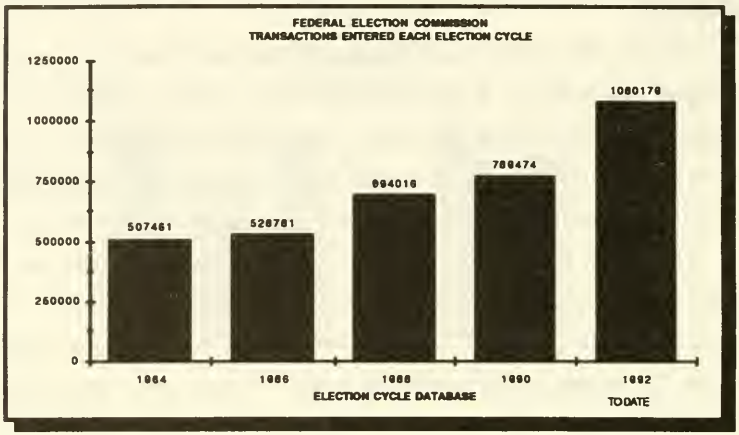
While additional staff would have been desirable for other Commission programs as well, the limit of ten additional FTE for FY 1993, given our priority needs for enforcement, audit, and reports review, required that the requested additional staff be allocated to OGC and RAD in FY 1993. The FY 1994 Request attempts to rectify this, and provides for additional staff for the disclosure and informational operations, as well as for the support functions of the agency. Here again, productivity improvements have partially offset workload increases, but are no longer enough to meet record volumes of demands. Additional staff are necessary, or quality and timeliness will begin to degrade.

THE COMPUTERIZED DISCLOSURE DATA BASE AND PUBLIC RECORDS

Through the FEC's Public Records Office, data from the computerized disclosure data base are in high demand by the public, the media, academia, and the political community. The Commission makes a high volume of data available to the public in a timely and useable fashion, as well as the paper copies of the disclosure reports filed at the FEC.

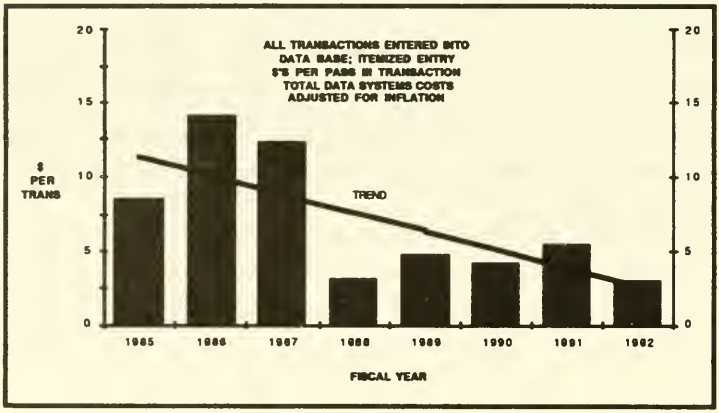
The steady increase in money for federal campaigns means an increase in every aspect of the Commission's disclosure workload, including reports filed and itemized transactions (contributions) entered into the Commission's disclosure data base. For example, from 1984 to 1992, similar presidential elections, the number of reports filed at the FEC as of December 31st of the election year increased 21%, and the itemized transactions increased by 194%. Even if we compare 1992 to a congressional election year, such as 1990, the increases were 12% for documents filed and 49% for transactions entered. Once again, productivity increases enabled us to cope with the workloads, but, as our justification points out in detail, we are beginning to see a degradation in timeliness of data entry. Data Systems can not continue to maintain an ever expanding in-house data processing and office automation system and keep up with the increasing volume of data going into the databases without additional staff.

TOTAL ITEMIZED TRANSACTIONS ENTERED INTO FEC DISCLOSURE DATA BASE BY ELECTION CYCLE–FOUR-YEAR PERIODS PER ELECTION CYCLE

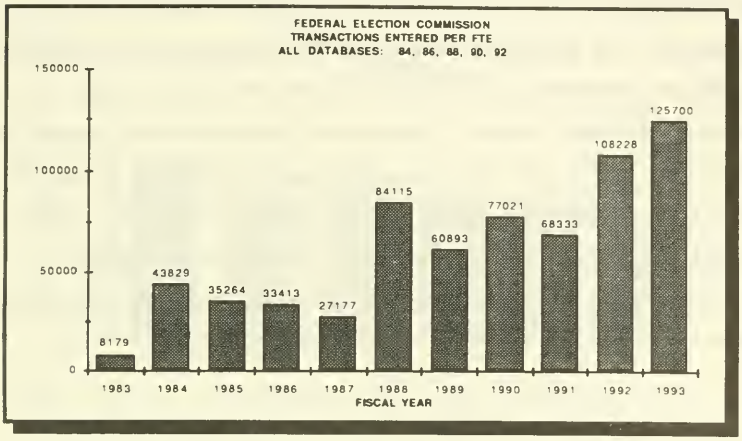


(Dates for the 1992 election cycle: January 1991 to December 1992 so far; comparable dates for the 1984 cycle are January 1983 to December 1986; for the 1986 cycle January 1985 to December 1988; for the 1988 cycle January 1987 to December 1990; and for the 1990 cycle are January 1989 to December 1992.)

COST OF TRANSACTIONS ENTERED INTO THE FEC DATABASES



TRANSACTIONS ENTERED PER FTE OF CODING STAFF (93 PROJECTED)



The Commission's computerized disclosure data base also supports the Commission's program for State filing office access to our data base (the State Access Program), and the ability of users to tap directly into the data base (the Direct Access Program.)

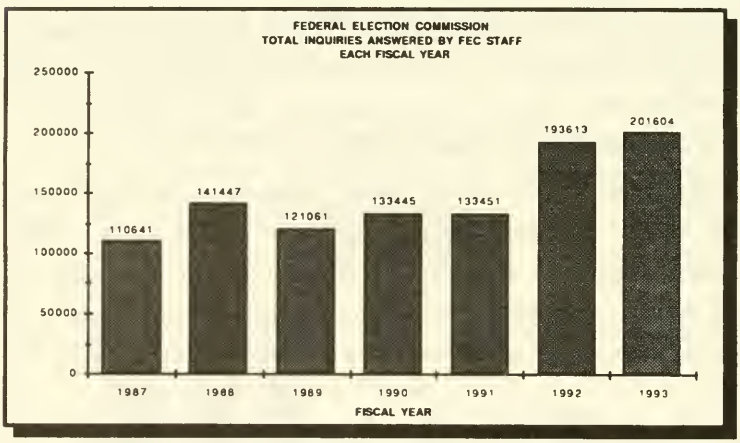
This budget request includes funds necessary for the ongoing data entry of all statutorily disclosed contributions of $200 or more. The Commission began such entry for the 1990 election cycle in FY 1989. This budget request continues that effort, and maintains the high level of timeliness achieved for all itemized data entry by the Commission.

DISCLOSURE, INFORMATION, PRESS AND CLEARINGHOUSE

Our Information and Press programs are also in increasingly high demand as we assist the media and the public in accessing and understanding the Act and Commission regulations and rulings. Part of

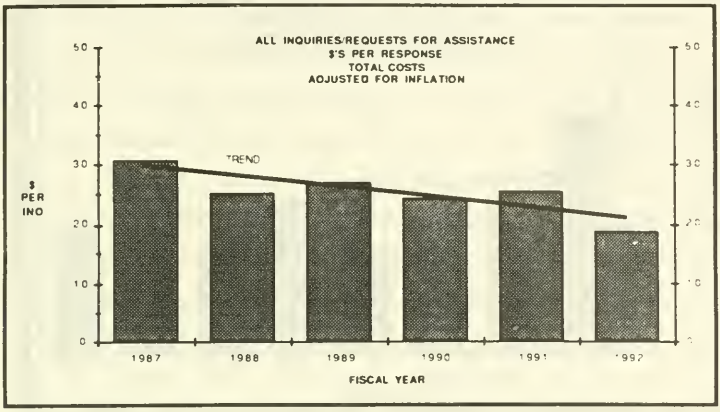
this educational effort involves a series of campaign finance workshops and seminars, the toll-free 800 phone lines, and numerous informational publications. The Disclosure Division too has experienced an increase in requests for information and service. As was the case for other previously identified programs, productivity increases can no longer cover workload increases. The Disclosure, Information and Press Offices all require more staff to meet increased demands from the public. The following two charts show the increase in responses to requests for assistance and/or information, and the increased productivity for these offices.

NUMBER OF REQUESTS FOR INFORMATION RESPONDED TO BY CYCLE



(TOTAL INQUIRIES PER FISCAL YEAR; FY 93 PROJECTED 2/4/93)

COST OF INQUIRIES AND REQUESTS RESPONDED TO FOR ALL FEC OFFICES

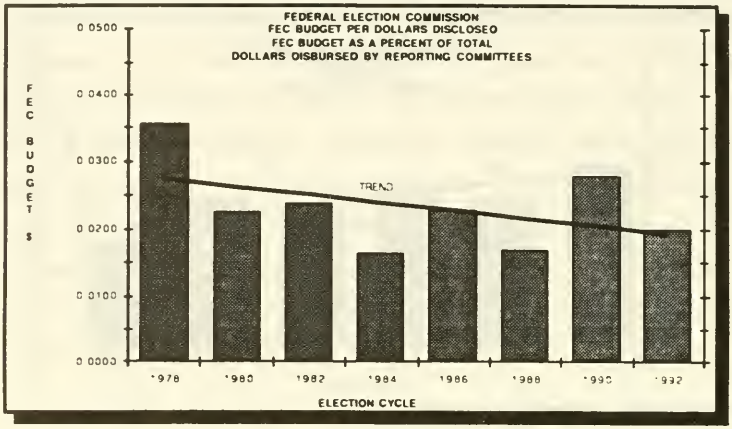


The Commission's Clearinghouse on Election Administration makes available the results of FEC-sponsored research to election officials on such topics as absentee ballots, voter registration, and reprecincting (due to redistricting.) The Commission has also released the final voluntary Voting Systems Standards after many years of research, and is working with state and local election administration officials to implement these standards in an efficient and cost-effective manner. The Clearinghouse also monitors the success with which polling stations are being made more accessible to the elderly and handicapped voters.

IMPACT OF TOTAL DISCLOSURE EFFORTS BY THE FEC

In sum, if we calculate the cost of the entire Commission compared to the amount of money disbursed and disclosed over past election cycles, the general trend is for a smaller expenditure of money on the Commission compared to total money disclosed.

OVERALL RELATIONSHIP OF COMMISSION BUDGET TO ACTIVITY DISCLOSED



MANDATORY AUDITS OF PUBLICLY FUNDED PRESIDENTIAL CAMPAIGNS

An area of significant concern for the Commission is the program of audits of public funds disbursed and expended by the qualified presidential candidates receiving them. Due to budget cuts and legislative changes, the Commission reduced the size of its audit staff subsequent to the 1980 elections. In 1984 and 1988, the Commission implemented the public funding programs with a core staff of only 24 FTE, supplemented by temporaries to assist in the certification process. We also received the generous support of a non-reimbursable detail of as many as five GAO auditors for 18 months.

While this system worked well in 1984, it did not work as well in our audits of the 1988 presidential campaigns. The audits for the 1988 presidential election cycle were not as timely as in 1980 or 1984, and we

have had to curtail our audits of all other non-presidential committees on some occasions. It became obvious that the Audit Division needed more experienced, trained auditors in-house for the program to function successfully. Therefore, we requested and received funding for additional FTE to build the core staff up to 30 for the 1992 cycle. We are maintaining 30 FTE of permanent positions in FY 1993 and in this request for FY 1994. For the 1992 presidential election year we supplemented this core of 30 permanent staff with 3.0 FTE of temporaries to assist in the certification process. We have also received assistance from the GAO. This increase in staffing should help to restore the timeliness of the presidential audits. Failure to maintain sufficient permanent staff on board and trained for the entire 1994 cycle will ultimately delay the audits of presidential candidates for the 1996 cycle. This concern was also articulated in our past several annual A-123 statements to the President.

For your information, maintaining this trained audit staff takes on even greater importance for the 1996 election cycle, as we have been informed that the GAO will not be able to provide any non-reimbursable assistance beyond the 1992 cycle. Their assistance in 1992 has been diminished compared to past election cycles. Therefore, it is imperative that the Commission retain a strong, trained and experienced audit staff. We are not satisfied with our performance in the 1988 Presidential audit process, and we have taken and are taking further steps to improve that performance in 1992, including revising our auditing procedures. Maintaining a full audit staff in FY 1994 and beyond is a key part of that improvement process.

PRESIDENTIAL FUND STATUS

One of the most important programs within the Commission's jurisdiction is administering the public financing of presidential primaries and general elections, as well as the major party conventions. The Presidential Election Campaign Fund provides public financing to legally qualified presidential candidates and is funded by the one dollar income tax check-off program. While payments out of the Fund have been indexed for inflation over the years, the dollar check-off has not. In 1989 we testified that the Fund would not be able to finance fully the 1996 presidential elections. The next year our testimony indicated the situation had become worse--the Fund was facing a potential shortfall for the 1992 elections. Due to the late start of the 1992 race and the small number of active candidates, that shortfall ultimately did not occur. However, it was a near miss, and the outlook for the 1996 election remains grim. Given current rates of taxpayer participation in the tax check-off, inflation forecasts, and the assumption that the Republican party will have strongly contested primaries in 1996, the Commission projects between a $75 to $100 million shortfall by 1996. This would leave the primary election candidates with no matching funds whatsoever, and could leave the general election candidates short by as much as $20 million.

The lack of adequate funds indicates that, in the long run, legislative change is needed for continuation of the present process to be ensured and the Commission has suggested a variety of ways to correct the imbalance between disbursements and income into the Fund. In the interim, the Commission undertook a modest educational program to educate taxpayers about the Fund through a series of surveys, educational

videos, and brochures. The Commission has warned both OMB and the Congress of this situation the last five budget requests, and in our last four annual letters to the President with regard to A-123, the Federal Managers Financial Integrity Act.

For 1992, the Commission attempted to devise regulations and procedures to ensure that the 1992 primaries for nomination for President were impacted as little as possible by the potential shortfall. While not completely successful, we worked with the Treasury Department (IRS) in their development of the funding regulations to try to minimize the impact of the potential shortfall.

As you are aware, the Commission did not agree with the final Treasury regulations. Because the laws governing the public financing of candidates for federal office were very carefully worded by Congress to assure that the government does not intrude into the political marketplace, the Commission's primary goal is to interject itself as little as possible into the actual campaign process. We hoped to avoid disruption to the greatest extent possible in 1992, and were, by and large, successful. The public funding programs have been administered by the Commission with a great deal of success, and we hope to avoid jeopardizing that success.

The Commission's endeavors, however, are no substitute for legislative change to fix the chronic problem. Given the potential for a serious shortfall in 1996, we will continue to do all we can to minimize the disruption to the campaigns if such a shortfall occurs.

ADEQUATE FUNDING TO SUPPORT 320 STAFF

It is imperative that the full 320 FTE contained in the appropriation request be funded. This represents the staffing necessary to fulfill our statutory mission. The FEC is a personnel intensive agency (70 to 72% of costs go directly for personnel salaries and benefits.) Unfortunately, the Commission has been forced to reduce staffing levels in the past to cover non-discretionary increases in health insurance, retirement, and basic payroll costs due to unfunded pay increases and general budget restrictions. The Supplemental Appropriation approved in Fiscal Year 1989 recognized this chronic problem. While the Commission has attempted to maximize staffing levels, in the past cuts have been necessary to avoid budget overruns. To avoid staff reductions, support functions have been trimmed whenever possible to increase staffing. This request ensures proper support for the staff requested, including training, printing, travel, and equipment and supplies.

This request reflects the fact that the Commission's continued forced absorption of the aforementioned pay raises, health insurance costs, retirement costs, and basic overhead costs such as phones, postage, and similar items, as well as the establishment of an Inspector General's office, cannot be carried forward from year to year without serious adverse impact on the Commission's programs.

NATIONAL VOTER REGISTRATION ACT

As I noted previously, this request has been amended to include $255,000 and one FTE to enable the Commission to meet its responsibilities under the anticipated new "Motor Voter" legislation. The Clearinghouse is responsible for assisting the states in complying with

the legislation, including the development of the registration forms. The Commission will also be responsible for developing the implementing regulations, to provide more detailed guidance to the states. This request represents the costs in FY 1994 to continue to implement the new legislation for the 1994 elections. We have also requested a Supplemental Appropriation for FY 1993 of $112,000 and .5 FTE to begin to implement the legislation as soon as it is enacted. In addition, we have approved a reprogramming of $30,000 from existing Clearinghouse funds to initiate the implementation process in FY 1993.

The Commission's goal is to assist the states with a minimum of federal interference and at minimal cost. However, the states will require a central coordinating effort and some assistance. We will model our efforts on our similar role in the implementation of the Voting Accessibility Act, for which the Commission received high marks.

ADDITIONAL SPACE

The final initiative for FY 1994 is the request for funds for additional space. We have requested additional space in some of our previous original budget requests to both OMB and the Congress, but FY 1993 was the first request to include additional space agreed to by OMB. While providing some space for staff to hard-pressed offices such as the Clearinghouse and the Inspector General, for the most part the FY 1993 funding for additional space (which we are in the midst of acquiring and occupying) reflected the need for additional filing, processing, storage, research, and meeting space. The FY 1994 request would provide space for the additional staff requested in many offices.

The public disclosure orientation of the Commission's work necessitates a large amount of filing and processing room for public and legal compliance documents, as well as the certification and audit documents for the public financing programs. The growth in money and the attendant documents reflecting that money involved in campaign finance has outstripped our present processing, filing, and storage facilities. Work with GSA representatives on our long-range space needs has convinced them of this requirement, and will be incorporated in our FY 1995 and 1996 budget requests. However, this FY 1994 request attempts to respond to our immediate, short-term space needs. It reflects a total of about 13,000 additional square feet of space (compared to our current occupancy at FY 1992 levels), at prevailing rates for our location.

CONCLUSION

I have attempted in my brief testimony to touch on the highlights of this Budget Request. I should note, however, that our request does not include any funding to address any campaign finance legislation now under discussion, or the Federal Election Commission's responsibilities with respect to any Ethics Act Amendments, but only the anticipated Voter Registration legislation. Enactment of new legislation which requires budget increases to fulfill any new responsibilities will have to be handled through programmatic supplemental appropriation requests, if necessary. At the time this budget request was prepared, so-called Motor Voter legislation appeared likely to be enacted.

Despite evidence that our workloads required even further additional staff for programs such as the disclosure, information, press, and data processing functions, we agreed with OMB last year to a final request for

only ten additional FTE for OGC and RAD in FY 1993. We reached this agreement in recognition of the general budgetary climate, and with the recognition that OMB had responded to our pressing needs for full audit staffing, enhanced ADP, replacement of the disclosure equipment, and the drastic need for some additional space. However, the explosive growth in our workloads during the 1992 elections makes it imperative that the Commission receive the full budget requested for FY 1994 and the full 320 FTE it represents.

The Commission has met past increases in its workload with productivity improvements, which enabled us to meet a higher workload with static staffing levels. We did increase our audit staff; however this came under fixed total staffing ceilings and was therefore at the expense of other programs which were forced to remain at static staffing levels. An increase in staff in FY 1993 was limited to OGC and the Reports Analysis Division. This budget request rectifies this by providing the informational and disclosure operations with much needed staff increases These operations were nearly swamped by record workloads in 1992. and can not face the 1994 elections without additional resources.

We are seeking, in this Budget Request, sufficient staff in enforcement, disclosure, information, and audit to enable the Commission to meet its statutory mission. We also seek sufficient support for the staff to carry out their duties. Finally, we seek some funding to address our pressing space needs. I request full funding of our request for $23,654,000 and 320 FTE staff. I hope I have forcefully made our case that the explosive growth in the level of campaign finance activity requires us to ask for the full amount of funding to successfully achieve our mission. Given the heightened level of public concern and misgiving

about our political system and its financing, the FEC must have a solid foundation upon which to add any additional duties designed to restore public faith. Any attempt to add to our regulatory mission without providing us with the basic resources to meet our obligations will not be successful in helping to restore that public confidence so necessary in a working democracy.

In this context, the Commission is treating the recent Executive Orders with regard to reductions in operating budgets and staff sizes as voluntary for independent, regulatory agencies such as the FEC. The pressing need for additional resources and staff we have argued before you here today mandates this approach. I would like to remind the Subcommittee that, as you are well aware, for a regulatory agency such as the FEC, "administrative expenses" represent our entire non-personnel budget (except rent from GSA.) This, plus the fact that over 70% of our budget goes for personnel costs, makes the Executive orders particularly onerous on the Commission.

I thank this Subcommittee for its past support of our efforts, and for the opportunity to appear today and present our case. My colleagues and I are ready to respond to any questions you may have.

APPENDIX A FY 1994 APPROPRIATIONS REQUEST

PREVIOUS FEC MANAGEMENT SUCCESSES
(A Proven Record of Meeting Targets)

When the FEC has received funds for specific programs or projects, we have successfully implemented the new projects in a timely fashion and under budget:

-- FY 1985: requested funds to move from our original location at 1325 K Street to new quarters at 999 E Street. The move was accomplished within budget, and funds were returned to the Treasury.

-- FY 1988: requested additional staff to meet the 1988 election workload, due to the first "open" Presidential elections for both parties in the history of the FECA. Additional staff was brought on board for several offices, and the 1988 election was successfully implemented with regard to disclosure and informational operations. However, the Audit division was understaffed, and we underestimated the need for additional resources for enforcement activities.

-- FY 1989: one million dollars was sought for the acquisition of new word processing equipment, to provide for desktop word processing and EM capabilities, especially for enforcement staff. The system was procured and installed within budget and on time, despite delays due to uncertainties over funding.

-- FY 1989: six positions were requested for an additional enforcement team in OGC to process the enforcement backlogs and rising caseloads. The additional team was assembled, although not immediately at full strength due to uncertainty over funding and the forced absorptions of some pay costs. Enforcement certainly would be in worse shape without this additional team.

-- FY 1991/92: six FTE for increases in FEC audit staff to process the 1992 presidential election more timely than the 1988 election were requested. The additional staff were in place by the close of FY 1991, and, as a result, the Commission has every indication that the 1992 audits will be completed in a more timely fashion.

-- FY 1992/93: $500,000 was requested to replace aging microfilm processing, filming, and retrieval equipment with new technologies such as CD ROM, optical disks and PC networks, and digitized imaging technology. This is on track, despite the requirement to split the project over two FY's.

-- FY 1993: $500,000 was requested to provide for

additional ADP enhancements for the Audit and Reports Analysis Divisions (RAD); this project is projected for implementation once the new technologies for disclosure processes are completed above.

-- FY 1993: ten FTE were requested, six in OGC and four in RAD. RAD has already reached expanded staffing levels, and OGC is projected to reach its desired FTE levels by the end of FY 1993. In addition, three other FTE were reassigned from Audit temporaries to OGC (for total of 84 FTE.)

FEDERAL ELECTION COMMISSION
Highlights of FY 1994 Budget Changes
(In thousands of dollars-- $000's)

FY 1993 Estimate *	FY 1994 Request	Explanation and Justification of Changes by Object Class	Net Change
$14,668.0	$16,624.0	Personnel Compensation and Benefits	$1,956.0
		Cost of 320 versus 276 FTEs, plus COLA's and mandated increases: Within-grade increases and Merit Pay. $332 for FY 93 COLA and mandated increases; $1,624 for 44 additional FTE's.	
$287.0	$360.0	Travel	$73.0
		Cost of Audits and enforcement actions, inflation.	
$2,253.0	$2,516.0	Rental Payments to GSA	$263.0
		An additional $60,000 for mandated GSA rate increases, and $203,000 for additional space approved by GSA.	
$480.0	$597.0	Rent, Communications, and Utilities	$117.0
		Increases in the cost of phones, guard services and other services from GSA, as well as health unit services for employees; 44 new FTE.	
$392.0	$489.0	Printing and Reproduction	$97.0
		Increases in printing costs from GPO, Federal Register and private vendors.	
$1,260.0	$1,684.0	Other Services	$424.0
		Increased usage of ADP assisted legal research services, and increased costs for basic services and contracts, such as books and periodicals for the FEC Library, as well as legal deposition services. Support for 44 additional FTE.	
$451.0	$528.0	Supplies and Materials	$77.0
		44 additional FTE and increased costs.	
$333.0	$460.0	Equipment Rental	$127.0
		Increases in costs for basic usage and service for disclosure and copying equipment (Public Records and FEC in general); 44 FTE.	
$907.0	$396.0	Equipment Purchases	($511.0)
		$500,000 for ADP initiative for Auditors and Reports Analysts (desktop units for audits and analysis); $345,000 to complete replacement of Public Records disclosure and reports retrieval equipment; in FY 93 but not FY 94. 44 additional FTE and increased costs.	
$21,031.0	**$23,654.0**	**Total All Object Classes**	**$2,623.0**

* Represents FY 1993 enacted; does not include request for FY 1993 supplemental of $112,000.

FEDERAL ELECTION COMMISSION
FISCAL YEAR 1994 APPROPRIATIONS REQUEST

FY 1994 JUSTIFICATION FEBRUARY 24, 1993

$23,654,000 and 320 FTE

FY 1993 SUPPLEMENTAL FEBRUARY 24, 1993

$112,000 and .5 FTE

MISSION OF THE FEDERAL ELECTION COMMISSION

The Federal Election Commission ("FEC" or "Commission") is charged with administering and enforcing the Federal Election Campaign Act (FECA) as amended. This includes facilitating public disclosure of campaign finance activity; providing information to the public, press, and campaign officials on the law and Commission regulations; encouraging voluntary compliance with the disclosure and other requirements of the FECA; and enforcing the statute through audits, investigations, and civil litigation. The Commission is also charged with implementing the public funding programs for Presidential campaigns and conventions. This includes certification and audit of participating candidates and committees, and enforcement of the provisions of the public funding legislation concerning the use of federal funds.

The Commission estimates that it will monitor between $1.75 billion and $2.0 billion raised and spent for federal elections in the 1992 election cycle by the over 7,000 committees currently registered and reporting to the FEC. The total amounts raised and spent and the corresponding workload this creates are expected to increase with each new succeeding election cycle. At a minimum, the totals for spending and committees filing for the 1994 election cycle are expected to approximate that of the 1992 election cycle.

THE FY 1994 BUDGET REQUEST

The Federal Election Commission requests a Fiscal Year 1994 budget of $23,654,000 and 320 FTE, which reflects both an increase of $255,000 and one FTE over the original request of $23,964,000 and 319.0 FTE concurrently submitted to OMB and Congress on September 1, 1992, and the elimination of the FY 1994 COLA for federal employees for a reduction of $565,000.

The increase reflects the cost of the second year of implementation of the National Voter Registration Act, also known as "Motor Voter" legislation, which is expected to be enacted shortly. The Commission is also submitting a request for a FY 1993 Supplemental Appropriation of $112,000 and .5 FTE to begin implementing this legislation upon its enactment.

The decrease of $565,000 reflects the President's determination to eliminate the January 1994 COLA, originally included in the FY 1994 request in September 1992.

The request for a full $23,654,000 and 320 FTE is referred to hereafter as the "Agency Request Level". It represents the full amount of resources necessary to complete the 1992 congressional and presidential election processes, prepare for and address the 1994 elections, and continue the progress the Commission has made in recent fiscal years in major programs. It allows the Commission to meet its statutory responsibilities

in the face of rising campaign finance expenditures, including so-called "soft money" which the Commission first required to be disclosed beginning with the 1992 election cycle.

For comparison purposes, we have calculated what is referred to as a "Base Level" budget. A Base level for FY 1994 of $20,925,500 (originally $21,440,500, now less $515,000 for the eliminated COLA) and 276 FTE would merely continue FY 1993 staffing levels (276 FTE) into FY 1994 with no real adjustments for the workload expected from the 1994 election cycle. The FY 1994 Base Level is slightly lower than the requested amount for FY 1993 because it does not include the $345,000 contained in the FY 1993 request to complete the modernization of the microfilm equipment in the Public Records Office (and throughout the Commission) that began in FY 1992. Nor does it include the $500,000 to complete the ADP enhancement for Audit and RAD also contained in the FY 1993 level. Any new initiatives like these can only be funded at the higher Agency Request Level.

The Agency Request Level reflects the fact that recent FEC Budget Requests have emphasized a modest rebuilding of the Audit staff and increasing the Office of General Counsel("OGC") enforcement staff, while maintaining relatively flat staffing for other Commission operations. It reflects the need for additional staff to address surging workloads in Disclosure, Data Systems, Information, Press, Reports Analysis and support functions such as the IG Office, Personnel and Administration. It also includes another significant and necessary increase in OGC staff for enforcement, ethics, policy (regulations review, Advisory Opinions, etc.) and legal (FECA and non-FECA)reviews. Finally, it includes additional space at a cost of $203,000, plus $130,000 for renovation costs. Thus, $333,000 of the full Agency Request Level represents additional space for the requested augmentation of 44 FTE.

The Agency Request Level represents an increase of $2,623,000 over the enacted FY 1993 appropriation of $21,031,000. This 2.6 million dollar increase is necessary just to address the backlogs in both our compliance and disclosure work stemming from the 1992 elections. It is also necessary in order to clean the slate of this residual work before we can meet the increased expectations for more rigorous enforcement of the campaign finance laws as expressed by the President, the Congress and the Electorate. While we understand that the general budget climate for FY 1994 calls for reductions in federal spending, the necessities of the 1992 and 1994 election cycles and our regulatory mission require that we request the resources necessary to perform our statutory obligations.

An informed, active citizenry is a key factor in a successful democracy. The FEC performs a key function by providing the public with the information which they need concerning campaign finance. The general public also needs assurance that there exists an independent and credible

instrument to oversee the conduct of political campaigns. Therefore, it is imperative for the Federal Election Commission to receive adequate funding to play an active, vigorous role in disclosing and monitoring the financing of elections.

Failure of the Commission to meet its responsibilities, particularly due to a shortage of funds and staff, would be another damaging blow to voter confidence in the political process. The Commission already has suffered heavy criticism over its inability to thoroughly monitor the $25,000 annual limit on contributions by individuals and the requirement that committees fully disclose the identification of contributors. The need to regulate and disclose "soft money" and ensure proper allocation of expenditures between federal and non-federal campaigns is another example of the huge task faced by the Commission in a time of limited budgetary resources.

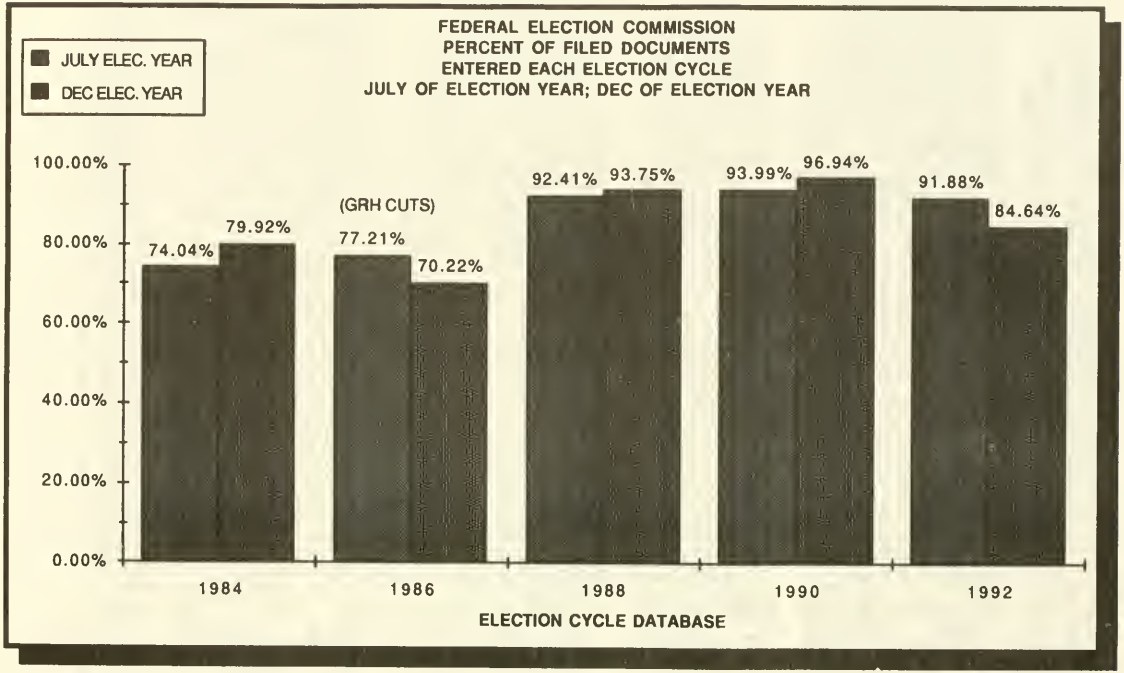
This Agency Request Level attempts to ensure adequate staffing for the audit, enforcement, disclosure, policy-making, and informational aspects of the FEC's mission. Experience with previous attempts to disclose and regulate campaign finance, and the Commission's own experiences, highlight that compliance with the statute does not exist without effective disclosure of campaign finance information and vigorous and timely enforcement of the law.

The staggering increase in regulated financial activity in recent years has made the Commission's task very difficult. For example, the number of transactions entered into our disclosure data base in the first five months of 1992 exceeded the full year's total of the last comparable year, 1984. Yet the disclosure operations are severely understaffed for the 1992 and 1994 elections. For the first time in a decade (except for the year of the Gramm, Rudman, Hollings Act reductions), we are starting to fall behind rather than improve the timeliness of the review and computerization of information submitted by more than 7,000 political committees reporting to us.

Until the last election cycle, the data processing staff had been coding and entering data into the disclosure database faster than any preceding election cycle. However, the sheer volume of financial activity to be disclosed from the 1992 elections has overwhelmed the staff at hand, which is below or barely equal to previous election cycle staffing levels. Despite increased productivity levels, the volume of activity to be processed has created backlogs, which will be perpetuated without an increase in staff. This ill serves the public and has demoralized a staff which heretofore has prided itself with its timely and accurate work.

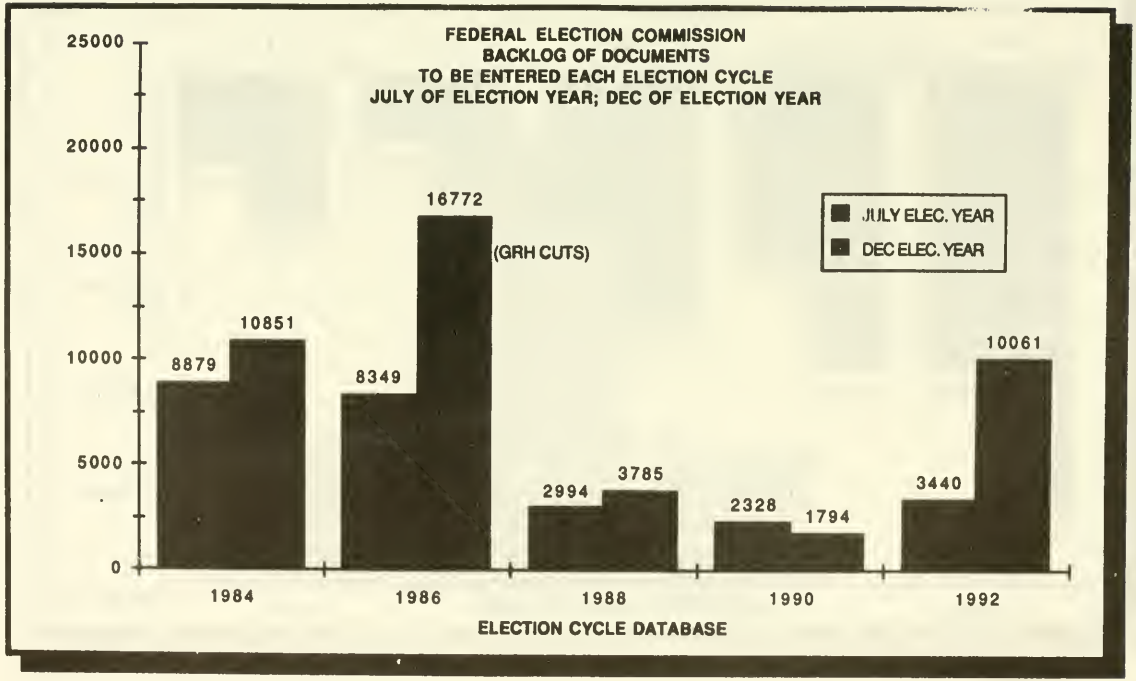
The attached five charts depict the problem. The first shows that, as of July 31,1992, detailed, itemized data entry had been completed for 91.9% of documents filed with the Commission. This was a comparable, but slightly lower,

FEC FY 1994 BUDGET REQUEST--PERCENT OF ENTERED DOCUMENTS AT JULY AND DEC. OF ELECTION YEAR



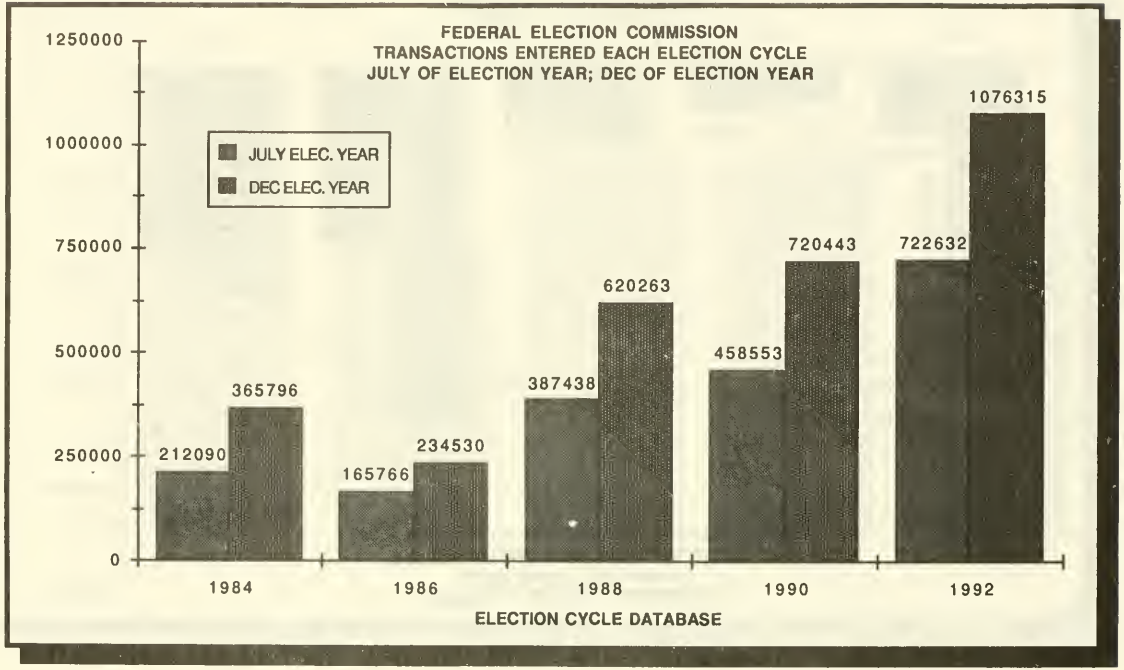
% FILED DOCUMENTS ENTERED BY ELECTION CYCLE (84, 86, 88, 90, 92 DATABASES) 12/31/92

FEC FY 1994 BUDGET REQUEST–BACKLOGGED DOCUMENTS AT JULY AND DEC. OF ELECTION YEAR



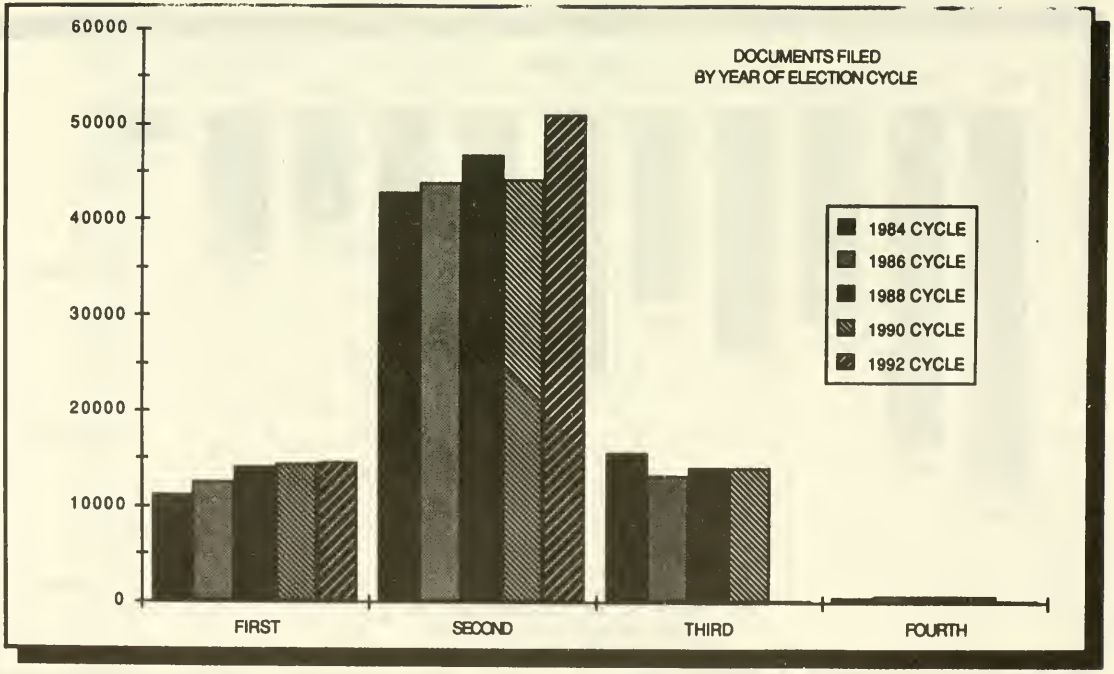
DOCUMENTS TO BE ENTERED BY ELECTION CYCLE (84, 86, 88, 90, 92 DATABASES) 12/31/92

FEC FY 1994 BUDGET REQUEST--ITEMIZED TRANSACTIONS AT JULY AND DEC. OF ELECTION YEAR

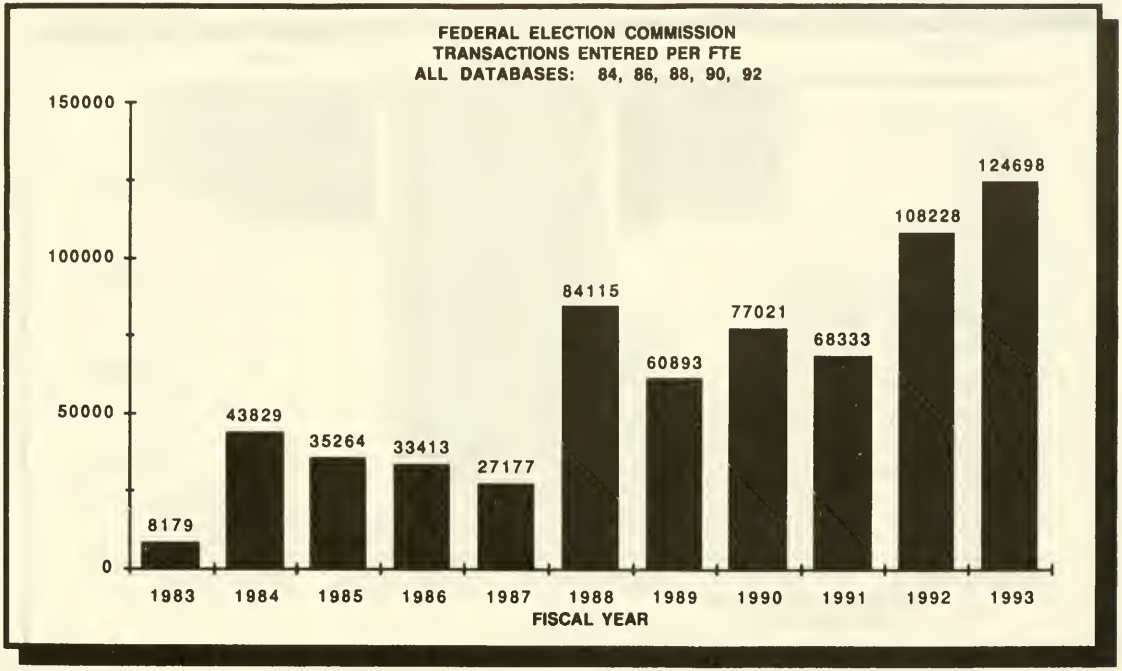


ITEMIZED TRANSACTIONS BY ELECTION CYCLE (84, 86, 88, 90, 92 DATABASES) 12/31/92

Documents Filed by Year of Election Cycle



Total Filed for 1984, 86, 88, 90 and 92 Data Bases--as of 12/31/92



ITEMIZED TRANSACTIONS PER CODING FTE BY FISCAL YEAR (84, 86, 88, 90, 92 DATABASES) 12/31/92

percentage than for July 1988 and July 1990 for those respective election cycles. However, by December 1992, this had declined to only 84.6%, significantly below December 1988 and 1990, which had shown increases from the previous July percentages.

This is further depicted in the second chart which shows the number of backlogged (unprocessed documents) for July and December of each election cycle. Once again, July 1992 showed some increase in backlog compared to 1988 and 1992, which had expanded to a huge increase by December 1992. Notice that, in 1990, the backlog actually decreased from July to December 1990 for that election cycle; in 1992 the backlog increased dramatically. In terms of timely processing of documents for itemized entry into the computerized data base, the FEC has virtually slipped back to 1984 election cycle timeliness.

The next three charts depict why this has happened. First, the amount of transactions entered into the computerized data base has increased tremendously: from 365,796 in December 1984 to 1,076,315 in December 1992. As of July 1992, more transactions had been entered into the 1992 database than for the 1990 database in December of 1990. In other words, despite processing almost three times the number of itemized entries during the same time period as in 1984 (and between 50% to 75% more than in 1988 and 1990), the Commission has a bigger backlog of documents waiting to be processed than in 1988 and 1990 as of December of the election years. Second, the number of documents filed by committees reporting to the Commission has increased: from between 7,000 to 10,000 more documents were filed as of December of the election year than any previous cycle back to 1984.

Finally, the overall financial activity has increased. We predict over 1.75 billion dollars in total disbursements for federal elections by all committees reporting, including "soft money" received by the national party committees. Yet in the face of this increase in financial activity and the corresponding increase in documents and transactions to be processed, the Data Systems total staff has actually declined: from over 31 FTE in FY 1985 and 1988, to 28.9 FTE and 30.2 FTE in FY 1990 and 1992. The staff allocated specifically to coding of itemized information has declined from 8.1 FTE in FY 1981, 7.8 in FY 1985, and 7.5 in FY 1988, to 6.4 FTE in FY 1992. In other words, one coder processed an average of 108,000 transactions in FY 1992, compared to the previous high of 77,000 transactions per FTE in FY 1990. (The 84,000 transactions per coding FTE in FY 1988 was inflated due to the delayed entry of items recaptured from the 1986 database during FY 1988 due to GRH reductions.)

This analysis shows that the Commission has experienced productivity increases in the coding and entry of data into the computerized database, yet is experiencing a degradation in the timeliness and completeness of that data entry due to a massive

increase in financial activity. Despite the fact that the Commission is processing significantly more data, the general increase in overall campaign finance activity in the face of static or even declining staff resources has led to a decline in the timelines of data processed. The FY 1994 Budget Request attempts to rectify this staffing shortage.

The same problems confront the staff providing disclosure information to the public and press, as well as the staff charged with reviewing the reports filed for compliance with the requirements of the FECA. Our Information staff also is flooded with a high level of requests for assistance and for information about the FECA and the reporting regulations. The Commission can supply reams of charts depicting the same type of workload increases, coupled with static or even declining staffing levels. We will let the data entry statistics stand as the dramatic example of the need for more resources, but the same story holds for Information, Public Disclosure, Press and Reports Analysis.

In the enforcement program, the Commission has continually husbanded scarce resources by ratcheting enforcement thresholds higher to focus the limited available resources on more significant violations of the FECA. Through the use of these thresholds and improved management of programs and resources, the FEC has survived the general governmental budget context of limited resources. Nevertheless, the use of ever higher thresholds means that significant activity outside the legal bounds of the FECA becomes tolerated, severely undercutting the law. At some point, the risk of detection or prosecution becomes so low that the "cost of doing business" outside the rules becomes acceptable, the law comes into disrespect, and public confidence in the electoral process is further eroded.

The Agency Request Level would add more OGC staff to address the ever-burgeoning workload and avoid the danger of weakened enforcement. Moreover, the Agency Request Level addresses the Commission's resolve to clear up the existing backlog of cases and to improve dramatically the timeliness of enforcement from this point on.

It should be recognized that the Commission plays a significant role in the American political process. Concern about public perception of the health of this process prompted the Commission to request a significant increase in its Budget for FY 1993. While partially successful in receiving an increase for FY 1993 (ten FTE limited to and focused on reports review and enforcement), the dire needs of the FEC's disclosure operations and enforcement program require a larger increase in FY 1994. Even given the strict budget climate and the resulting competition for scarce resources that pervades the government overall, a three million dollar increase is a small price to pay to enhance the credibility of our democratic process.

In essence, absent a considerable increase in disclosure, information and enforcement resources, the Commission may have to make drastic policy decisions regarding the tradeoffs between enforcement of the law and the disclosure functions. While the FEC believes both are necessary for true, full disclosure of campaign finance activity, continued steady-state funding, or even minor incremental increases, will not provide sufficient resources to keep up with the demands on Commission programs. The Commission then will become faced with the prospect of seeing all activities further degrade due to staff overloads, or making decisions to cut back in some areas in order to do other things well. Funding of the Agency Request will avoid this dilemma.

The FEC has reached agreement with OMB and the President whenever possible, and it has not always been easy to meet our goals within limited budgets. If we are to head off deterioration of many Commission operations and make further progress in improving other areas, the full Agency Request is necessary. The lower Base Level for FY 1994 would not rectify the severe staff shortages in Data Systems, Information, Disclosure, Press, RAD, and the support functions. Nor would it enable the FEC to build a more effective enforcement program. With this in mind, the Federal Election Commission urges full funding at the Agency Request Level outlined below.

BASIC ASSUMPTIONS

Salaries and Benefits

The Base Level contains 276 FTE with a 3.7% COLA effective January 1, 1993. Our projected costs for benefits assumes that FERS and Health Benefits continue to consume significant resources. The average GS-5 or GS-7 requires 30 to 35% benefit cost factors, given the employer's share of FERS and Health Insurance. The FERS system continues to transfer costs to the FEC from OPM as more and more FEC employees are FERS employees. TSP costs also rise as more employees are FERS employees, taking advantage of the agency match of TSP deposits up to 5% of their salaries.

The agency share of health insurance costs continues to escalate: from FY 1987 to FY 1992 the FEC share of health insurance costs increased by 147%. In late FY 1987 we paid an employer's share of roughly $7,700 per pay period; by FY 1992 it had reached almost $19,000 per pay period.

Space/Rent

The Base Level budget also includes basic services such as rent and phones at GSA prescribed rates. In just four years, the FEC's rent mandated by GSA has increased from just over $1,600,000 to well over $2,050,000, an increase of about 30%. The Base Level Budget also assumes that we will acquire

additional space in FY 1993, resulting in a continued incremental cost of $203,000 in FY 1994. Our current lease expires in early FY 1996, and this space is necessary to carry the Commission over until we can acquire and make usable consolidated space in FY 1995 and 1996.

With regard to long term space needs, the FEC has been working with GSA planning staff to develop a prospectus for our space needs in FY 1995 and 1996. The preliminary evaluations by the GSA planning staff called for at least an additional 20,000 square feet to provide for the Commission's current and anticipated needs under our current law. The GSA planning staff also recommended that another 20% increase in space, or another 17,000 square feet, should be available to provide for possible changes in the FECA and other legislation such as the National Voter Registration Act, which passed both houses of Congress in 1992, has been reintroduced, and is expected to be enacted shortly. Campaign finance reform and "Motor Voter" are priorities of the new administration, and are projected to be enacted during FY 1993.

While the additional 17,000 square feet has not yet formally been approved in the GSA planning process, the Commission clearly has made a strong case for long term space needs. Although the FY 1994 Agency Request Level requests a total of 13,000 square feet above our current space occupied (FY 1992 level), this is a short term solution to our long range space needs. The Commission will request the full 20,000 square feet additional space in our FY 1995-1996 Budget at a minimum, and will argue for the additional 17,000 square feet immediately if amendments to the FECA or the other pending legislation is enacted prior to submission of those Budgets.

The Commission has made a strong case to the GSA planning staff for additional support space with our current staffing, and OMB recognized the need for some additional space in the President's FY 1993 Budget for the Commission, which included $275,000 for additional space in FY 1993. Therefore, the FY 1994 Budget Request provides for the additional space critically required for the short term, with the recognition that our long term space needs require significant additional space in FY 1995 and 1996. The FEC is pleased that GSA planning staff recognized the special needs of the FEC for additional support space in keeping with our disclosure and public informational functions.

Support Costs

Travel and printing costs continue to increase, reflecting higher per diem costs and inflation. Postage continues to increase due to higher rates, as does the cost of publications. This budget request assumes that the Postal Service implements new mailing procedures proposed for governmental agencies, which effectively eliminate the franked envelopes, requiring either meters or stamps by FY 1994. Having to meter each outgoing

envelope will also increase our labor costs.

The cost of depositions and searches of bank records during investigations has driven up administrative expenses, and the increased usage of computerized legal research services has caused such costs to rise as well. Also included in the Base Level are funds to provide transcripts of Commission hearings.

The Commission argues strongly that arbitrary, formulistic across-the-board reductions in object classes such as travel are harmful to the FEC's ability to complete its mission. In FY 1992, such a reduction in travel severely curtailed Commission efforts to provide normal, pre-election outreach services to persons regulated by the FECA. It also hampered the flexibility to plan enforcement actions and audits. The travel usage by the Commission fluctuates widely from FY to FY within a four-year cycle, depending on the need to travel to complete the audits of presidential candidates receiving federal funds and to perform educational functions.

Object class budgeting is harmful to our ability to carefully plan and respond to contingencies in our audit and enforcement activities, as well as our outreach efforts. We urge that such restrictions not be utilized for the FEC's FY 1994 Budget.

INCREASES IN THE AGENCY REQUEST

Additional Personnel Based on Workload Analyses

Several Commission offices have repeatedly requested additional personnel since FY 1992 and 1993. However, given the need to staff up in the Audit Division for the 1992 presidential elections within a ceiling of 266 FTE, increases were not possible for other offices in FY 1992. The 10 additional FTE received in FY 1993 have been allocated to OGC and the Reports Analysis Division (RAD). Several additional positions remain necessary, and are justified for inclusion in the Agency Request Level for FY 1994.

The 1992 elections have created significantly increased workloads for offices such as Reports Analysis, Public Disclosure, Data Systems, Information and Press. Factors in the increase include the 1992 redistricting, the new reporting of "soft money," the new debt settlement procedures, the Perot candidacy (the Commission will have to handle the processing of reporting by the remnants of the Perot campaign.), and the dramatically increased number of open seats in the House due to record retirements.

Much of this workload increase will carry over into FY 1994 which covers most of the 1994 elections. The reporting of allocated federal and non-federal expenditures will still be a relatively new, complicated process for party committee

officials and the FEC in FY 1994. The large number of freshmen anticipated as a result of the 1992 elections will most likely result in many strong challengers in 1994, as past history indicates that the parties tend to recruit viable candidates to challenge freshmen before they become entrenched in their districts.

From workload analyses and an analysis of recent staffing levels, several offices have compelling arguments. The staffing increases are highlighted below, as well as the workloads experienced so far in the 1992 election cycle. The cumulative totals reflect either fiscal year or two fiscal year periods, roughly comparable to election cycles, while the monthly totals reflect activity for selected months. These measures show both higher total workloads over the entire 1992 election cycle so far, as well as record levels of activity on a either a fiscal year or a monthly basis for many programs.

Reports Analysis Division (RAD)

Even with an expected increase in staffing during FY 1993, RAD still will barely exceed its 1988 FTE levels. RAD had over 39 FTE in FY 1988 and 1989, and will have just over 41 FTE in FY 1993, yet RAD now has major new responsibilities in the areas of debt settlements, allocation regulations, and the $25,000 limit. This burden falls on top of record numbers of committees and candidates filing disclosure reports. For example, the number of documents filed by House candidates as of December 31st of the election year increased from 12,779 in 1990 to 16,343 in the 1992 election. Similar increases have been experienced for Party and Non-party Committees (PACs).

These reports must be reviewed and potential audits or enforcement actions must then be referred to the appropriate offices. A measure of this activity is the number of RFAI's (Requests for Additional Information) issued: as of September 30, 1992 the total was 7,485 for FY 1992 compared to 5,146 in FY 1990 and 6,051 in FY 1988. Even more dramatic are the cumulative total RFAI's issued over two-fiscal year periods: 14,585 in FY 1991-1992 compared to just under 12,000 each in FY 89-90 and 87-88.

This increase in requests for additional information occurred despite an actual decline in the number of reports reviewed in recent FY's, due largely to static staffing and larger, more complex reports to review. Despite static staffing and higher review thresholds, a smaller number of reviews accomplished compared to the 1984 and 1988 cycles produced more RFAI's. The number of referrals to Audit/OGC for audits or enforcement action provides another measure of the activity: a total of 291 referrals were made in FY 1991, while only 77 were made in FY 1992. These totals reflect both the highest and lowest number of referrals since FY 1980.

This is reflective of the lower staffing levels in FY 91-92, and the fact that reports are beginning to require more review time, particularly the Party Committee reports which contain the new allocation and "soft money" provisions. The time required to review an average state and local party report has increased from 45 minutes to over four hours. Further evidence of the shortage in RAD staffing is the fact that monthly RFAI's issued are down in recent months compared to previous election cycles, despite the cumulative totals being higher. The total number of reports reviewed to date is actually lower than previous election cycles although more reports have been filed. This impacts on RFAI's and referrals and is reflected in the growing backlog of unreviewed reports.

Given that average review time per report was consistent with previous election cycles, until the allocation reports began to appear, the backlog appears to be solely a function of the shortage in RAD staff. All measures point to productivity remaining the same, if not improving, for RAD programs, yet a backlog is developing. This will continue to worsen without additional staff in RAD.

The perception of incumbent vulnerability led to an increase of challenger Congressional candidate committees (for both the primaries and the general elections) compared to previous election cycles in 1992. Additional staff time is being expended communicating with committee treasurers in writing and in telephone calls. The branch that handles candidate committees, however, had no additional staff for the 1992 election cycle.

Reports Analysis believes strongly that a minimum of 44 FTE are necessary in FY 1994 to meet the needs of the presidential election workload, the additional candidacies resulting from the 1992 redistricting, the new workload generated by the debt settlement and allocation regulations, the accumulating review backlog, and enforcement of the $25,000 limit. This represents an increase of 2.5 FTE over planned FY 1993 levels. RAD projections indicate that FY 1991 and 1992 staffing levels were five to six FTE below the required level.

Data Systems

The Data Systems Division performs many of the traditional ADP support services in the agency including the development and maintenance of payroll and accounting housekeeping systems and a full range of office automation systems to support the line divisions and offices. At the FEC, however, the Data Systems Division also serves as a line unit with an integral role in the public disclosure function. This role is served by Data System's capture of detailed financial data filed by the thousands of political committees reporting to the Commission, the aggregation of this information into meaningful statistics, and responding to the public interest for this information by

affording flexible access to this information on-line and in hard copy reports.

Access to microfilm and paper copies of the data is made possible by use of the basic indexing system, called Pass I data entry at the Commission. This provides access to reports through committee ID numbers and microfilm locations on documents filed. Detailed information is entered under the Pass III data entry process, and includes transactions such as individual contributions, committee contributions, and the "soft money" allocations. Access is also provided to users through the Direct Access Program, whereby they can access a copy of the database directly through PC's. About half of the States participate in making the database available to users in state election offices through the State Access Program.

The fundamental measurement of this line function workload on Data Systems is the volume of substantive campaign finance data captured, as measured in four-year election cycles. The increase in workloads has been documented above. While a portion of the additional workload is attributable to the Presidential campaigns, much of the increase is due to a dramatic increase in the volume of funds flowing into Congressional and Senate campaigns and the new and continuing requirement to capture soft money solicited by national party committees.

In productivity terms, at some point, staff must be increased to process the increased workloads, yet Data Systems has been working at virtually the same or lower staffing levels as in the 1988 and prior election cycles.

Data Systems has also inherited the job of maintaining FEC owned ADP systems, as well as supervising the contracted leased systems, since the acquisition of owned systems beginning in FY 1988. This requires significant staff time to service, maintain, and train users of the systems, yet again Data has had no increase in staff. Furthermore, the old microfilm cameras, processors, and reader-printers in Public Disclosure will be replaced by the end of FY 1993 with new imaging technology using laser discs, centralized processors, and multiple viewing and printing stations. Data staff will be responsible for maintaining and servicing this equipment for the Public Records Office and other Commission offices.

In order to service the growing inventory of FEC owned ADP equipment, Data Systems requires 3 FTE of systems analysts, programmers, and training staff for FY 1994. Another 2 FTE are required for the coding and entry programs to keep up with rising workloads. The three additional analysis and programming staff are really overdue by about two fiscal years, given the increasing responsibilities of the Data Division. The total requested increase for FY 1994 is five FTE.

Public Disclosure

The front line of the Commission's public disclosure operations is the Public Records Office and the Processing Section of the Public Disclosure Division. The staff of this unit have witnessed an increase in the demand side (public requests for data and information) of disclosure that is almost as dramatic as the increase in the supply side (campaign finance activity).

The number of people served as of December 31st is 24% greater this cycle than at the comparable point in the last Presidential cycle (87,557 vs. 70,348). For several months in 1992, Public Records served about 1,000 more people each month than comparable months in the 1988 election cycle. In order not to risk undercutting the high credibility of this operation this year, this unit was permitted (among others) to marginally exceed its FTE ceiling in view of this increased demand. However, the entire Commission has come up against the FTE ceiling. Therefore, 3.0 additional FTE are requested for Fiscal 1994. As was the case for RAD and Data, discounting conscious overstaffing, the staffing allocated for this unit has remained steady over the last few years.

Information

The total cumulative informational inquiries for the fiscal year to date and inquiries in selected months show dramatic increases over prior cycles. As of December 31, 1992 the Information Division had responded to 108,855 requests for assistance or information. This compares to 56,219 as of December 31, 1990 and 71,129 as of December 31, 1988.

Dramatic increases are also seen in the individual monthly total inquiries for January, March, and April. In 1992, Information processed between 10,000 and 11,000 requests per month. In 1990 these months averaged about 5,600 requests, while they averaged about 7,000 in 1988.

To cope with these increases, Information requires an additional writing (editor) position and more staff to respond to informational inquiries. Information also requested that the EEO officer be made full-time, allowing them to replace the information specialist which had been providing half-time to EEO and half to Informational programs; this would effectively restore the information specialists to six people giving full-time to outreach and response programs. The supervisory editor position is also requested, to free the Division Director from continual, every day editing work. The net increase for Information in FY 1994 would be 1.5 FTE.

Lack of additional staff will begin to impact severely on the outreach efforts of the Information Division, as available staff currently is more often tied up dealing with responses to inquiries. The Commission believes strongly that our very

modest outreach efforts have saved resources ultimately by heading off future compliance problems through educational endeavors.

Press Office

The Press Office previously requested additional staff to increase press outreach efforts; now the workload requires additional staff just to keep up with the level of inquiries and the demand for responses for information. This would require a junior information specialist and a clerical position in FY 1994.

The tally of press assistance to media is included in the total measure of informational inquiries for the entire Commission, which also includes the Informational and Disclosure requests for services outlined above. As of December 31, 1992 the Commission had responded to a total of 193,613 informational requests, compared to 133,445 as of December 31, 1990 and 141,447 as of December 31, 1988. The Commission also handled a record of over 19,000 requests in April of 1992 alone, and over 17,000 such requests in January and March of 1992. The averages for the same months in 1990 and 1988 were 11,500 and 13,000 respectively.

Office of the General Counsel

At the heart of the justification for OGC's request for 16 additional FTE is the general agreement among staff in OGC, the Commissioners, parties in our proceedings and the public, that enforcement cases have been taking too long to complete. Much of the delay is due to factors outside the control of the agency. Despite the fact that the office is continuing to institute a number of administrative changes to speed up the handling of cases, the fact remains that there are not sufficient resources to handle the pending case load in a timely fashion.

As of July 1, 1992 OGC had 17 staff attorneys and 5 paralegals assigned to handle 203 Matters Under Review (MURs or enforcement actions) involving 1,825 respondents. By December 31, 1992, this had increased to 328 active cases involving 2,432 respondents, with 23 staff attorneys and 5 paralegals assigned. These cases span the country and many of them are serious and complex enough to require the attention of more than one attorney on a full time basis if the cases are to be handled in a thorough and timely manner. Under the present staffing levels, however, this is just not possible since each attorney is handling an average of almost 16 cases and well over 100 respondents.

The problems have been exacerbated by the increasing complexity of the cases, which requires the dedication of more staff hours to each case. The result of all of this has been

the increase in the pending case load for OGC. The pending MURs for most of FY 1989-1990, as well as 1991-1992, exceeded all the previous levels except for the highest peak point in FY 1987-1988. The condition has worsened in FY 1993: the backlog of pending active cases is higher at this point, at 328 active cases, than ever before.

The number of new cases opened during the FY 1991-92 cycle exceeded the previous peak level reached in FY 1985-86. For closed cases, the peak of FY 1985-86 was not attained, although the second highest number of cases ever were closed in FY 1991-92. Thus, it is clear that not only is the present staffing in OGC not adequate to handle the case load but the problem is getting worse since the cases are requiring more work (staff time) and the active case load (cases pending) is building. During FY 1993 and FY 1994, we will witness a new class of cases referred from RAD due to the new soft money allocation and debt settlement regulations. This also will increase the OGC case load.

The argument for additional enforcement staff is both quantitative and qualitative. Not only has staffing for OGC been insufficient for timely completion of the case load for several years, but, over the course of the past three years, the Office of the General Counsel has experienced a significant increase in the complexity and difficulty of its enforcement matters. The number of respondents involved in these matters increased significantly, by 80 percent, from early 1989 to early 1991.

In particular, there continues to be a substantial increase in enforcement matters involving complex schemes for reimbursing contributions (i.e., contributions in the name of another) in violation of 2 U.S.C. § 441f, often using corporate funds in violation of 2 U.S.C. § 441b. By their nature, these cases involve attempts to hide conduct that is designed to circumvent the limitations and prohibitions of the Act; hence many of these matters involve knowing and willful conduct. Between 1987 and 1991, these types of cases also have increased by 80 percent.

Due to the possibly criminal nature of much of this activity and the Department of Justice's sometimes concurrent criminal investigations, respondents are more often asserting their Fifth Amendment privilege. Thus, the Commission has had to obtain evidence indirectly, rather than from the respondent himself/herself, thereby necessitating the use of greater enforcement resources. In addition, it is not uncommon in these matters for there to be related corporate entities reimbursing numerous employees or business associates (including other corporations) for contributions using different methods ranging from bonus/salary gross ups to false invoices. As a consequence, these matters have required more extensive investigation, often involving numerous depositions and broad document requests or subpoenas, including subpoenas for bank

records. The greater use of subpoenas has, in turn, resulted in an increase in the number and complexity of subpoena enforcement matters, and preparation for the litigation in these matters often necessitates assistance from the enforcement staff.

The enforcement case load has been further affected by an increased use of more complex arrangements for raising and transferring campaign funds, including joint fundraising and earmarking programs, bank loans, and the movement of funds through the federal and non-federal accounts of national and state parties. Because these matters by their very nature involve a more elaborate money flow, they have required increasing amounts of resources to properly investigate and conciliate. The complex rules regarding allocation of expenditures by political party committees and the exemptions from the limits available to party committees also have involved greater examination of the details of party activities in order to determine their legality. Investigations in these areas often require taking testimony or obtaining documents from nonrespondents, such as vendors and other witnesses.

The Supreme Court decision in Massachusetts Citizens for Life v. FEC, 479 U.S. 238 (1986), which created a limited exemption to the prohibition on corporate expenditures of 2 U.S.C. § 441b for nonprofit corporations that could meet specific, narrow criteria, also has placed greater demands on staff resources. Many nonprofit corporate respondents now routinely claim to qualify for this exemption. Such claims necessitate a detailed preliminary investigation into the structure and operation of nonprofit groups to determine the validity of such claims before the main allegations in the case can even be addressed. MCFL and its progeny have also obliged us to redefine terms such as "in connection with a Federal election...," "express advocacy," and "election influencing" when addressing corporate expenditures proscribed by section 441b. The Commission is currently engaged in regulation revisions and rulemaking procedures as a result of these cases.

In addition, the Commission has placed greater emphasis on enforcing the disclosure requirements of the Act. Although such cases generally require less investigation, their increased number has placed additional demands on staff resources, both to prepare and resolve through conciliation negotiations.

The Commission is requesting an additional 16 FTE for OGC. The addition of the 16 staff members is not the only remedy the Commission is pursuing to alleviate the backlog in OGC, however. The Counsel's Office is also working to revise existing thresholds and institute a better "prioritization" system, with the aim of clearing out the backlog of cases to focus limited resources on the cases with the most significant consequences with regard to compliance with FECA. Once the enforcement case load is prioritized and cleared out, the additional staff members are necessary to handle the remaining cases more

effectively and in a timely fashion and to ensure that large backlogs do not begin to recur.

While enforcement is the central focus of the problems OGC faces, other needs exist in other areas. In reality, OGC has not had sufficient staff to concurrently handle all enforcement, policy, and administrative legal tasks without moving staff from project to project as "crises" require. Given the minimal staffing levels in other areas of OGC (e.g. 2 staff attorneys assigned to Advisory Opinions, 2 staff attorneys assigned to Appellate Litigation and less than 1 full-time paralegal FTE assigned to ethics matters), there is no way to shift staff without causing major upheavals in other areas. In addition, increasing workloads in these other areas of OGC will only make matters worse. For all of these reasons, the Counsel requested 16 additional staff members for enforcement, litigation, policy, regulations, audit review, legal review, and ethics.

Administration

Payroll and Accounting reiterated their FY 1992 and 93 request for an additional accountant, and Office Services needs three administrative aides. The growth in line programs and increases in the line staff to address this growth requires some measure of administrative support. The likelihood that supplemental space will have to be secured at another site also complicates the logistics of this support. Concern for maximizing the effectiveness of incremental line staff and to maintain strict internal control systems demand these increases. The total increase is four FTE over FY 1993 levels.

Clearinghouse

Anticipating the enactment of the National Voter Registration Act, this request includes $255,000 to continue the implementation of the expected legislation, which is anticipated to begin in FY 1993. The Commission has already approved the reprogramming of $30,000 in Clearinghouse research funds to begin the implementation in FY 1993, and is requesting a Supplemental Appropriation of $112,000 and .5 FTE to further those efforts during FY 1993.

The Clearinghouse will be overseeing the development of national voter registration forms, and coordinating the responses of the states to the legislation. In addition, the General Counsel will work with the Clearinghouse to promulgate regulations implementing the Act, which will require another .5 FTE for OGC. The Commission's model will be the non-intrusive manner in which we assisted the states in complying with the Voting Accessibility Act, which mandated greater polling place accessibility for the elderly and the handicapped.

In addition to the anticipated new duties, the Clearinghouse requested one temporary GS-5 for .5 FTE to assist

in preparing training modules for state and local election officials to use at state conferences and training sessions. This office provides crucial informational and educational assistance to thousands of state and local election officials, who are responsible for actually administering elections. The very modest research efforts of the Clearinghouse are the only federal assistance afforded the state and local officials who administer federal elections concurrently with state and local elections.

Staff Director

The Staff Director's Office had the following requests: the present part-time EEO officer requests that a full-time EEO director be established at the FEC (effective cost covered by the additional position in Information; the current EEO officer would be transferred full-time to the Staff Director's Office); the Congressional Affairs Officer requested an additional position to keep up with the volume of calls and requests; Personnel requested one clerical staff and one professional to assist with paperwork engendered with turnover rate and the increasing number of personnel actions; and finally, the Commission Secretary requires an additional position to keep up with the official document flow, and to handle transcript requests. The total increase for the Staff Director's Office in FY 1994, therefore is 6.5 FTE, including the two positions requested for the Press Office above.

Commissioners' Offices

All substantive decisions at the FEC require at least four affirmative votes from the six Commissioners. The increasing complexity and volume of work faced by the line units which has been outlined in the preceding pages translates into increased workload at the final decision making level. Many of the Commission's decisions are rendered by notation voting on documents circulated by the Secretary of the Commission. Others require collegial meetings either in executive or public session. Given the increased workload, making informed decisions in a timely fashion demands additional resources.

With the additional duties incumbent on the Chairman and the Vice Chairman, this need is acute for these two offices. This Agency Request Level includes two FTE for one legal assistant each for the Chairman and Vice Chairman's offices to perform legal research, administrative tasks and similar functions.

IG Office

The IG requests two additional staff for FY 1994: a clerical support position, and a junior level auditor. Currently, the Office consists of the IG and one auditor position. This request would provide for confidential clerical

assistance, and back-up for the sole existing audit staff member.

TOTAL INCREASES:

The total increase over the FY 1993 staffing level is 44 FTE, for a total of 320 FTE. The cost of additional space to house the requested additional staff is $203,000, plus $130,000 in construction costs.

STAFFING SHORTFALLS

The following table points out the increases realized by Commission offices since FY 1987, and the requested increases for FY 1994. It highlights that the vast majority of staff increases since FY 1987 have gone to OGC and Audit, and how the other offices are coping with a greater workload with essentially even, or declining resources.

FTE FY 87-93

					INCREASES	
OFFICE	FY 87	FY 92	FY 93	FY 94	87-92	93-94
ADMIN	15.4	15.8	16.0	20.0	.4	4.0
AUDIT	20.0	32.4	30.0	30.0	12.4	0.0
INFOR	11.8	12.8	13.0	14.0	1.0	1.0
OGC	61.4	75.8	84.0	100.5	14.4	16.5
CHOUSE	4.5	5.0	5.0	6.0	1.0	1.0
DATA SYS	29.2	29.7	30.0	35.0	.5	5.0
DISCL	12.2	12.7	12.0	15.0	.5	3.0
RAD	37.3	37.7	41.4	43.9	.4	2.5
SDO	23.2	22.5	22.6	29.6	-.7	7.0
IG	0.0	1.8	2.0	4.0	1.8	2.0
COMM	20.0	20.0	20.0	22.0	0.0	2.0
FEC	235.0	266.3	276.0	320.0	31.3	44.0

Static staffing levels in the face of dramatically increased workloads in the 1992 election cycle have severely strained Commission informational and disclosure operations. The Commission expects the 1994 cycle to evidence this increase in workloads, assuming a large number of freshmen congressmen will invite large numbers of challengers. Further turmoil and dissatisfaction with the political process and the move to limit incumbent terms could lead to more retirements and more highly competitive campaigns.

The 1992 cycle has impacted the Commission operations across-the-board and, absent additional staff, many programs which have performed well will see a degradation in quality and timeliness over time. Things the FEC now does well will begin to fall behind. The foregoing historical staffing analysis and workload comparison provide ample proof that the significant increase in staff requested for FY 1994 is more than justified.

The increase, in reality, is correcting for staffing deficiencies developed over five to six fiscal years, due to constrained FTE and funding.

The Agency Request Level maintains the Audit Division at 30 FTE to keep a sufficient audit staff that is trained and experienced for the next presidential election audits for federally funded candidates. Past experience has proven that a staff of 24 in Audit, although supplemented by GAO detailees and temporaries, was not sufficient to accomplish the presidential audits in acceptable time frames. The core staff of 30 will still require temporary assistance during presidential election years for certification. During FY 1994 this core staff will be able to devote more resources than in the recent past to compliance by congressional candidates.

FY 1993 SUPPLEMENTAL APPROPRIATION

The Commission requests a Supplemental Appropriation of $112,000 and .5 FTE for FY 1993, to enable the Clearinghouse to initiate activities to implement the anticipated final enactment of the National Voter Registration Act. Upon enactment of the legislation, anticipated shortly as an Administration priority program, the Clearinghouse will begin to coordinate state efforts to comply with the legislation, begin to design registration forms, and seek state and local election officials' advice on the new law. Work will also commence on the development of regulations to flesh out the new law, with FEC legal staff and the input of state and local officials.

CONCLUSION

Although this request is significantly higher than the Commission's FY 1993 appropriation, it is our responsibility to exercise our authority as a concurrent submission agency to request directly from both the President and Congress the level of funding necessary to fulfill the requirements of the FECA. Given that the general perception of the political process is extremely strained currently, the FEC must strive to maintain public faith in the campaign finance system's integrity.

The Commission cannot achieve this mission without the resources adequate for performance of the necessary tasks. While the FY 1991, 1992 and 1993 appropriations restored staffing levels for the Audit Division to 1980 election levels, staff levels for many programs are at or below staffing from previous election cycles. This is particularly true for the Disclosure, Reports Analysis, Data Systems, and Information Divisions.

The full Agency Request Level rectifies the staffing shortages for the informational and disclosure programs, and provides a needed boost in the enforcement staff. This is to provide for the work created by the new allocation and debt settlement regulations, to meet the expected 1994 election workload, and to better handle the expanding case load of active enforcement actions. The changing nature of enforcement actions also requires more extensive staff resources to

investigate and process a growing number of complex, multifaceted enforcement actions.

The staff necessary to pursue significant violations of the FECA, and to make a multitude of information available to the public in a usable manner must have the necessary support, including adequate space. The full Agency Request Level of $23,654,000 provides the necessary staff and support. Therefore, the Federal Election Commission urges approval of the FY 1994 Agency Request Level of $23,654,000 and 320 FTE.

The Administration, Congress, and the Electorate have all expressed their concern that perceived campaign finance abuses be rectified. Efforts are under way in Congress to make substantial amendments to the existing campaign finance law. However, finding common legislative ground for the changes will be difficult, despite the leaders of both political parties' voiced displeasures with the current system. Nevertheless, until the existing law is changed, this agency must improve its efforts to enforce the present law to hold public confidence in the political processes. This is the fundamental impetus for the three million dollar increase requested for the FEC's Budget. If the law is changed, we will rapidly propose realistic supplemental funding as necessary.

COMPARATIVE FTE LEVELS FY 1993 M. PLAN--FY 1994 BUDGET REQUEST

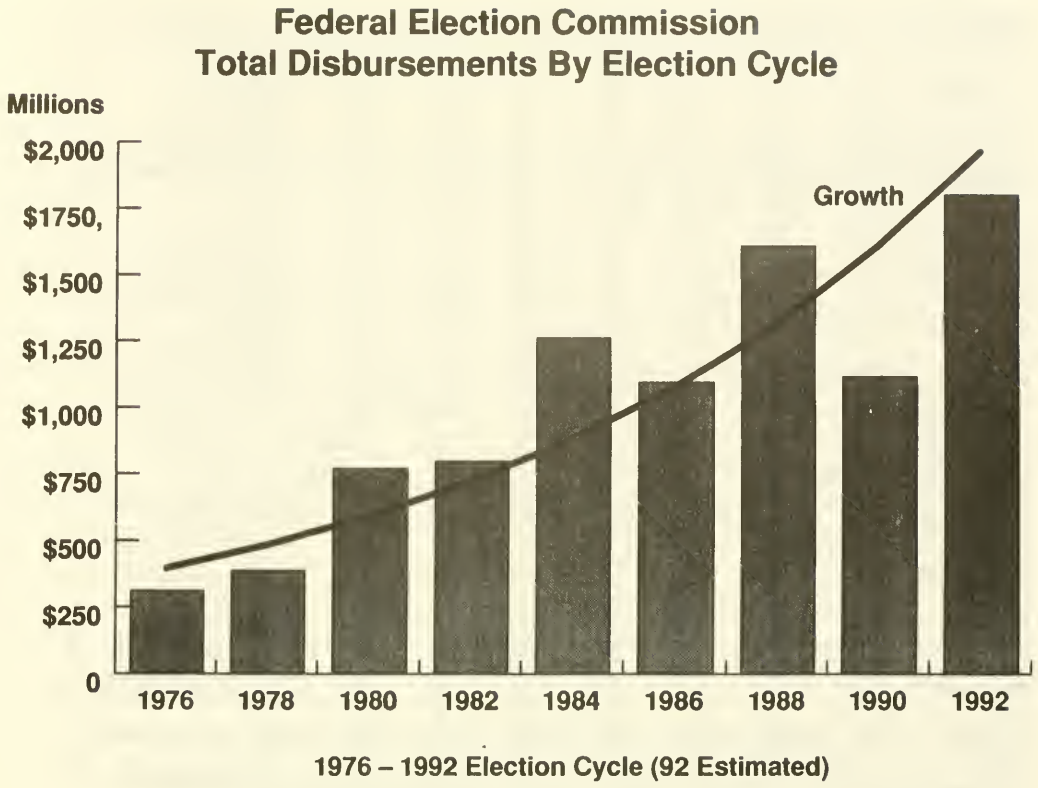
OFFICE	FY 1990 M. PLAN ACTUAL	FY 1991 M. PLAN ACTUAL	FY 1992 M. PLAN PROJECT.	FY 93 BUDGET BASE	FY 93 M. PLAN	FY 94 BUDGET FULL	FY 94-FY 93 CHANGE
COMMISSION	20.0	20.0	20.0	20.0	20.0	22.0	2.0
STAFF DIR.	21.3	21.2	22.3	22.6	22.6	29.6	7.0
ADMIN.	14.3	14.8	15.9	16.0	16.0	20.0	4.0
AUDIT	21.5	23.7	32.4	30.0	30.0	30.0	0.0
INFOR.	12.8	13.0	12.8	13.0	13.0	14.0	1.0
C. HOUSE	4.2	4.4	5.0	5.0	5.0	6.0	1.0
OGC	71.2	75.1	76.1	84.0	84.0	100.5	16.5
DATA SYS.	28.5	29.2	29.7	30.0	30.0	35.0	5.0
DISCLOSURE	11.1	12.2	12.5	12.0	12.0	15.0	3.0
RAD	35.7	37.3	37.4	41.4	41.4	43.9	2.5
I. G. OFFICE	1.1	2.0	1.9	2.0	2.0	4.0	2.0
TOTAL	241.7	252.9	286.0	276.0	276.0	320.0	44.0

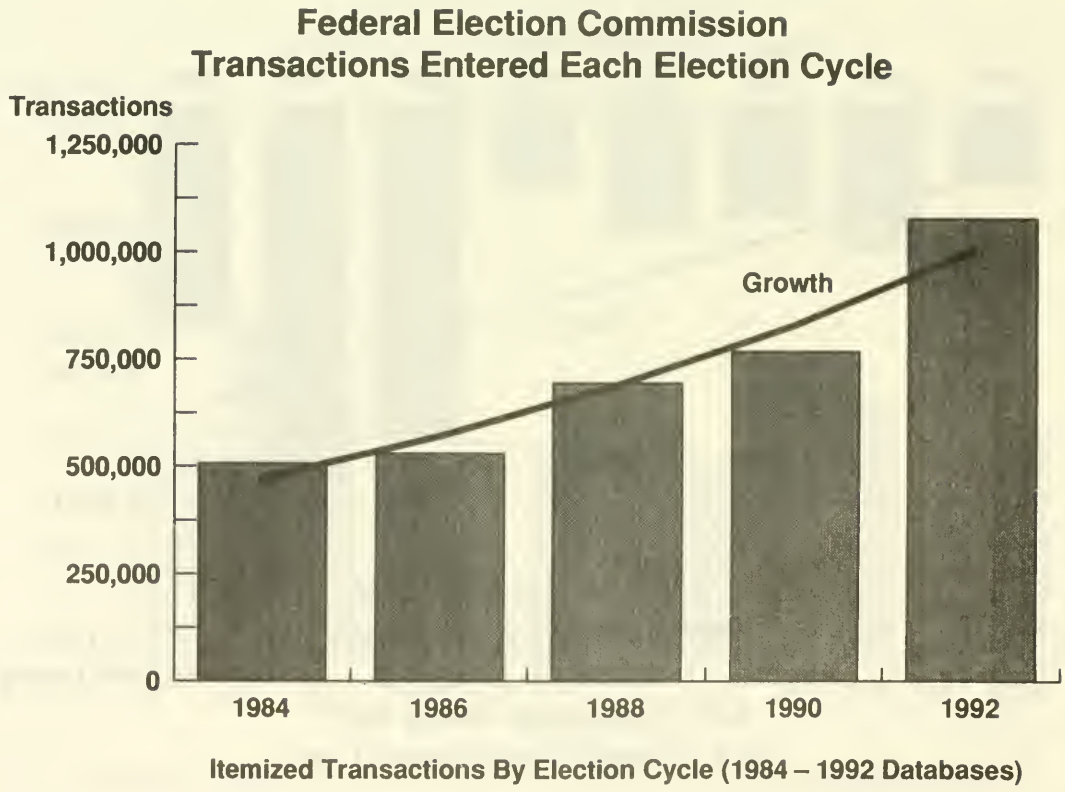
COMPARISON OF OBJECT CLASS AMOUNTS--FEC FY 1994 FULL BUDGET

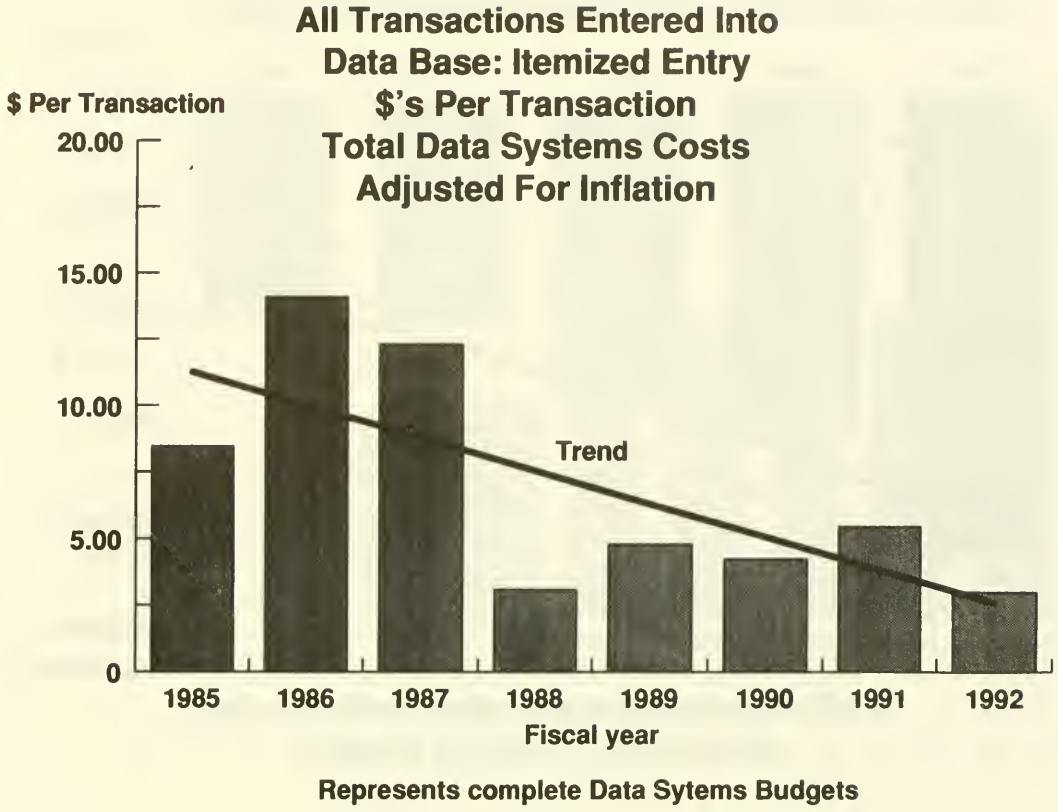
OBJECT CLASS ($000's)	FY 1989 ACTUAL	FY 1990 ACTUAL	FY 1991 ACTUAL	FY 1992 ACTUAL	FY 1994 FULL
SALARIES & BENEFITS	10,401.0	10,825.9	12,094.3	13,533.0	16,423.5
OVERTIME	29.0	55.9	40.6	48.0	60.0
WITNESSES	2.2	2.5	1.1	1.0	5.0
CASH AWARDS	62.4	79.8	92.7	88.2	115.0
UNEMPLOYMENT	29.0	18.9	5.5	9.5	20.0
DISABILITY	3.6	0.1	0.0	0.5	1.0
TOTAL PERSONNEL	10,527.2	10,983.1	12,234.2	13,680.2	16,624.5
TRAVEL	208.8	146.0	208.8	227.5	345.0
MOTOR POOL	8.7	5.0	5.6	6.3	15.0
TRANS. OF THINGS	6.5	5.4	4.9	5.5	8.0
GSA SPACE	1640.0	1671.4	1756.8	1905.3	2516.0
COMMERCIAL SPACE	19.3	17.9	20.2	21.1	26.5
EQUIPMENT RENTAL	260.4	231.5	304.3	315.0	460.0
PRINTING	224.0	303.8	288.3	333.1	454.0
MICROFILM PRINTS	28.2	27.6	28.3	30.0	35.0
TRAINING	83.2	53.7	77.9	97.7	125.0
ADMIN. EXPENSES	117.3	143.5	143.7	166.6	260.5
SUPPORT CONTRACTS	616.3	632.8	710.7	754.3	974.0
SUPPLIES & MATERIALS	228.1	222.1	218.3	235.0	302.5
PUBLICATIONS	120.7	134.2	167.8	208.3	225.5
TELEPHONE--LOCAL	126.2	137.0	137.6	135.5	170.0
LONG DISTANCE TOLLS	0.8	1.5	1.5	2.2	2.5
TELEGRAPH	1.0	1.4	0.9	1.0	2.0
POSTAGE	110.0	116.5	117.0	216.0	247.0
TELEPHONE INTERCITY	185.5	180.0	127.4	132.0	175.0
RECURRING SERVICES	46.9	51.5	50.8	57.5	70.0
NON-RECURRING SERVICES	69.1	31.1	123.4	17.7	160.0
EQUIPMENT PURCHASES	1040.9	220.9	413.3	223.9	396.0
LAPSE	13.9	12.1	8.1	13.0	0.0
TRANSIT SUBSIDY	0.0	0.0	0.0	23.3	60.0
TOTAL NON-PERSONNEL	5,155.8	4,346.9	4,915.8	5,127.8	7,029.5
T. COMMISSION	15,683.0	15,330.0	17,149.8	18,808.0	23,654.0

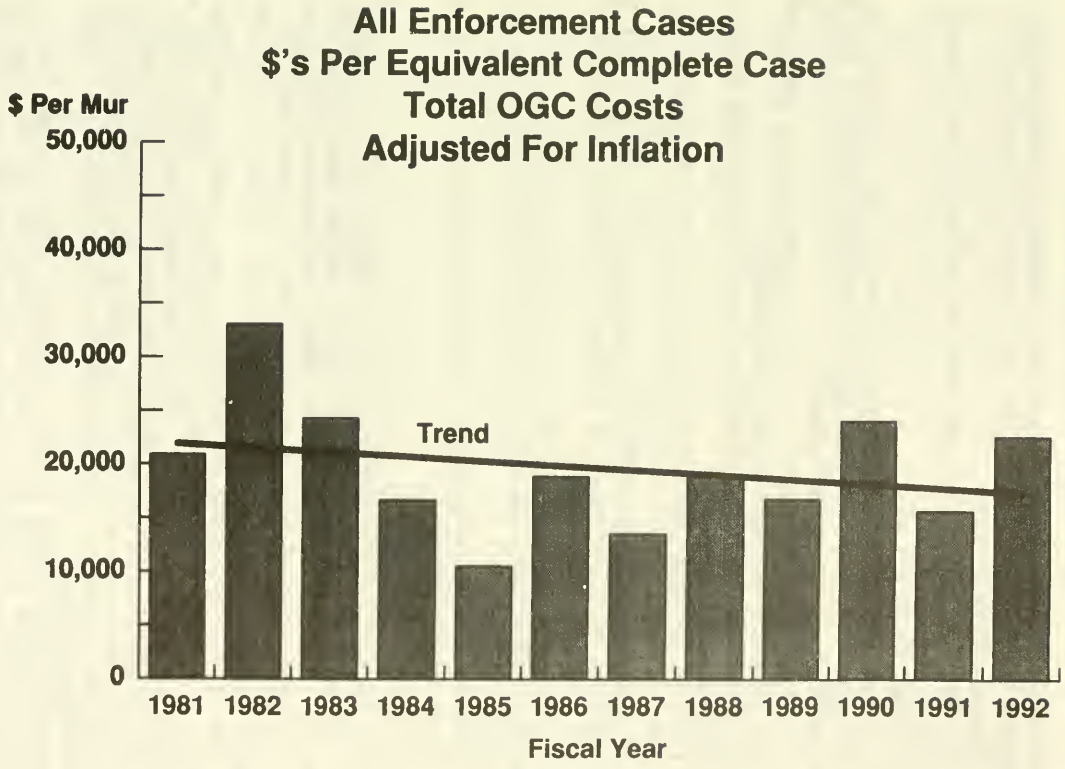
FEC FY 1994 FULL 2/19	ADMIN	AUDIT	INFOR	OGC	CHOUSE	DATA SYS.	DISCLOSURE	RAD
SALARIES & BENEFITS	781,500	1,563,000	699,000	5,409,000	343,000	1,511,500	525,000	1,582,000
MERIT PAY	55,000	0	0	0	0	0	0	0
TSP/FERS	205,000	0	0	0	0	0	0	0
OVERTIME	10,000	7,500	2,000	7,000	500	14,000	10,000	6,000
WITNESSES	0	0	0	5,000	0	0	0	0
CASH AWARDS	110,000	0	0	0	0	0	0	0
UNEMPLOYMENT/DISABILITY	21,000	0	0	0	0	0	0	0
TOTAL PERSONNEL	1,182,500	1,570,500	701,000	5,421,000	343,500	1,525,500	535,000	1,588,000
TRAVEL	5,000	90,000	25,000	65,000	90,000	5,000	5,000	1,000
MOTOR POOL	15,000	0	0	0	0	0	0	0
TRANS. OF THINGS	7,900	0	0	0	0	0	0	0
GSA SPACE	2,518,000	0	0	0	0	0	0	0
COMMERCIAL SPACE	28,500	0	0	0	0	0	0	0
EQUIPMENT RENTAL	143,300	12,000	8,000	28,000	1,500	155,000	79,000	5,500
PRINTING	100,000	0	204,500	40,000	75,000	15,000	9,000	0
MICROFILM PRINTS	0	0	0	0	0	0	35,000	0
TRAINING	7,000	20,000	4,000	45,000	1,000	5,000	3,000	4,000
ADMIN. EXPENSES	170,000	3,000	14,000	45,000	48,000	3,500	5,000	1,000
SUPPORT CONTRACTS	0	0	40,000	0	134,000	585,000	0	0
ADP CONTRACT	0	0	0	0	0	600,000	0	0
DATA ENTRY	0	0	0	0	0	85,000	0	0
C. HOUSE	0	0	0	0	134,000	0	0	0
OTHER	0	0	40,000	0	0	0	0	0
SUPPLIES & MATERIALS	145,000	0	5,000	0	10,000	85,000	55,000	0
PUBLICATIONS	4,000	2,000	2,000	90,000	2,000	3,000	2,000	1,000
PUBLICATIONS SERVICES	0	0	0	70,000	0	0	0	0
TELEPHONE--LOCAL	189,300	0	0	700	0	0	0	0
LONG DISTANCE TOLLS	2,500	0	0	0	0	0	0	0
TELEGRAPH	0	0	0	0	0	0	0	2,000
POSTAGE	247,000	0	0	0	0	0	0	0
TELEPHONE INTERCITY	95,000	0	80,000	0	0	0	0	0
RECURRING SERVICES	70,000	0	0	0	0	0	0	0
NON-RECURRING SERVICES	140,000	0	0	0	20,000	0	0	0
EQUIPMENT PURCHASES	295,000	0	0	0	21,000	75,000	0	0
TOTAL NON-PERSONNEL	4,158,500	127,000	380,500	384,700	403,500	1,031,500	193,000	14,500
TOTAL DIVISION	5,341,000	1,697,500	1,081,500	5,805,700	747,000	2,557,000	728,000	1,602,500

SDO	P AND M	PERSONNEL	PRESS	EEO	REPRESENT	COMM	IG	TOTAL	FEC FY 1994 FULL 2/19
720,500	184,000	343,000	306,500	50,000	0	1,956,000	194,500	16,168,500	PERM SALARIES
0	0	0	0	0	0	0	0	55,000	MERIT PAY
0	0	0	0	0	0	0	0	205,000	TSP/FERS
2,000	0	500	500	0	0	0	0	60,000	OVERTIME
0	0	0	0	0	0	0	0	5,000	WITNESSES
0	0	0	0	0	0	0	0	110,000	CASH AWARDS
0	0	0	0	0	0	0	0	21,000	UNEMPLOYMENT/DISABILITY
722,500	184,000	343,500	307,000	50,000	0	1,956,000	194,500	16,624,500	**TOTAL PERSONNEL**
7,500	1,500	9,500	5,000	2,500	0	30,000	3,000	345,000	TRAVEL
0	0	0	0	0	0	0	0	15,000	MOTOR POOL
0	0	0	0	0	0	0	100	8,000	TRANS. OF THINGS
0	0	0	0	0	0	0	0	2,516,000	GSA SPACE
0	0	0	0	0	0	0	0	26,500	COMMERCIAL SPACE
21,000	0	700	7,000	0	0	0	0	460,000	EQUIPMENT RENTAL
2,000	0	5,000	2,000	500	0	0	1,000	454,000	PRINTING
0	0	0	0	0	0	0	0	35,000	MICROFILM PRINTS
6,000	2,000	20,000	2,000	3,000	0	0	3,000	125,000	TRAINING
1,000	500	14,000	1,000	8,500	2,500	1,000	1,500	320,500	ADMIN. EXPENSES
110,000	0	5,000	0	0	0	0	0	974,000	SUPPORT CONTRACTS
0	0	0	0	0	0	0	0	600,000	ADP CONTRACT
0	0	0	0	0	0	0	0	85,000	DATA ENTRY
0	0	0	0	0	0	0	0	134,000	C. HOUSE
110,000	0	5,000	0	0	0	0	0	155,000	OTHER
0	0	0	0	0	2,500	0	0	302,500	SUPPLIES & MATERIALS
3,000	500	6,000	6,000	1,500	0	3,000	1,000	127,000	PUBLICATIONS
16,500	0	0	12,000	0	0	0	0	98,500	PUBLICATIONS SERVICES
0	0	0	0	0	0	0	0	170,000	TELEPHONE--LOCAL
0	0	0	0	0	0	0	0	2,500	LONG DISTANCE TOLLS
0	0	0	0	0	0	0	0	2,000	TELEGRAPH
0	0	0	0	0	0	0	0	247,000	POSTAGE
0	0	0	0	0	0	0	0	175,000	TELEPHONE INTERCITY
0	0	0	0	0	0	0	0	70,000	RECURRING SERVICES
0	0	0	0	0	0	0	0	160,000	NON-RECURRING SERVICES
0	0	0	0	0	0	0	5,000	396,000	EQUIPMENT PURCHASES
187,000	4,500	60,200	35,000	16,000	5,000	34,000	14,600	7,029,500	**TOTAL NON-PERSONNEL**
								0	TRAVEL SEQUESTER
889,500	188,500	403,700	342,000	66,000	5,000	1,990,000	209,100	23,654,000	**TOTAL COMMISSION**


Federal Election Commission
Total Disbursements By Election Cycle
Millions
$2,000
$1750,
$1,500
$1,250
$1,000
$750
$500
$250
0
Growth
1976
1978
1980
1982
1984
1986
1988
1990
1992
1976 – 1992 Election Cycle (92 Estimated)


Federal Election Commission
Transactions Entered Each Election Cycle
Transactions
1,250,000
1,000,000
750,000
500,000
250,000
0
Growth
1984
1986
1988
1990
1992
Itemized Transactions By Election Cycle (1984 – 1992 Databases)


All Transactions Entered Into
Data Base: Itemized Entry
$'s Per Transaction
Total Data Systems Costs
Adjusted For Inflation
$ Per Transaction
20.00
15.00
10.00
5.00
0
Trend
1985
1986
1987
1988
1989
1990
1991
1992
Fiscal year
Represents complete Data Sytems Budgets



Represents equivalent complete enforcement cases (MURS or Matters Under Review) 9/30/92

Mr. HOYER. Thank you very much, Mr. Potter. You indicate that the $23.654 million reflects the proposed freeze in Federal pay?

Mr. POTTER. It does.

Mr. HOYER. And presumably as well the postponement of the locality pay adjustment?

Mr. POTTER. It does.

Mr. HOYER. In the event that either the freeze or the locality pay were not approved, were not included in the package, what would be the budget impact on your agency?

Mr. POTTER. Those represent a total of approximately $500,000. I will give you an exact figure after the meeting.

Mr. HOYER. Can you break that down between the freeze and the locality pay adjustment?

Mr. POTTER. If I may, Mr. Chairman, let me ask Mr. Surina, our staff director.

Mr. SURINA. That did not address locality pay, sir. If the cost of living increase went through as originally projected, it would be $565,000.

Mr. HOYER. Let us say that the freeze was maintained but the locality pay adjustment was allowed to go forward. Have you figured that?

Mr. SURINA. Our guess is about $150,000; but we will submit an exact figure for the record.

[The information follows:]

In September of 1992, when the FEC's FY 1994 Budget Request was originally prepared, the OMB guidance for pay increases in FY 1994 was 4.7%, or effectively 3.53% for FY 1994 (assumed effective date January 1, 1994 for 75% of FY 94). This was not broken down into locality and basic COLA; in fact, we were told that locality increases would be calculated government-wide later. The cost of this 4.7% increase, $565,000, was included in the FEC's concurrent submission to OMB and Congress on September 1, 1992.

As a result of the Clinton Administration's pay decisions, the $565,000 was eliminated from the Commission's amended Budget Request, for a total request of $23,654,000 and 320 FTE. If the COLA's are restored, the cost would depend on the actual COLA determined. The basic 2.2% COLA (now discussed) would be calculated if restored, plus whatever the locality increase for D.C. was calculated to be. Numbers for this would be around 4.8%, given what has been discussed in a general way to date. Therefore, the final cost would approximate the original COLA estimate, plus an additional amount.

For example, 2.2% for 75% of FY 1994 is 1.65%, for a cost of roughly $270,000 for 320 FTE requested. Another 4.8% would cost roughly $591,000, for a total cost of $861,000. At the time we testified before this Subcommittee, the only OMB estimate at that time was for an average (nationwide) locality pay increase of .5%, hence our estimate of $565,000 to restore the eliminated COLA, plus another $100,000 to $150,000. Our best estimate to date is somewhere in the range of $750,000 to $860,000, depending on the locality cost factor.

Mr. HOYER. Now, is that $150,000 of the $500,000, so the $350,000 is attributable to the freeze?

Mr. MCDONALD. It is in addition to.

Mr. HOYER. In addition to, so that if the locality pay and the freeze were not adopted, you need $650,000, is that what you are saying?

Mr. SURINA. $670,000 total.

Mr. POTTER. We need $550,000 for the freeze and $150,000 for the locality pay.

Mr. HOYER. Last year we had some discussion of the viability of the Presidential Election Campaign Fund, which is what everybody is concerned about. This same issue continues to be a significant concern in 1993. What is the current financial status of the Campaign Fund and what are you doing to alleviate the shortfall?

Mr. POTTER. The Campaign Fund fully funded all of its obligations for the 1992 election, however, we will not have sufficient funds in 1996. The first payments required by statute out of the fund are for the party conventions. There will be sufficient money for that.

The second payments out of the fund are the estimates for the general election of the two national party nominees. We estimate that it is possible there will not be sufficient funds for those general election payments without a legislative remedy.

Mr. HOYER. What are you projecting those payments to be?

Mr. POTTER. Without question, there will be no money at all for the primary campaigns. This year those payments were each approximately $55 million for a total of about $110 million. The information we have on the accrual of monies in that fund, which is maintained by the Treasury, shows that the number of people checking off this year dropped again, and significantly—from about 19 percent to about 17 percent of taxpayers—which would indicate that there will be fewer funds than we had estimated.

As you know, Mr. Chairman, the Commission has pointed out that one of the principal problems is that the outgo from the fund is indexed to inflation, so that expenditures have risen considerably over the years, but the $1.00 check-off is not indexed to inflation so that income has remained flat.

Mr. HOYER. You say it is going to drop from 19 percent to 17 percent. What was the high point? What is the high level mark, do you know?

Mr. POTTER. I think it was in the high 20s.

Mr. THOMAS. 28 percent in 1980.

Mr. POTTER. 28.7, was the highest in 1980. It hasn't stayed high; it has generally gone down.

Mr. HOYER. Been a straight line?

Mr. POTTER. There was one up-take in 1980 where it had gone to 28.7 percent. Since then it has gone down. This year it is 17.7 percent.

Mr. HOYER. Now, we have talked about why that is happening. Do you have conclusions on that? Have you discussed that? Have you discussed any ways that we can overcome this?

Mr. POTTER. We have, Mr. Chairman. The Commission believes that the principal reason it is happening is, as I have indicated, that we indexed one side of the equation to inflation and not the other.

Mr. HOYER. Let me ask you something. This is the number of returns in which the check-off is made?

Mr. POTTER. That is correct.

Mr. HOYER. That would be unrelated to indexing. That is just gross numbers. That relates to whether it is $1.00, $1.50 or $2.00. Obviously, there has been a 10 percent reduction in the number of

taxpayers who have made a determination to check off, and unlike Maryland's experience, which was an add-on, is a set aside, if you will.

So from that standpoint, we have fallen off 10 points, approximately, in the number of participants.

Mr. POTTER. From that standpoint, we did.

Mr. HOYER. I guess we have dropped a third of the participants.

Mr. POTTER. Yes, of those participating, a third dropped. The FEC initiated a focus group about two years ago to find out from individual taxpayers what their problems were with the fund. What came out of that was first and foremost, the fact that there was very little information about the fund in the possession of taxpayers. Few people in the focus group had an idea what the fund did, where the money went or even that the box existed on the form.

It is also interesting to note that there has been some evidence that professional tax preparers, which I believe now constitute the preparers for approximately 40 percent of all American returns, have been automatically checking no on the forms.

The Commission has contacted the bigger accounting firms and it has had an outreach program to try to get them to do two things. First, to ask the individual taxpayer how to check that box, and secondly, to give them information to pass on to the taxpayer. But we think there is a lack of knowledge of what the fund does.

I would also say, Mr. Chairman, that in that focus group, when the fund was explained in detail, the numbers of people who checked off did not change significantly. Some people, when they learned more about the fund, were less likely to check off; others who hadn't known about it before were more likely to check off.

Mr. HOYER. That still doesn't explain why there has been a change in attitude among a third of the participants.

Mr. MCDONALD. Mr. Chairman, we literally have a new generation of taxpayers as an outgrowth of Watergate. As Chairman Potter says, there is a lack of understanding about the program. Frankly, it is understandable because the further you get away from that time, most people simply don't have a concept of what the fund is about. However, they would be more likely to be informed if they had prior knowledge about Watergate. I think the record is clear there is not much understanding about the fund.

Mr. POTTER. I would also say, Mr. Chairman, and this is my view as only one commissioner—but as Commissioner McDonald points out, when the fund started it was widely publicized in the press, and was to be the alternative to private funding in presidential campaigns.

Today there is a great deal of press attention to private funds that are being raised by national parties during the presidential process. That may also confuse participants as to what the money in the fund goes to. We found, for instance, that in the focus group almost nobody knew the money went to the national party conventions, nor were they clear on why it might go to those conventions.

Mr. HOYER. We are obviously going to have to do something because, according to your projections, there will be no money available for the Primary. Frankly, while that was a problem for us this year, presumably it won't be a problem for us in 1996. It may be

a problem for the Republicans because they may have a relatively larger field than we will have in terms of primaries, so the situation will be reversed from 1992. In any event, it is a concern-if we are going to continue the ability of less well financed candidates to participate in the primary process in presidential elections.

Mr. POTTER. And at 17.7 percent, it would undoubtedly cut into the money available for both general election candidates as well.

Mr. HOYER. I have some other questions, but let me ask Mr. Lightfoot and others if they would like to ask some questions.

Mr. LIGHTFOOT. Thank you, Mr. Chairman. I would just like to follow the questions of the Chairman. Is some of this potentially reflected in just the general attitude towards government, people are just fed up with us in general and they say, gee, here is another rip-off?

Mr. POTTER. I think the evidence is overwhelming that people are not keen on politicians today and that may well have something to do with it.

INCREASED WORKLOAD

Mr. LIGHTFOOT. Obviously you have done a tremendous job with a short staff and as you mentioned you have a tremendous backlog. Because of the apparent increased interest in this election, do you see that type of interest continuing on in 1994 and 1996 and 1998 and on down the road, or was this a blip on the chart this time?

Mr. POTTER. We believe that the volume of reports will continue to increase. We are seeing more money in the system. One of those charts shows the total growth. And while it has grown, you can see the presidential years are above the others, the whole trend is up. More interestingly, the top chart shows the number of transactions and that is going up each year, whether it is a presidential year or not.

DATA ENTRY

Mr. VISCLOSKY. What is a transaction? What constitutes a transaction?

Mr. POTTER. A transaction is an item on a report or information on a report that needs to be entered into our database. When information comes in, it is all computerized. The transaction is each contribution that is given and each expenditure that is made as it is typed into our system.

Mr. VISCLOSKY. My committee sends in a report, is that a transaction?

Mr. POTTER. Several transactions, because contributions of $200 or more within your committee's report are required to be entered separately. They are required to be itemized.

Mr. VISCLOSKY. So, if I reported contributions and two of those were over $200, then——

Mr. POTTER. Then each one of those is a transaction because someone is sitting there entering the data. So what we are seeing on the individual transactions is also what we are seeing in the total dollars spent in politics. If there is more money spent, we have to have more people to enter those dollars into the system.

Mr. VISCLOSKY. I apologize for breaking in to your questioning.

INCREASED WORKLOAD

Mr. LIGHTFOOT. That is fine. I appreciate the clarification. Let's follow that track a little bit. So we basically had more money given to political candidates than we have in the past. So there is more interest in the system yet the presidential fund is going down. If this trend continues with more people staying in the system, then what do you see as your way out of this work load?

Is it more sophisticated computer equipment, different software programs, more people? What do you need to be efficient?

Mr. POTTER. We are moving towards the next generation of computer programs—digital imaging technology, which we budgeted for this year and are purchasing. But as my testimony indicated, the wave of additional spending has overwhelmed those somewhat incremental improvements.

We are improving our efficiency by about 5 percent annually, but we project 50 percent more transactions for 1994. That overwhelms the staff we have on board. Without additional staff, the pile of documents that haven't yet been entered will grow.

Mr. LIGHTFOOT. If we can learn from your experience in handling this big work load, how do you manage to keep up so far? What are some of your secrets? We could apply this to some of the other agencies possibly because you have obviously done a good job with a lot of data and not that many people.

Mr. POTTER. I would like to thank you and agree with you, but I think part of our concern is that we feel we are falling behind, that we are not doing as good a job as we have in the past, or as good a job as you would expect us to do, particularly in the data entry area. We have, in the past, been able to simultaneously obtain and enter the information into the system. We are now looking at a backlog. For instance, if someone comes to the Commission and asks, what did my opponent spend in the last election? Until recently, we could instantly access the information from one system. We are now seeing a delay in the accessibility of that information on the disclosure side, which we are not used to.

ENFORCEMENT

On the enforcement side, one of my concerns when I joined the Commission a year ago was; why are the enforcement cases taking as long as they are? What I quickly learned was that they are taking as long as they are because we have so many of them. We are doing a number of initiatives this year to try to work through that delay—to prioritize the cases, to throw out the ones that are without merit, to deal expeditiously with the ones we actually had to proceed with, to develop new internal procedures to move along—but we then got hit with almost 200 new cases in the last year.

So I am afraid we are falling behind the curve in the enforcement area and, as I say, that has been an area that has been of concern for some time, to people both inside and outside the Commission.

Mr. LIGHTFOOT. I guess the thought strikes me that you are in a position that we many times put a lot of communities in or States in. We pass mandates here and say, you have got to do this, but there is no funding there to comply or to live up to the regulations.

With that thought in mind, as obviously campaign reform is probably going to be one of the big issues that gets kicked around here this year, as we try to work our will on the goals that we want in campaign reform, it might be instructive if you could give us some input as to the mechanics of trying to live up to those goals that we decide we need.

Maybe you have some suggestions on how it could be done more efficiently in terms of the types of reporting that is done or how it is done or something of that nature.

Mr. POTTER. Well, first, if I could, I would state the obvious, because I had the same train of thought that you have had and the difference of course is that when Congress mandates new programs for communities, and it doesn't provide the funding, they have the option of finding the funding through the tax increase, as painful as that is.

The Federal Election Commission doesn't have that option. If we aren't given the funding for new programs, we really are in a fix. We stepped up our submission date and have made a number of legislative recommendations to Congress this year in anticipation of enactment of major campaign finance reform legislation. We have suggestions that we believe would make the enforcement workload lower, would make it easier for committees to comply with the law, and would clarify some of the areas that tend to be arcane and that get committees and candidates into trouble. So we are hopeful that in the legislative process Congress will be able to do something about some of those areas.

Mr. LIGHTFOOT. Thank you very much. Appreciate it. Mr. Chairman.

Mr. HOYER. Mr. Visclosky.

FY93 SUPPLEMENTAL

Mr. VISCLOSKY. You mentioned a supplemental request and also discussions with OMB. Have they approved the supplemental request as proposed today?

Mr. POTTER. John.

Mr. SURINA. They are aware of the request and it is under consideration right now.

Mr. POTTER. I would like to address the OMB situation, because I think it is unusual. As the Chairman's letter to OMB indicated, at the beginning of this cycle, with the new President and new OMB, we are all trying to get up to speed at once. Here, the situation is that we went through the normal OMB process with the career staffers, but they informed us that they did not have specific policy guidance from the President in terms of the FEC, which is admittedly a tiny agency and our figure is tiny compared to most.

Since then we have been in contact with OMB and are informed that they are taking a look at our whole budget picture, which would include the supplemental. So we are hopeful that with some policy input, the final budget out of the President will include our full figure. We know they are taking a look at it now, but for the moment we don't have guidance on the supplemental.

Mr. VISCLOSKY. What would be the impact if you didn't receive the supplemental?

Mr. POTTER. Well, the supplemental is specifically for 1993 Motor Voter costs. The costs represent increased personnel to comply with Congress' mandates in the Motor Voter legislation, which are to devise a mail-in form, to coordinate with all the secretaries of States across the country and other individuals involved in devising the Motor Voter program itself, and to issue regulations.

If we don't get the supplemental, we have added to the work load without resources. We then have two choices: either we are slow in responding to what is required of us by Motor Voter, or we take the resources away from some other FEC program, which is already slow, and make it slower.

ENFORCEMENT

Mr. VISCLOSKY. Is there an average that an enforcement team spends on a case, and if I could ask a second definition, what is a case? From time to time we will receive a letter from the FEC that we didn't have the appropriate documentation of someone's employment, address or whatever. I assume that is not a case.

Mr. POTTER. That is the disclosure process we have been talking about. Reports come in and are entered into our system. Once transactions are entered, they go to the Reports Analysis Division (RAD). They look at every report that is filed, and in that format, they are essentially there as helpers for the filing committees. If RAD thinks there is a problem—they don't understand an entry, somebody didn't include information that the report requires—they would then send your committee a letter and say, we noticed this, what is it? Your committee would respond and the report likely would be amended.

The Reports Analysis Division, though, has thresholds. At a certain level it will look at a committee's report or a whole series of reports and say this group really has a problem. They haven't done five of these things. They have omitted large sums of money. It looks as though they have corporate contributions out here and they don't have any answer. We have written them. In that situation they will recommend to the Commission that we open a case. It then becomes what is called a matter under review.

There is a formal recommendation through the Office of General Counsel to the Commission that we open the matter, that we find reason to believe that there may have been a violation of the law. At that stage, there is a formal case number assigned, a matter under review or MUR number is assigned, and it becomes part of the enforcement case load. So only there do we count it as part of the enforcement process.

Mr. VISCLOSKY. Is there an average period of time from your statistical work that a team spends on a case? And I assume some are obviously much more complicated than others.

Mr. POTTER. Yes, there is. We have four enforcement teams. That is essentially an internal way of organizing the work of those lawyers. Each of those teams has six lawyers who are working on cases, many of them will work on up to 20 at a time, which is one of our problems. Some of those 20 may be major cases.

We have figures that will give you an average length of time per case. I would be glad to get those to you. A case averages a little over a year.

I would note, however, that they are misleading because some cases are absolutely cut and dry. For example, there may be no question that there was a failure to refund money in time. We opened the case, we sent them a letter.

One of the procedures we have initiated is to send a conciliation agreement whereby the Commission and the committee agree on what happened and there is a penalty paid. That can get sent out the door at the same time as our initial finding.

The committee may agree and want to settle it immediately, so there is a set of cases that we will settle within months. There are other cases that will involve significant violations of the law, disagreement between the Commission and the people involved in the case, or perhaps—and more frequently now than before—the need to take a real look at what is happening, perhaps in an adversarial setting, even to seek depositions and subpoenas and so forth. Those investigations tend to be the ones that take a lot longer. There we could be looking even at a couple years.

Mr. VISCLOSKY. Certainly. Does your flow of cases mirror the election cycle?

Mr. POTTER. The flow seems to be up. What happens is, we do experience a flow in cases before an election. I should have explained earlier on, there are two ways we get a case. One is through the internal review and the other, which is the preponderance, is that we get complaints filed with us saying so and so did such and such as a violation. We get a big jump in complaints before the election.

This past October we had 100 complaints filed with us. They were coming in at two, three, sometimes four a day. What happens, of course, is that our staff then adds them to their existing work load, gets to them, reads them, digests them. Staff then recommends to the Commission either that there is no violation here, or that we send out a conciliation agreement because it looks simple, or this looks as if it might really be a problem in which case we would open a fuller investigation. That starts the process.

Because it takes awhile to do that, particularly given the number of cases we have per attorney, what we find is that our staff is working hard year round. It doesn't make any difference whether it is an election year or an off year. One of the problems we have is that when we hit a new election, they are still dealing with the cases from the last election.

We have cases at the Commission from 1990, 1988 and some from before that, either because respondents have been very difficult to deal with or the matters have been very complex, they usually do not involve individual candidates.

Mr. VISCLOSKY. Is part of the solution to hire part-time people, if you could, much in the manner of the Internal Revenue Service, for simpler situations that you face and have those cost savings?

Mr. POTTER. Where we found that particularly helpful has been in the area of presidential audits and there we do have a cyclical type of work load. You have presidential elections; you have the audits. If possible, we like to get those finished in two years or so, and we have been able to use GAO's staff. GAO's staff has been lent to us on essentially a part-time basis for that bulge in the cycle.

One of the concerns we have is that GAO has told us that they will be unable to continue that program in 1996, so in that situation, I don't know what we are going to do. In our view, one way to solve it would be to increase the enforcement in terms of the FEC now so we can get through this great bulge of cases we have. Then, if we found the bulge went down, we could perhaps take a look at decreasing attorneys at some point in the future, perhaps through attrition.

Mr. VISCLOSKY. Could you use some part-time people to get through some of that bulge now instead of hiring people?

Mr. POTTER. If we had the FTEs, we could. Last year we were not only at our FTEs but right at our FTEs. By the end of this year we will certainly be right at our FTEs. We have offers out now for the attorneys who were authorized last year. We expect to have on board——

Mr. VISCLOSKY. I am going to ask for the record, Mr. Chairman, if you could give us an estimate based on your backlog in the nature and mix of your cases, that if you were given X number of part-time people for the coming fiscal year, what you would project the impact would be on your backlog or case log and if you could give us several different options at least for the Commission, I would an appreciate that.

Mr. POTTER. Absolutely. We would be happy to do that.

[The information follows:]

While the elections go in two, four and six year cycles, the enforcement work is not as cyclical. There may be more complaints filed just prior to an election, but given the nature of the enforcement process, that influx of complaints does not translate into a "peak season." That is, not all complaints can be viewed equally. While some complaints can be handled quickly, others will require lengthy investigations, that may be further delayed by difficulties in locating witnesses, subpoena enforcement and changes in counsel. It is not possible to predict ahead of time what the caseload will consist of. Additionally, the specialized nature of Commission enforcement work makes it unlikely that we could find sufficient temporary staff trained in the Federal Election Campaign Act. Consequently, the time it would take to train temporary attorneys does not make short term temporary help a viable alternative.

On the other hand, granting the Commission a temporary FTE increase over a several fiscal year period might be a more fruitful way to eliminate the enforcement backlog. That way, after a training period, those additional staff could be assigned to work on the old matters, thereby freeing up the regular staff to concentrate on a current, more manageable workload. As time passed and the backlogged workload lessened, we would phase down the FTE ceiling and hopefully absorb the "extra" staff through natural attrition.

Mr. VISCLOSKY. You understand those would be temporary.

Mr. POTTER. I understand that. We will work that up.

Mr. MCDONALD. It certainly has worked in the area of audits, and I think it saved us a great deal of time. However, enforcement backlog and data entry backlog are two entirely different things.

Part-time help in enforcement might be much more difficult. I will give you a classic example. You would be forced with the situation of trying to bring people up to speed, which is fairly time consuming. What happens, in effect, is that you start taking away from the other projects because you are trying to get people up to speed. And your turnover rate, which I think every government agency has, and certainly ours, is a problem in and of itself.

So I think we would welcome any help we could get, but I do think there is a difference in the various departments in relation-

ship to how part-time help would be beneficial. When you get into the enforcement area, which is very difficult and very technical and, frankly, has gotten much more complex over time, I think you are looking at a different set of circumstances.

Mr. VISCLOSKY. I would assume these estimates you supply the Committee, you would factor that in, that there would be a period of training in terms of your technical staff.

Mr. POTTER. I think we can fully answer that. Let me take a look at it.

Mr. VISCLOSKY. Thank you, Mr. Chairman.

STAFFING

Mr. HOYER. What is your FTE?

Mr. POTTER. Our current FTE is 276.

Mr. HOYER. How many do you have on board?

Mr. POTTER. We have 273 as of today.

Mr. HOYER. So that is three short.

Mr. POTTER. We have offers out for attorneys who we hope will join us, and we can bring that up to 276.

Mr. HOYER. In your discussions with OMB, have you had any indication whether or not they will be expecting you to contribute to the 100,000 to 152,000 reduction in force?

Mr. POTTER. Their first passback to us included a cut off the top of our FTE and would have brought us down to 269. So below where we are now and clearly well below the 320 that we have requested for fiscal year 1994.

Mr. HOYER. Mr. Darden.

Mr. DARDEN. Thank you, Mr. Chairman. Gentlemen, thank you for being here this morning. We have been talking about FTEs. That translates into how many bodies working at the Commission?

Mr. POTTER. 273.

Mr. DARDEN. Exactly 273. Now, of that 273, how many are appointed or are there by virtue of being appointed by the President or ex officio for one reason or another?

Mr. POTTER. Eight. Of that, six commissioners and two ex officio members representing the Clerk of the House and the Secretary of the Senate. Each of those individuals have one executive secretary and one legal assistant. The six commissioners and the executive secretaries are on the Commission payroll. The special deputies and the legal assistants are paid by the House and the Senate.

Mr. DARDEN. So our special deputies, that is congressional from the House, we pay their salary; is that correct then?

Mr. POTTER. That is correct.

Mr. DARDEN. As well as their legal assistant?

Mr. POTTER. That is correct.

Mr. DARDEN. And their——

Mr. POTTER. We pay the secretary. The House and Senate pay the legal assistants.

Mr. DARDEN. You pay the secretary. All right, once we get below this level then, what is the next level of authority at the Commission?

Mr. POTTER. We have two statutory officers, a staff director and a general counsel, who are responsible roughly for the two-halfs of the Commission.

Mr. DARDEN. So the staff director supervises the clerical personnel and then the general counsel——

Mr. POTTER. The staff director is responsible for our audit program personnel, disclosure and data entry. The general counsel is responsible for enforcement, regulations, and the advisory opinion section.

Mr. DARDEN. How many attorneys work for the FEC under the general counsel?

Mr. POTTER. We have 46 attorneys at the Commission and 10 paralegals.

Mr. DARDEN. Now, so everyone follows either in the support staff of the staff director or the legal staff under the general counsel?

Mr. POTTER. Right.

ENFORCEMENT

Mr. DARDEN. The most frequent complaint that we Members hear, and I realize the difficulty with which you operate, is the length of delays in enforcement. Serving on the committee on official conduct or the Ethics Committee, I understand as you do the political significance of that delay in processing a complaint, and regrettably under our procedures, as well as yours, sometimes the most insignificant complaint can take as long as a very, very serious one. I realize they all have to be looked at very carefully.

Do you have in place or have you considered some type of expedited review for a politically sensitive case?

Mr. POTTER. We have spent much of this year looking at the prioritization of our cases. We have been attempting, since we don't have the resources, to expedite our most important cases. We would like, if possible, to move staff from other cases and put them on those to get them through.

We have a lengthy list of criteria for those, but the problem we have, and I think you will immediately appreciate it, is that if we say this case here is of national priority, it involves transactions across the Nation, or it may affect the next election cycle, as well as the past one, it is an area of the law where the Commission needs to clarify those sorts of criteria, we put resources on that.

But one problem you create is that it takes the resources from another case. And even though the case may only affect one race or one district, or not be a particularly difficult legal case, or not break new ground, if you are the person who has been accused of a violation in one less significant case, or you are the person whose opponent did that, then you are going to regard that case as a very significant case.

Mr. DARDEN. The most important case in the world.

Mr. POTTER. Absolutely. So it has been a very hard call for the Commission to put these priorities together. We realize the hit we will take is that while some of our cases will be sped up and they will be, in our judgment, the ones that should be, others will be slower.

That is our problem; but, yes, we have been attempting to prioritize those cases. Do either of my colleagues want to add to that?

Mr. MCDONALD. I think Vice Chairman Potter is absolutely correct. If you are the complainant, you want it to be resolved imme-

diately, and it makes no difference if we say to you that 10 other cases have much more money involved and are much more difficult cases; that news is not received very well by a member.

On the other hand, if a complaint is filed against an opponent, the question is, why aren't we moving faster? If it is against a member, why are you nitpicking? It is a problem that we are always going to have at the Commission and it is not going to change.

Mr. POTTER. We have changed our internal procedures in ways that attempt to move cases quickly. One of them is that if it is a simple straightforward case, we would include, with the Commission's first finding, a proposed settlement of that case so that it goes out the door, and if the committee agrees to it, we can settle it very quickly.

Also, we try to move as quickly as possible in those cases where staff looks at it and says there is no violation here; it doesn't even allege a violation of the Act. In those situations, we try to move them through the Commission as quickly as possible. But by definition, the ones that are taking us awhile are the ones that don't fall into those categories.

Mr. DARDEN. As you know, the most frustrating thing being a member of a commission such as yours, or in our case the Ethics Committee in the House itself, is to see the availability of the procedure used as an election device back home, out in the districts. This is not a Democrat problem or a Republican problem. There seems to be a growing tendency, among at least the last several cycles, to file some type of ethics report, either with us or with you, and then the damage is done once the complaint is filed, press discovery has come about. I am not sure what the solution might be.

Do you have authority to—official authority to impose sanctions for frivolous cases. Do you on occasion do that?

Mr. POTTER. You are hitting on an area that we have spent considerable time discussing. We have been very sensitive to your concerns. The answer to your last question is no, we have no authority at all to impose sanctions on frivolous cases.

Secondly, there is no way that the Commission, under the statute as currently written, can resolve a case that is filed weeks, even months before an election. We will not be able to resolve it before that election.

The reason for that is the time periods that are written in the statute for 15 days to respond to a complaint, then 30 to 90 days to conciliate. If the committee refuses to conciliate, the process we have to go through in terms of the investigation and eventually suing the committee in court means that we do not have the statutory tools currently to resolve a matter filed by somebody just before an election—before that same election.

One of the things we have said to Congress in our legislative recommendations is that if this is something you would want us to do, it would require a change in the statutory scheme of the number of days that the Commission must give a respondent in order to file response.

Mr. DARDEN. I assume you are in the process or at least have someone detailed to looking at recommendations to make to the au-

thorizing committee. Is that Government Ops, the authorizing committee?

Mr. HOYER. Al Swift does this in the House Administration.

Mr. THOMAS. On January 26th, we sent our legislative recommendations to the appropriate committees and to the President. Several of them address this question of better enforcement.

Mr. HOYER. Prospects for an authorization bill are not bright at this point in time.

Mr. DARDEN. And finally, on the situation of sanctions and remedies, the Commission, as I understand it, only has authority to take punitive measures; is that right? You don't have lines of authority in which you could actually affect the outcome of an election?

Mr. POTTER. That is correct.

Mr. DARDEN. So all your work is after the fact.

Mr. POTTER. It is all after the fact.

APPEALS

Mr. DARDEN. And finally, to what area are appeals taken? Is it to a U.S. District Court or——

Mr. POTTER. The Commission has the authority to settle a case provided both parties have reached a consensus and the violator has agreed to pay a penalty.

If they choose not to agree, then we, acting as a prosecutor or U.S. Attorney, file suit in U.S. District Court, asking the court to review all the evidence and determine if they broke the law. So we don't make an independent determination in that sense.

Unilaterally, we can't decide someone broke the law and penalize them. All we can do is argue they broke the law, and urge them to agree with us and to the penalty. We negotiate those penalties. The threat is, if you don't agree, we will sue you in U.S. District Court and the judge may give you a bigger penalty than we would have. So there is that balance there.

Mr. DARDEN. We are spending a lot of money on a toothless tiger here, aren't we?

Mr. POTTER. We are trying to put more teeth into it, but the way the system is designed, we do not have unilateral authority to levy penalties. I would argue, having now been at the FEC for a year and watched the process, that in fact the right to sue someone in U.S. District Court is in many instances a significant deterrent, because, in most cases, they would rather agree with us than be sued in court by the Federal Election Commission.

Not always, not if there is a legitimate disagreement as to how the law should be interpreted, but that does give us more power than it might appear.

Mr. DARDEN. How many suits do you have pending now?

Mr. POTTER. We had 46 cases pending at the beginning of 1992.

ENFORCEMENT

Mr. MCDONALD. May I address the last comment regarding the commission being viewed as a toothless tiger, because I think it is one that is batted around continually—about the status of the cases and what impact it has on the process. Under the current

system, we are always going to be behind the curve, as the vice chairman has pointed out.

Clearly, if there are complaints in the earlier part of the process, as opposed to October, it is not inconceivable that they would be resolved. But I must tell you that insiders who practice before the Commission on both sides of the aisle certainly know the process and they are fairly skilled at using the statute to their best advantage. I don't think anyone questions that.

On the other hand, what is equally important is, it is like the same argument you hear about any phase of government, whether it is the Congress of the United States or the Federal Election Commission. When it is illegal to rob a Quik Trip, it is illegal to rob a Quik Trip. But there is a massive amount of crime that goes on in our society. I don't think there is any doubt about it.

Mr. HOYER. Illegal to rob a Quik Trip. Does everybody else understand that? Maybe you guys from Georgia understand that.

Mr. MCDONALD. Mr. Chairman, I am sorry I said that.

Mr. HOYER. With all due respect, Mr. McDonald, the Chairman of this committee——

Mr. MCDONALD. My apologies, Mr. Chairman.

Mr. HOYER. I know about a dog and this hunt and all of that.

Mr. MCDONALD. These are the kind of businesses we have out in Oklahoma as Mr. Istook can tell you. I am sorry I brought it up, to be honest. It is like a 7–11.

Mr. HOYER. All right.

Mr. MCDONALD. I think it is very fundamental, though, to talk about this for a minute, because the key is the parameters of the law. It is like the Ethics Committee. It is like anything. You have to have standards in a process, which the Congress has had for the last 18 years.

There is no question that the Commission is not as strong as we would like it to be. By the same token, I wouldn't want to leave the impression that neither the law nor the Commission has a fairly substantial impact. Money and politics in this process is an area where the American public is extremely interested; they sit up and take notice. If you go down to Oklahoma City, or you come up my way to Sand Springs, or you go up in Prince George's County, and you are talking to someone about a violation of the FEC, and you say there is a 441a(d) violation, their eyes glaze over. It is kind of like what is a Quik Trip? It is the same sort of response.

But if you talk about campaign finance and money, and the process, there is a substantially different reaction, whether it involves the Ethics Committee, Congress of the United States, Federal Election Commission or whatever. It's the nature of the beast. One of the things the vice chairman was trying to point out this morning is that for a very nominal fee, the commitment that the Congress can make in the area of enforcement can be very substantial, and I think that is going to be critical in the process. So I don't think I would necessarily concur that it is a toothless tiger.

I know that is a phrase that I have been hearing for the last 11 years. I do think there is a lot more Congress could do to strengthen the position of the Commission; we are hopeful that will be the case. That is why we are here this morning in this economic climate asking you, this Committee, for assistance.

But I think people are always going to take the law very seriously. The fact that fundraising is an ongoing activity that basically never stops, has a real impact on the process, and I think the law by the very nature of the parameters which is created has been very helpful to the process.

Mr. DARDEN. Thank you for your patience, Mr. Chairman.

Mr. HOYER. Yes, sir. Mr. Istook.

Mr. ISTOOK. I appreciate Mr. McDonald bringing up the Quik Trips, although I think you would find they are pretty common around the Sand Springs and Tulsa area. Actually we don't have any Quik Trips in Oklahoma City. We have got 7–11s, Circle Ks, Save a Stop, and it was a sad day for western Oklahoma when Wag-a–Bag went out of business.

Mr. HOYER. This has certainly been an illuminating hearing.

Mr. MCDONALD. We are going to submit a list of these to you so you will have them.

Mr. HOYER. We refer to these hearings, they are all on the record, because we get this kind of information out to the public.

STAFFING

Mr. ISTOOK. I understand, but I know what you are talking about certainly on that. I wanted to ask something, and this goes back to something that Mr. Potter brought up, I want to make sure I understood correctly, currently the FEC's actual employees, FTEs and your authorized are the same. You don't have any excess of authorized over actual?

Mr. POTTER. We, at the moment, have three FTE slots that do not have employees in them. We have offers out for those.

Mr. ISTOOK. So you are essentially full up on that.

Mr. POTTER. Yes.

Mr. ISTOOK. I want to be sure. I know that yesterday I wasn't here for that, the Chairman, and I think properly so, began questioning agencies about that, especially in light of the President's discussion about cutting FTEs and it is a very crucial point, as Mr. Hoyer brought up, are we talking about real people, or are we talking about just slots that aren't full?

Mr. POTTER. I assure you that we are talking about real people. In fact, the FEC's problem, at the end of the fiscal year, has been making sure we aren't talking about too many real people.

VOTER REGISTRATION ACT

Mr. ISTOOK. I hear you and I am glad the Chairman has got us on that area and I am sure we will cover that with the other agencies.

I wanted to ask, you mentioned in your testimony the first year request regarding the Motor Voter Act. Do you foresee additional personnel and funding being necessary for the second year, the third year and so forth? Can you give us a projection?

Mr. POTTER. The primary costs for the Commission are the start-up costs. We are required, by legislative mandate to write regulations. We do so in consultation with the States. We need, initially, to devise the mail-in voter registration form, which would be a nationwide form. This it is not something that would need to be done on a recurring basis. And, finally, the initial start-up costs would

include at least one, perhaps more, opportunities to actually meet and consult with the States who are going to be affected by all this.

But once that is under way, the Commission does not have a continuing role. It has no enforcement role, for instance, in the legislation at all.

Mr. ISTOOK. No requirement to be writing rules or regulations or any such activity?

Mr. POTTER. It says that we will write the regulations initially, but it doesn't appear to indicate that we would have a continuing role in, for instance, revising those or offering an opinion on them. The enforcement mechanism, as I understand it, is lodged with the Department of Justice, to the extent there is any.

Mr. ISTOOK. So you are presupposing that any regulations will be a first-year activity and minimal time devoted to that.

Mr. POTTER. I think it would probably extend over current fiscal year 1993, which is why we have asked for a supplemental, and into 1994, but we are not anticipating continuing costs beyond that.

Mr. ISTOOK. The clearinghouse that you operate for assisting the States currently, can you tell me a little more about that function, especially if you foresee that some of the requirements of Motor Voter might require them to be involved with working through that clearinghouse? Because I know the State procedures certainly vary tremendously. Oklahoma's do certainly from what is in that bill.

Mr. POTTER. The clearinghouse is our link with the States. It is that function of the Commission that looks not just to Federal law, but also State law. It has been involved in the past in coming up with nationwide standards on voting technology, and it would be the office of the agency that would be responsible largely for all the communications with the States on Motor Voter.

Mr. ISTOOK. So some of the expense of Motor Voter might not necessarily be through a new employee, but it would be consuming some of the time of the clearinghouse personnel?

Mr. POTTER. Yes, it would. We estimate that we would need a .5, or a half new FTE, to do Motor Voter. Some of the additional costs are in printing or in holding meetings to consult with the State officials.

Mr. ISTOOK. Although this law is not on the books, has your agency done any contact with the States as far as how the Motor Voter requirements might mesh with their existing computer systems?

We have just gone through a tremendous expense in Oklahoma in new computer equipment, both hardware and software in all 77 counties and so forth, and there is certainly concern that there might be some stand to come down that would be inconsistent with what we have just spent so much money on.

Have you had any discussions like that with the States at this point?

Mr. POTTER. We have not had discussions as to whether Motor Voter would be consistent with State technology, or appropriate, because we haven't felt that was our role. We have had discussions with States to indicate that we will stand ready to coordinate their response to Motor Voter and that we will be, again, assuming the legislation passes, sponsoring conferences at which they will work with us on the regulations and so forth.

Mr. ISTOOK. But you still think that this is—you know, I am just trying to flesh out some of these things and see what the state of the thinking is. If this figure that you are projecting now might escalate, do you feel firm in the figure that you have mentioned as far as the first year expense and will it remain fairly constant?

Mr. POTTER. We do on the basis that we would assume by the time the bill is passed, we are almost halfway through this fiscal year, so we can pretty well outline what our expenses would be for 1993. We can identify most of our anticipated expenses. We have not attempted to identify what the States' anticipated expenses would be on that.

EQUIPMENT

Mr. ISTOOK. You mentioned on the chart up here on the transactions and so forth that you are basically entering the entries that you receive from each report and so forth. Now, what hardware and software do you all use in that process? Are you working on PCs linked together? Do you have some other computer system? What are you using?

Mr. POTTER. Mr. Chairman, you are our expert. Would you like to opine on that at all?

Mr. THOMAS. I don't have anyone to turn to. I can give you some general information. We currently have a contract with Digital Equipment Corporation; we don't have a system of stand-alone personal computers. We have a centralized computer system, so-called terminals where you can pull up a limited amount of information and do limited things, but our contract is soon to expire.

This year, we are working on a new contract, and are hoping to move more towards a system of stand-alone personal computers with increased capabilities to meet our needs.

Mr. ISTOOK. What I was wondering about, since certainly for everyone that has been involved in a Federal campaign and has explained the bookkeeping requirements, and who has tried to figure out what you do manually and what you do through automation will know, I was wondering if you have considered or have in the works, (if you were using software that was compatible with the PC), basically making software available to candidates where not only could they use that to perform some of the same double-checking that you are doing, because I am sure that these little inconsistencies that I am sure we have all seen in one form or another in a little letter back from you, that it is kicked out by your computer, if candidates and committees were using the same software, they might kick those inconsistencies back themselves and correct them before they get to you and also be able to file the data electronically with or without a paper submission, which saves you a lot of data entry time, it saves you the time of writing back to correct some of these things, that if we were using the same software might have been caught at our level.

What is the status of something like that and what is the potential savings?

Mr. THOMAS. We are looking toward that approach right now. One of our legislative recommendations this year was that Congress think about the legislative changes that would be necessary to facilitate electronic filing by committees. There would have to be

some statutory changes, because, for example, right now the committee's report has to be signed by the treasurer and you can't send something with an original signature.

But recently our technical staff met with technical staff of the appropriate committees on the Hill regarding these issues—what kind of technology exists, what kind of work would the Commission have to do to develop software, and so on.

So those kinds of communications are already under way and we are looking forward to that. There is the problem, of course, that many committees still don't use computers. I say many. I have a hard time quantifying exactly how many. I don't know that we have done a survey. I have even heard stories of some committees that do their information gathering with a computer but then they fill out their reports; they throw it on by hand to jumble it a little bit. I hope that is very minimal.

Mr. ISTOOK. I wish it were more minimal. I know of one that went through that.

Mr. POTTER. If I could jump in here, one of the things that we have asked Congress to do is to give us the authority to require committees that maintain their data on computer and have computer programs that are compatible with ours to file it electronically to avoid this issue. We do think that in situations where a committee already has it on a computer, it would be a big help to the Commission to file it in that way. We are sensitive to the mom and pop committees that don't have that technology, although we have looked at the possibility of trying to find ways to provide other means to them.

ITEMIZED TRANSACTIONS

Mr. ISTOOK. How much are you paying for entering these million transactions? What is that costing the Commission?

Mr. POTTER. Let me ask our staff director.

Mr. SURINA. The itemized transactions that we put in, the $200 and above contributions are contracted out at 12.5 cents per transaction. So if we are talking about 1 million transactions, we are talking $112,000 strictly for the data entry. Some of the transactions we enter ourselves in-house because the consuming public likes to know immediately the bottom lines on each committee, but a lot of the detail we do farm out on contract.

Mr. POTTER. If I could point out, there are two aspects to that chart. The one is, there is somebody sitting there typing, but the other is, when those figures go up, it means there are more reports and there are more lines for our analysts to look at. There are more possibilities for problems, so it isn't just that we have a problem physically typing it in. We have the problem of analyzing all those transactions.

Mr. ISTOOK. Is most of the analysis generated by your computer program that looks for certain things and does the comparisons, which is then basically kicked out by the computer?

Mr. POTTER. Yes, but you still have a staffer going over that report to make sure it is signed, or whatever, and then looking at everything that is kicked out.

Mr. ISTOOK. So if you are looking for a potential savings, conceivably, and like you say, it would involve legislative authority, you

might have a system that says if you agree to file electronically and you can have a paper copy accompany it with a certification, but if you will agree to file electronically, we will provide you a copy of the software and it saves you money and it doesn't take any more time.

In fact, it helps with the organization on the other end, and everybody else, except the company that has got the contract for data entry.

Mr. POTTER. I think that is certainly something we have talked about and we should continue to look at.

DIRECT ACCESS

Mr. ISTOOK. And the last thing I wanted to ask in connection with that, did I understand correctly, is there currently direct public access into some portions of your computerized records?

Mr. POTTER. Yes. We have a direct access program to filings that are on the computer.

Mr. ISTOOK. That is by modem.

Mr. POTTER. That is correct. There is access through the Secretarys of State offices throughout the country, as well as through the Digital system.

Mr. ISTOOK. So a private individual that is interested could call up with a password or whatever.

Mr. POTTER. Yes, and they can subscribe to that system.

Mr. THOMAS. Congressman, just to give you an idea, we have some 500 persons that are subscribing to our direct access program.

Mr. ISTOOK. Thank you very much. Thank you, Mr. Chairman.

DISCLOSURE

Mr. HOYER. Thank you.

As you point out, Mr. Potter, in your statement, and as Mr. McDonald has pointed out as well, the public is very concerned about money and politics. I would tend to agree with Mr. McDonald.

Unrelated to your enforcement powers, there is a present enforcement power in terms of disclosure—the reports filed with you and the availability of that information to the public. We ought not to diminish the disclosure aspect.

I happen to be one who believes that the disclosure aspect itself is the most significant reform before FEC. Before we had the disclosures, the big vice was that we had a lot of secret money being doled out in large sums and that is what we tried to get at in 1974. We tend to lose sight of some of why we did some of these reforms. They aren't perfect, but when we all find a perfect reform we will have died and gone to heaven.

Mr. POTTER. Mr. Chairman, those are tied together too, because what the enforcement side does is make certain committees disclose what they are required to. If we pass a law and they don't follow it, don't comply in a timely manner, then it doesn't work.

Mr. HOYER. The point is, I think 95 percent of the candidates in either party try to comply and the fact that they know you are going to check it makes them more careful. My point is, yes, people are going to rob the Quik Trip, but that doesn't mean that the

overwhelming majority aren't going to try to not do that because they will get caught at some point in time.

CONCLUSION

Thank you very much. We will be looking forward to seeing what the administration requests for FEC.

We want you to have the resources to do your job properly.

CLARIFICATION FOR THE RECORD

I really do believe that if we are going to cut personnel, we are not just going to cut from numbers. I want to specifically make it clear, that the National Archives was not the problem and I wasn't picking on Archives. The Washington Post story makes it look a little bit like I was picking on Archives and its planned reduction in personnel. The fact is that Archives has had funding constraints, sort of like FEC, and it can't get the number of personnel needed to do the job. What Archives is saying is it is going to take a double hit—it has been constrained by funding shortfalls, which it needs for personnel but haven't had available for personnel, and will be cut twice, with the announced 4 percent reduction.

That is Archives' argument and it is a fair argument.

[Additional questions submitted for the record by the Committee and the answers thereto follow:]

PRESIDENTIAL ELECTION CAMPAIGN FUND

1. Last year we had some discussion of the viability of the Presidential Election Campaign Fund. This same issue continues to be a significant concern in 1993. What is the current financial status of the Campaign Fund and what are you doing to alleviate the shortfall?

Total deposits from the checkoff for calendar 1992 were $29,592,735.

Total payments from the fund during 1992 were $153,191,151.

The balance in the fund on December 31, 1992 was $4,061,061.

The estimated shortfall in 1996 given current patterns is $80 - $100 million.

With respect to alleviating the shortfall the Commission has undertaken an educational program regarding taxpayer participation in the tax checkoff and has mentioned its concern over the status of the Fund in the last four annual A-123 statements to the President and the Congress (required by the Federal Managers' Financial Integrity Act or FMFIA). We have also sent numerous letters to the President and the Congress, and issued several press releases, expressing our concern over the status of the Fund with regard to the 1996 election. The Commission believes that we have exhausted our oversight responsibilities and it is up to Congress to decide whether or not it wishes to preserve the current Presidential public funding system; if so, a legislative remedy is mandatory.

2. Have you submitted legislation to adjust the financing of the Fund and, if so, which Committee is responsible for enacting this legislation?

The Commission first recommended legislative changes to address the potential shortfall, and to prevent future insolvency of the Presidential Election Campaign Fund, in its March 1990 legislative recommendations to Congress. We have made similar legislative recommendations each year thereafter. Our recommendations noted that the projected insolvency resulted from the present system of using a non-indexed $1 tax checkoff mechanism to fund inflation-indexed payments. If Congress wishes to retain the current tax checkoff system, a legislative remedy is needed to correct the imbalance between disbursements and income into the Fund. Attachment A contains the Commission's 1993 legislative recommendations pertaining to the Presidential Election Campaign Fund.

The committees responsible for oversight of the Presidential Election Campaign Fund are the Senate Rules Committee and the Subcommittee on Elections of the House Administration Committee. Both of these committees held hearings in 1991 at which the Commission testified regarding the status of the Presidential Election Campaign Fund.

Two bills were introduced during the 102nd Congress that contain one or more of the Commission's legislative recommendations pertaining to the Presidential Election Campaign Fund. See, for example, H.R. 2533 and H.R. 3644, both introduced by Congressman Al Swift.

3. If the fund cannot become financially viable in 1994, what will be the impact on the 1996 Presidential election?

Given current statutory priorities for payments and assuming no change in checkoff participation, the approximate fund balance as of January 1, 1996, will be about $66.5 million.

The Commission will certify payments to the nominating conventions in the amount of $25 million, the bulk of which will be paid in 1995, the year before the election.

Inflation adjustment payments for the nominating conventions will total about $1 million. (These payments are made in the election year.)

This will leave about $65.5 million available for general election grants, whose full value should be about $127 million.

As a result, each major party nominee would receive about 51% of their full entitlement for the general election campaign, and there would be no funds available for the primary matching program.

EDUCATING THE PUBLIC ABOUT FINANCING CAMPAIGNS

1. Last year you testified that you would be spending $110,000 in fiscal year 1993 to educate the public on the Presidential Campaign Fund. Do you have data on the effectiveness of this campaign?

In 1991, the Federal Election Commission first planned and executed a Multimedia Education Program on the $1 Tax Checkoff. The purpose of the program was to educate the public as to the purpose of the Presidential public funding program; explain how the money is collected and spent on the program; and how the public funds are allocated and spent. The 1991 educational program cost $75,000, lasted three months and reached an estimated audience of 92,365,321. It focused entirely on broadcast media.

The 1992 campaign (spanning both FY 1992 and FY 1993) was more ambitious, longer in duration and expanded to include print medium and additional outreach efforts, such as a special toll-free number for those who wanted to request more information. The program was carried out in three parts: Part One consisted of the launch of the program and distribution of the PSAs and news items at the beginning of the tax preparation/tax filing season in January. The theme of the PSAs, "Make an Informed Choice," was emphasized throughout the year. Part Two consisted of continued distribution of broadcast and print materials and outreach during the Presidential primaries. Part Three took place after the completion of the election cycle (during the beginning of FY 1993). The 1992 program covered 12 months and reached an estimated audience of 203,067,249.

Evaluating the effectiveness of the program is difficult. It was acknowledged from the beginning that an educational program of 1 or 2 years is unlikely to change public behavior and that the creation of an informed populace might not alter existing patterns of participation in the checkoff. Prior to the start of the program, participation in the tax checkoff had gradually decreased from a high of over 28 percent for 1980 returns to less than 18 percent for 1991 returns. An IRS Taxpayer Usage Study for the first eight months of 1991 (based on a sample of returns) indicates that the percentage of tax returns with the box checked "yes" (designating $1 to the checkoff fund) had decreased from 23.76 in 1990 to 20.94 for the same period in 1991. The study also shows that the percentage of individuals checking "no" had increased from 60.37 to 62.73; the percentage of tax filers who checked neither box had gone from 15.53 to 16.32. The Commission does not believe, however, that it can attribute these changes to the educational program, since many other factors may have had an influence on the public's decision to participate, including, e.g., the economy and the public's attitude toward politics in general. In addition, many observers say that you cannot change behavior by doing a national campaign only twice. It takes repetition over several years. Therefore, it is difficult to evaluate the impact of the educational effort.

The Commission is attempting a different type of public education program for the remainder of FY 1993. Rather than simply convey a media message about the existence of the Fund in connection with tax return preparation, we are educating policy-members about the shortfall for 1996 and preparing a thorough report on the history of the Commission's administration of presidential public financing. It is our hope that our efforts will help Congress analyze whether public financing of presidential campaigns has been effective and whether the legislative changes the Commission has proposed would make the system better. The Commission has planned to expend a total of $50,000 in FY 1993 for its educational program.

2. What data do you have from IRS on the number of taxpayers who on their tax returns check "yes" to finance the Presidential Campaign Fund and has this number increased or decreased since 1990?

The IRS has annually provided us with the percent of returns with the "yes" designation. (Since this figure does not distinguish single filers from joint returns, it does not provide exactly the answer you have requested. From the information available, we cannot tell you the percent of taxpayers who checked "yes"; but rather the percent of returns checked "yes".) The IRS has provided us with such percentage figures for each tax year back to 1976, and we have attached a chart with yearly information on the Fund for your reference (Attachment B).

Regarding the most recent information available, the IRS has provided us with the following data: of the 115.4 million individual tax returns filed during 1992 (i.e. 1991 tax returns), 20.4 million, or 17.7%, contained a "yes" designation. Further, it is our understanding that IRS has not, in the past, kept track of the number of "no" designations or those left blank.

You will see from the attached chart (Attachment B) that the highest percentage recorded was for the 1980 tax returns - 28.7%. The 1991 (tax year) percentage of 17.7% is a decrease from the 1990 (tax year) percentage of 19.5%.

3. What are your plans and requested funding in 1994 for your education program?

The Commission has requested $110,000 for the education program in FY 1994, which is to be used depending upon what Congressional action is taken regarding the Presidential Election Fund. If no legislative action is taken to shore up the Fund, analytical studies will be undertaken to provide Congress with more information about possible causes for declining participation in the Fund. If the checkoff is somehow modified, the FEC will undertake a modest program to provide more information about the Fund and the changes to informational sources (media) and the public.

PRESIDENTIAL PRIMARY STATE EXPENDITURE LIMITS

1. Last year we discussed the idea of revising the formula used for determining presidential primary state expenditures and you indicated that the FEC has recommended eliminating state-by-state limitations. What is the concern with state-by-state limitations and to whom have you recommended changes?

As recently as January of this year the Commission included a recommendation to eliminate state-by-state expenditure limitations in its legislative recommendations sent to Congress and the President. Based on its experience in five

Presidential elections the Commission believes that state-by-state spending limitations can be eliminated with no negative impact on the process. In those campaigns where state spending limits have been an issue the problems have surfaced in the early primaries, particularly Iowa and New Hampshire where the limits have proven to be unreasonably low.

Obviously, if the limitations were removed, spending may increase in these early primaries; however, the Commission believes that the overall national spending limit will serve as a constraint on state spending, and candidates would have broader discretion on where to spend their campaigns' funds if the state limits were eliminated.

Committees also frequently have attempted to circumvent the state expenditure limitations through the use of the statutory and regulatory exemptions and creative accounting techniques. These procedures have resulted in burdensome accounting for the campaigns and an equally difficult audit and enforcement task for the Commission. We have estimated in the past that approximately 50% of our auditor's resources, for campaigns that raise state-by-state limit concerns, go toward analyzing just this issue.

The Commission, in 1992, revised the state allocation regulations in an effort to simplify the process of allocating expenses to the state limits. Under the new rules, only expenses which fall within one of five specific categories require allocation to a state limit. Expenses falling outside of those categories and not falling under an exemption are allocable to the national spending limit. Nonetheless, a great deal of accounting and legal work is required even within this system. Elimination of state-by-state limits altogether is the best course.

2. Would a change to an overall spending limit ease your workload in terms of monitoring and auditing compliance?

Elimination of state-by-state spending limits with a retention of the overall expenditure limit would have an impact on the Commission's workload. It is anticipated that the revisions to the state allocation regulations noted above will significantly reduce the Commission's enforcement burden regarding the state limits. In the 1992 election cycle it appears few committees will have problems staying within those limits. However, as long as the state spending limits are in effect, the Commission will be required to devote resources to monitoring compliance with them. History has shown that except in a small number of instances, enforcing the national expenditure limit has proven less burdensome than state-by-state limits since relatively few candidates have the resources to come close to national limits.

In a further effort to reduce workload the Commission included in its legislative recommendations a proposal that the separate fundraising exemption be combined with the overall expenditure limit. The proposal would combine the overall limit of $10 million, plus a cost of living adjustment (COLA), and the fundraising limit of $2 million (plus COLA) into one $12 million (plus COLA) expenditure limit. (Spending limits are increased by the COLA, which the Department of Labor calculates annually.) The effect would be to reduce the committees' accounting and reporting requirements. This change would have little impact on how campaigns spend their money. Larger campaigns that approach the overall limitation always allocate significant amounts to the fundraising exemption while smaller campaigns, in many cases, do not even bother to take advantage of the fundraising exemption.

3. What does Congress need to do to revise the law, and which committee would be responsible for developing this legislation?

The sections of the current law which deal with state-by-state limitations and the overall limitation are 26 U.S.C. 441a(b)(1)(A); 441a(g); and 431(9)(B)(vi). Attachment A to these responses are the various legislative recommendations the Commission presented to Congress on January 26, 1993, which deal with the Presidential Election Campaign Fund, including the elimination of the state-by-state expenditure limitations. The committees traditionally responsible for developing this legislation are the House Administration Subcommittee on Elections and the Senate Rules Committee.

ENFORCEMENT OF CONTRIBUTION LIMITATIONS

1. In your statement you indicate an increase in organized attempts to subvert disclosure and limitation laws. What are your concerns in this area and do you have any data which shows this increase?

Over the last several years, we have seen a rise in the number of cases involving complex schemes for reimbursing contributions (i.e. contributions made in the name of another) in violation of 2 U.S.C. § 441f, often using corporate funds in violation of 2 U.S.C. § 441b. Because of the surreptitious nature of these schemes, investigations of these matters are more difficult and require more staff resources. In addition, these cases tend to involve more individuals or groups than more straightforward matters. Much of the direct evidence of what occurred must be gathered through deposition testimony of participants in the scheme. Because of the possibility of criminal liability, individuals subpoenaed to testify do not always comply, or may assert their privilege against self-incrimination. Even when they do comply the depositions are time consuming, often requiring staff to be out of the office for days at a time. Furthermore, the documentary information needed to complete the investigation often is not available to

the Commission absent formal discovery via subpoena. Because the stakes can be very high to those involved, many organizations resist the subpoenas resulting in the need to pursue time consuming subpoena enforcement actions at the district court level. Once the documents are made available, additional staff time is needed to piece the information together to determine what actually occurred. Again, because the parties involved may be attempting to hide the real nature of their actions, this review can be very time/resource consuming. All of these factors increase the number of staff hours needed to complete the appropriate investigations in these matters and limit the number of cases each staff person can handle.

Our present caseload includes 35 contribution reimbursement cases involving over 600 respondents. We also have cases involving alleged schemes to embezzle committee funds, allegations of corporate facilitation (corporate orchestration of fundraising for candidates) and allegations of excessive contributions to federal candidates through the use of non-federal accounts of political committees. While not as numerous as the contribution reimbursement schemes, these types of cases also are very resource intensive.

2. How do you review cases to identify those who "skirt" the limitation? Do you look for unusual patterns or target a specific group?

The Commission does not review cases to identify who "skirts" the limitation; it reviews the reporting entity.

Under our internal review process, all political committee reports are subject to review by our Reports Analysis Division (RAD). Under our review procedures, different types of committees may have different schedules for their reviews. There are certain types of discrepancies and patterns that the RAD analyst looks for in the review. If those reach the level of our internal thresholds, the committee involved may be referred to the Enforcement Division of the General Counsel's Office.

With regard to externally generated matters that come to the Commission from the public, we also review these matters in order to prioritize our workload.

BACKLOG OF CASES UNDER REVIEW

1. In your statement you discuss the increasing complexity of enforcement cases and the impact this has on workload and staffing. On average, what is the amount of time an enforcement team spends on a case?

The average amount of time it took to close an enforcement case in 1992 was ten and a half months. However, that figure does not tell the whole story because the cases in-

cluded in the calculation run the gamut from non-filer matters, that may be completed in a few months, to complex, multi-respondent schemes, that have taken several years to complete.

2. Have you considered hiring temporary employees to assist you during peak seasons the way the IRS hires extra staff during tax season? If not, is this something we should consider?

While the elections go in two, four and six year cycles, the enforcement work is not as cyclical. There may be more complaints filed just prior to an election, but given the nature of the enforcement process, that influx of complaints does not translate into a "peak season." That is, not all complaints can be viewed equally. While some complaints can be handled quickly, others will require lengthy investigations, that may be further delayed by difficulties in locating witnesses, subpoena enforcement and changes in counsel. It is not possible to predict ahead of time what the caseload will consist of. Additionally, the specialized nature of Commission enforcement work makes it unlikely that we could find sufficient temporary staff trained in the Federal Election Campaign Act. Consequently, the time it would take to train temporary attorneys does not make short term temporary help a viable alternative.

On the other hand, granting the Commission a temporary FTE increase over a several fiscal year period might be a more fruitful way to eliminate the enforcement backlog. That way, after a training period, those additional staff could be assigned to work on the older matters, thereby freeing up the regular staff to concentrate on a current, more manageable workload. As time passed and if the backlog workload lessened, we would phase down the FTE ceiling and hopefully absorb the "extra" staff through natural attrition.

3. Who is at fault with the delays? Are candidates and the political committees not filing reports in a timely manner?

Delays in the enforcement process are due to three major factors. Some of the delay is caused by the procedural safeguards in the statute. For example, the statute provides the respondent 15 days to respond to the complaint, 5 days to respond to the General Counsel's Brief and 30-90 days to negotiate a conciliation agreement. Respondents often add to these time frames by seeking extensions of time in which to respond to the mentioned items, as well as to Commission discovery requests. Finally, as further illustrated below, the number and complexity of enforcement cases often strain our staff resources, so that cases may wait for staff attention at the Commission.

While some of our cases involved failures to file reports in a timely manner, these generally are not the more time consuming matters. The more time consuming investigations relate to cases involving numerous respondents, concerted hidden schemes, or both. At present there are over 60 cases in Enforcement that involve 10 or more respondents and some of these involve as many as 70, 80 and even 140 respondents. Dealing with notifications, responses, discovery and conciliation with that many parties is very time consuming. The same can be said for investigations into concerted schemes. Presently the Commission's caseload includes 35 matters involving complicated contribution reimbursement schemes. The surreptitious nature of such schemes complicates investigations into these matters. Most of these matters do not involve activity by regulated entities so their records are not readily available to the Commission. All discovery must be formal, and often the Commission is required to seek enforcement of its subpoenas in district court. Furthermore, piecing together information to unravel the hidden activities of those involved is very time consuming. Because of the time needed to pursue these matters, staff sometimes must put aside work in less complicated matters while they are conducting the necessary investigation into more complicated issues. This also contributes to the backlog.

INCREASED PRODUCTIVITY

1. I am very interested in helping agencies increase their productivity. So I was interested in your statement indicating that the Office of General Counsel has been able to meet increasing workload with fewer dollars. Does this interest in productivity spread to other offices in FEC?

The Commission has only been able to survive the significant increase in its workloads across the board through productivity increases. Most disclosure and informational programs at the Commission have not received additional staff since the 1988 elections, and in fact in 1992 many have operated with slightly less staff resources than in 1988. Given the rise in workloads for most Commission programs, this has only been possible through productivity increases. For example, more requests for data and information were responded to in Public Records, Information, the Press Office, and by RAD staff in the 1992 elections with static staffing levels.

Most significantly, much more data was coded and entered into our computerized disclosure data base, and more efficiently than ever before. This occurred despite the complex and difficult new "soft money" reports allocating non-federal activity by party committees. However, despite the productivity increases, the sheer volume of activity is overwhelming the data operations. The FEC is back to 1984 election cycle

backlog levels of documents processed. This, despite processing more itemized contributions in the first two years of the four year 1992 Presidential election cycle than in all four years of any previous Presidential election cycle.

In other words, the data staff processed far more transactions than ever before, and more efficiently, yet is still over 10,000 documents backlogged. This is a deterioration from the timeliness of the 1988 and 1990 cycles, and is due solely to a massive increase in workload, yet having essentially the same staff resources as in 1988.

It is also noteworthy that the immediate offices of the Commissioners have also had to absorb a proportionate increase in their respective workloads without staff augmentation.

Clearly, our Budget Justification and formal statement document that we have experienced productivity improvements in most major program operations. Nevertheless, these improvements are offset by dramatic increases in workloads and money involved in federal campaigns.

2. What level of productivity has FEC experienced since 1990?

As noted above, most FEC operations have experienced productivity increases, along with dramatic workload increases. Data systems most dramatically reflects what has happened: almost 50% more transactions (itemized contributions) have been entered into our computerized disclosure database than in 1990, yet the unprocessed documents backlog is worse, and the percent of completed documents is down from previous cycles.

This degradation in the timeliness of document processing comes in spite of the large increase in the number of transactions entered, and a significant increase in productivity for coding documents for data entry. Because most of the itemized data entry (Pass III) is performed by contractor, the coding is the key staff input. This was all depicted very graphically in our Budget Justification, and the charts from that document are also replicated here. In essence, the workload increase has overridden the productivity increases.

Below are comparisons between 1992 and the 1988 and 1990 cycles for staff resources, outputs and program efficiency for several programs. Once again, workload increases have overcome the Commission's ability to keep up with productivity increases. (All data is by Fiscal Year, except data entry and coding, which is by four-calendar year election cycles.)

PUBLIC DISCLOSURE

	1988	FTE 1990	1992
Line Public Records Staff	11.5	9.1	10.8
Workloads:			
Responses to requests, etc.		1988:	39,082
		1990:	42,228
		1992:	46,200

INFORMATION

	1988	FTE 1990	1992
Line Information Specialists	11.1	9.8	10.2
Workloads:			
Responses to requests, etc.		1988:	71,129
		1990:	66,219
		1992:	108,855

REPORTS ANALYSIS (RAD)

	1988	FTE 1990	1992
Line Reports Analysts	29.7	27.4	28.2
Workloads:			
Requests for Assistance:		1988:	6,785
		1990:	7,420
		1992:	8,488
Form 1's (Statements) Reviewed:		1988:	8,093
		1990:	7,397
		1992:	13,090
Form 3's (Reports) Reviewed:		1988:	33,608
		1990:	30,680
		1992:	32,467
RFAI's Issued:		1988:	6,051
		1990:	5,146
		1992:	7,485

DATA SYSTEMS

Pass I represents summary data from summary page of reports for basic index of reports filed; Pass III represents itemized data for contributions from individuals and committees. Most Pass III data entry is performed by an outside

contractor, while coding is performed by Data Systems staff. Data Systems is also responsible for maintaining the FEC owned ADP equipment, and monitoring the contract with DEC corporation for leased ADP equipment. This phase of operations has also seen an expansion of work with static staffing levels.

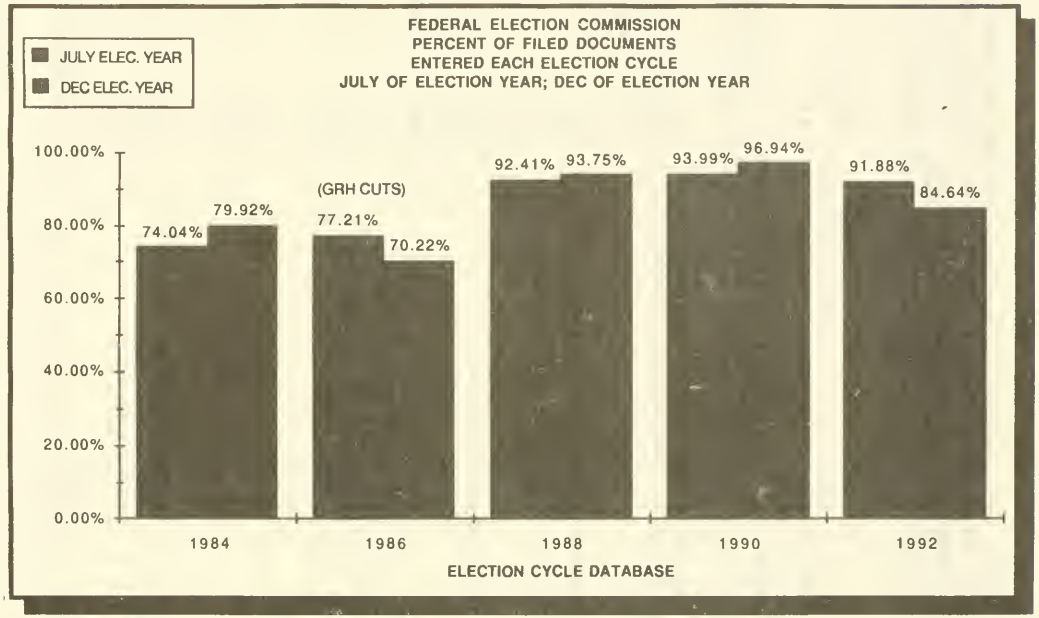
	FTE		
	1988	1990	1992
Line Data Processing Staff	23.9	18.4	19.9

Workloads: By election cycle (As of December of Election Year); 86 cycle deleted due to delays caused by GRH sequester, when data was not entered, but was recaptured during 88 cycle.

Percent of Documents Entered:	1984:	79.92%
(Pass III itemized entry done)	1998:	93.75%
	1990:	96.94%
	1992:	84.64%
Documents Unprocessed (Backlog):	1984:	10,851
	1988:	3,785
	1990:	1,794
	1992:	10,061
Transactions Entered:	1984:	365,796
	1988:	620,263
	1990:	720,443
	1992:	1,076,315
Transactions per Coding FTE:	1984:	43,829
(88 inflated due to recapture of	1988:	84,115
86 cycle due to GRH cuts in 86 FY)	1990:	77,021
	1992:	108,228
Documents filed with FEC:	1984:	54,041
	1988:	60,588
	1990:	58,600
	1992:	65,495
Documents entered into Database:	1984:	43,190
	1988:	56,803
	1990:	56,806
	1992:	55,453

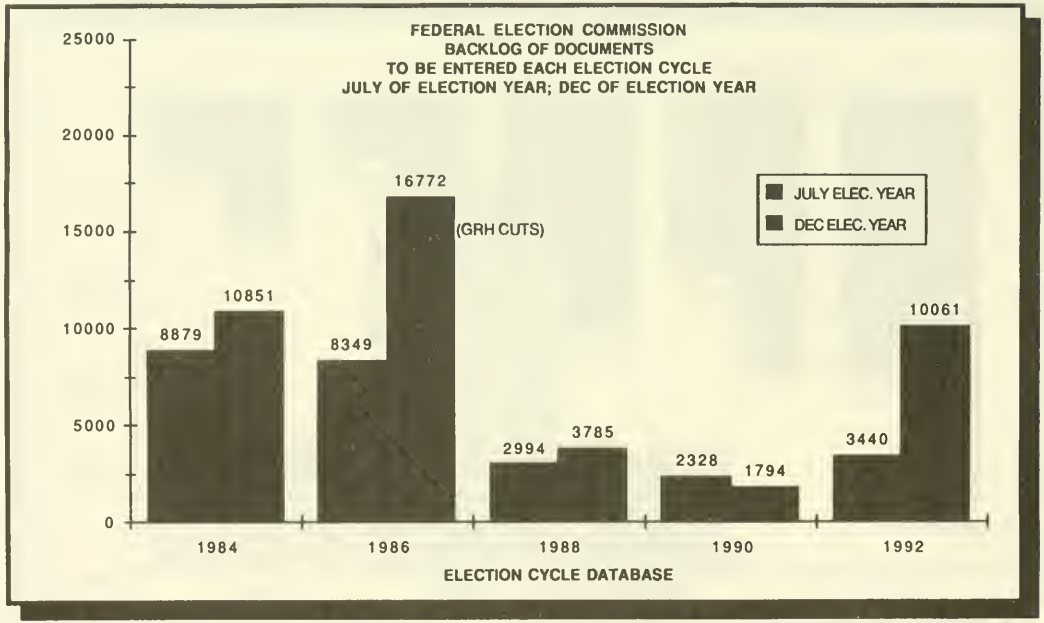
The following charts clarify the above information.

FEC FY 1994 BUDGET REQUEST--PERCENT OF ENTERED DOCUMENTS AT JULY AND DEC. OF ELECTION YEAR



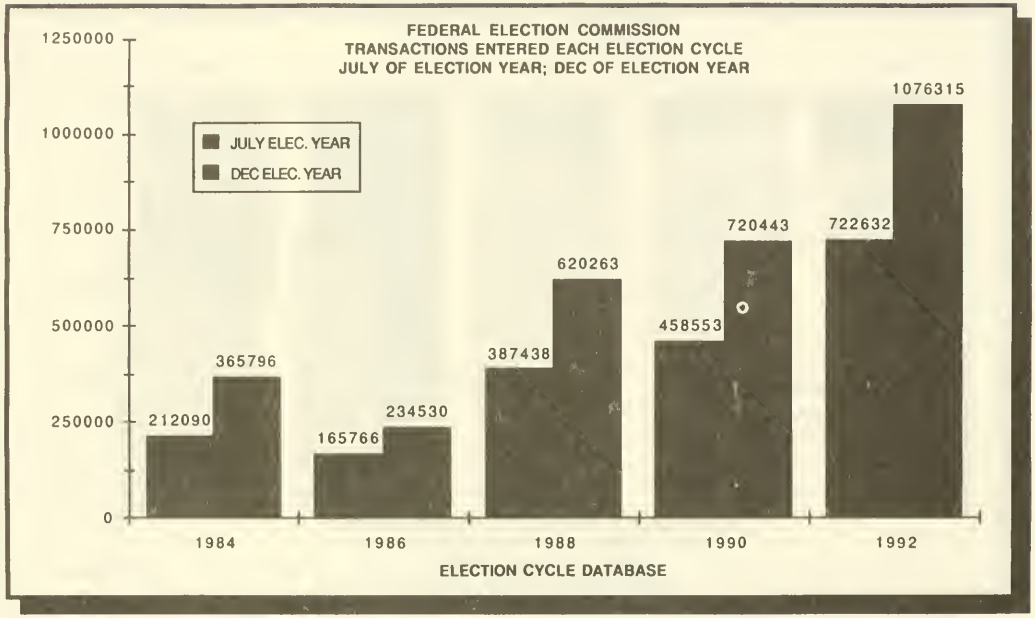
% FILED DOCUMENTS ENTERED BY ELECTION CYCLE (84, 86, 88, 90, 92 DATABASES) 12/31/92

FEC FY 1994 BUDGET REQUEST–BACKLOGGED DOCUMENTS AT JULY AND DEC. OF ELECTION YEAR



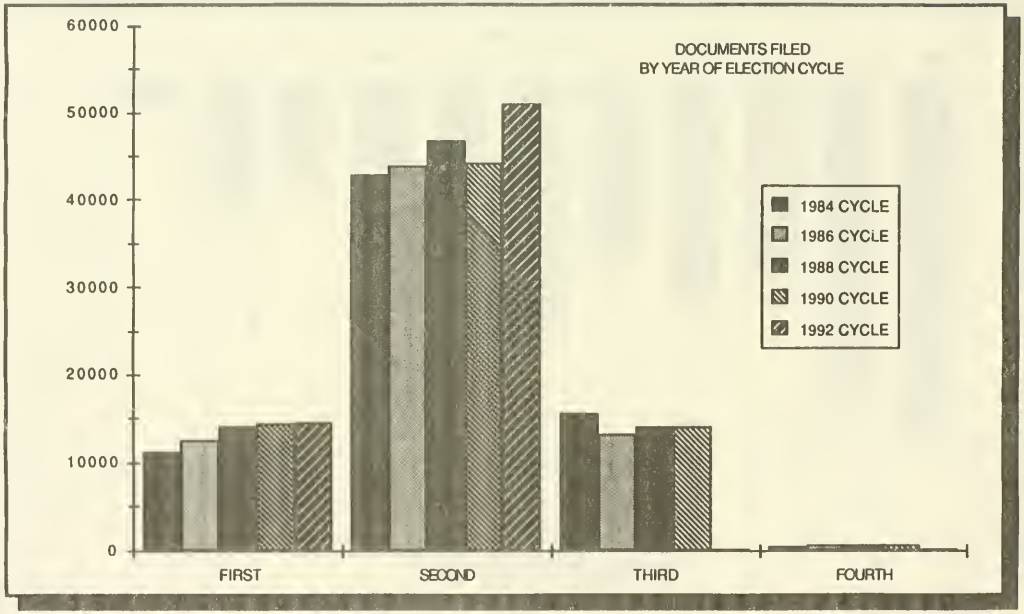
DOCUMENTS TO BE ENTERED BY ELECTION CYCLE (84, 86, 88, 90, 92 DATABASES) 12/31/92

FEC FY 1994 BUDGET REQUEST--ITEMIZED TRANSACTIONS AT JULY AND DEC. OF ELECTION YEAR

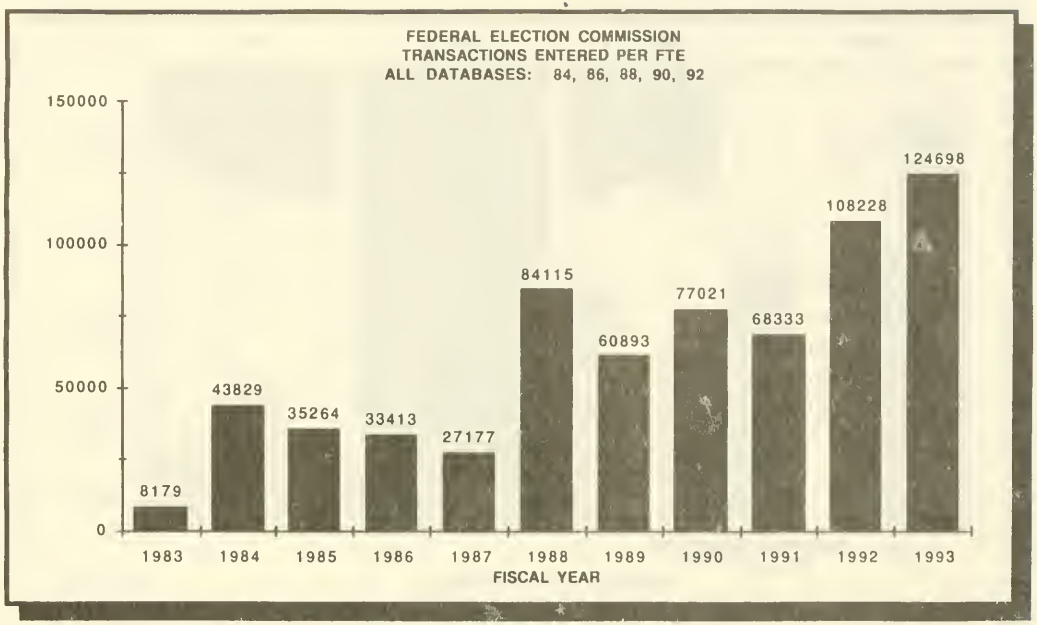


ITEMIZED TRANSACTIONS BY ELECTION CYCLE (84, 86, 88, 90, 92 DATABASES) 12/31/92

Documents Filed by Year of Election Cycle



Total Filed for 1984, 86, 88, 90 and 92 Data Bases--as of 12/31/92



ITEMIZED TRANSACTIONS PER CODING FTE BY FISCAL YEAR (84, 86, 88, 90, 92 DATABASES) 12/31/92

3. Do you believe that there is a point at which productivity is "maxed out" and the mission of the agency begins to suffer? Do you think that the FEC has reached this point?

Yes, as we state in all of our Budget documents, the Commission has reached the point where the amount of dollar activity in federal campaigns and the resulting workloads this generates has overwhelmed the Commission's operations. The FEC was able to cope with workload increases until the 1992 election cycle through productivity increases. However, 1992 saw such dramatic increases in most disclosure and informational activity that it overrode any increased productivity.

People calling the 800 lines encountered busy signals, requests for documents and/or information in Press or Public Records took longer to fill, and data was delayed in entry into the disclosure database. For enforcement, despite increasingly more complex cases arising, the amount of staff effort to close an average case has generally declined over the past ten years. However, the time lapse in months required to close an average case has increased recently, after some gains in this area previously. This reflects the growth in caseload combined with limited staff resources, which creates delays in closing cases even with productivity gains.

Therefore, the FEC requires an increase in staff to cope with our workloads, even with productivity increases. Further use of even higher enforcement thresholds threatens to create a climate of lack of concern for the requirements of the FECA; the price of non-compliance becomes acceptable with little risk that effective compliance actions will be initiated. Past history of efforts to regulate campaign finance shows that effective disclosure is lost if effective compliance is not obtained.

CLEARINGHOUSE REIMBURSEMENT FOR SERVICES

1. The FEC Clearinghouse provides free information to election officials. Has the FEC evaluated the impact of charging clients for at least a portion of the cost for providing this information?

The Commission has not formally evaluated the impact of charging clients for selected information on election administration. Clearinghouse publications resulting from contract research are sold by the Government Printing Office (GPO) for a limited period of time. When GPO no longer carries the publication, remaining GPO stock is transferred to the FEC and is available to requesters free of charge. Information based on in-house research is always free of charge.

The Commission would be reluctant to charge State and local election officials for information. The Clearinghouse relies on the cooperation of these officials in order to com-

pile accurate data on the laws and procedures involved in administering elections. Requiring them to pay would significantly impact the effectiveness of the Clearinghouse.

Even if the practice were implemented of charging other groups (i.e.; press, advocacy groups, teachers, general public) for information provided by the Clearinghouse, the FEC would not receive the resulting monies. At the present time, other FEC offices sell copies of reports, microfilm, and computer tapes to the public at the Commission's cost. However, instead of the funds being used to reimburse the Commission for its expenses in producing the materials, they are credited to the U.S. Treasury. The effect on the Commission of selling materials is thus the same as if the materials had been given away. The Commission has repeatedly recommended legislation that would address this situation.

2. In general, what kind of information is developed by the Clearinghouse and is this information requested or is it simply sent out to people?

The Clearinghouse conducts research on all aspects of election administration. This includes laws, procedures, technology, and issues and options involved in implementing functions such as: planning and managing elections; ballot access; voter registration; campaign regulation; voter information and education; balloting; vote tabulation; and certification of results. The Clearinghouse compiles this information by means of contract research and studies conducted by the five person Clearinghouse staff.

Formal research projects are initiated based on the recommendations of a twenty member Advisory Panel consisting of State and local election officials and the Clearinghouse's assessment of the information needed. In addition, Clearinghouse staff is frequently called upon to perform ad-hoc research on a specific problem or topic area.

The Clearinghouse provides the vast majority of its information in response to requests received on a daily basis. However, some information is sent without waiting for a request. One complimentary copy of each Clearinghouse publication is provided to governmental officials most likely to use the information. These officials include members of the House Committee on House Administration, members of the Senate Committee on Rules and Administration, Congressional Research Service staff, State Chief Election Officials, and the State Legislative Research Bureaus. In addition, periodicals of general interest produced by the Clearinghouse (e.g.; The FEC Journal of Election Administration, the Essays in Elections series, and the Innovations in Elections series) are mailed bulk-rate to a list of approximately 8,000 persons including State and local election officials, federal officials involved in elections, academics, and other interested persons.

3. What is the current operating cost and the 1994 budget request for the Clearinghouse?

The Fiscal Year 1993 operating costs for the Clearinghouse are $505,552. The FY 1994 amended budget request for this division, which includes funds for carrying out the responsibilities of the "motor voter" legislation, is $747,000.

IMPACT OF "MOTOR VOTER" LEGISLATION

1. In January you indicated that you had not yet completed a detailed estimate of the administrative costs associated with H.R. 2, the so-called "moter voter" bill. Do you have more complete data at this time, and if so, what is your estimate of increased costs in Fiscal Year 1993?

The Commission (through its Clearinghouse on Election Administration) has prepared an estimate of the costs to carry out our responsibilites under the Act. As a concurrent submission agency, we have transmitted this data to OMB. The supplemental request for FY 1993 is $112,000 and .5 FTE.

2. You have indicated that OMB has not granted your request for a 1993 Supplemental appropriation. What will be your action should funds not be forthcoming?

Given the high priority of the "Motor Voter" bill and the expected short time frame for Congressional approval, the Commission submitted its supplemental request in advance of passage. Hence, we do not expect OMB action until final enactment.

Should such monies not ultimately be forthcoming, the Commission would have one of two options: to divert funds from other campaign finance functions; or to provide minimal assistance to States in their implementation (the Clearinghouse has already re-programmed $30,000 of its research budget to begin the coordination phase). Without additional funds, we would face delay in our statutory efforts to design the mail registration form and draft the accompanying regulations.

Given the severe staffing constraints on the FEC and the workloads we are currently facing, it would be very difficult for the Commission to reallocate additional funds to the Clearinghouse from other operations.

IMPACT OF RISING PERSONNEL COSTS

1. In your fiscal year 1994 request, you touch on a very serious issue for smaller agencies with little room for reprogramming: increasing costs of health insurance and retirement programs. What has been the impact of these two items on your budget over the last 10 years?

These cost items are indeed a major factor for agencies such as the Commission, especially because over 70% of our costs go to salaries and benefits. This is particularly a problem for us when we are directed to absorb such costs without any additional funds to offset increases mandated government-wide.

With regard to health insurance costs, the Commission's employer share on a pay period basis (two week period, approximately 26.1 pay periods per average fiscal year) was about $7,800 in the last quarter of calendar 1987. In January, 1988 this increased almost 32% to over $10,100 per pay period. By January, 1990 it had increased to $15,500 for a total cumulative increase of almost 100% in three years. As of the last pay period, the FEC cost of the employee health insurance was $16,700 per pay period.

Even factoring in the fact that total FEC staff has increased somewhat since FY 1987, the health insurance costs have still increased by about 114% in the six years since FY 1987. This is a significant cost to the FEC. In fact, absorbing pay and benefits costs partially prevented the FEC from meeting authorized FTE ceilings prior to FY 1992. We do note that the present Chairman of this Subcommittee in recent years has attempted to ensure that OMB budgets provided for full funding of FTE costs for agencies. This assisted the FEC in meeting its FTE ceiling in FY 1992, when we desperately required all available staff resources.

The cost of FERS and the TSP program (matching portion) has also impacted on the Commission. A Civil Service Retirement (CSRS) employee costs the FEC roughly 8.5% (of salary) in retirement costs, employer share. On the other hand, a FERS employee costs the FEC at least 22% at a minimum, and more depending on the amount the employee contributes to their TSP account that is matched by the FEC. In essence, the CSRS was only partially funded by employee and direct agency contributions, with the difference made up by OPM appropriations. FERS is fully funded by the employee and direct agency contributions. Therefore, FERS has essentially transferred retirement costs from the OPM to the agencies.

As more new employees come into government, it obviously costs the FEC and other agencies more as CSRS employees are replaced by FERS employees. Thus, despite an initial adjustment in budgets by OMB when FERS was first initiated, the long-term on-going costs have risen for the FEC and all agencies. The impact of years of having to absorb pay and benefit increases is that budgets are squeezed even more by increasing participation in FERS and TSP.

2. Are you experiencing an increasing number of employees choosing to maximize their FERS (sic) [TSP] contributions and has this, in turn, caused increased expenditures on your part?

Since employee contributions to the defined benefit portion of the Federal Employees Retirement Plan (FERS) are fixed, we presume your interest is in the Thrift Savings Plan (TSP) portion of the plan. Since employees covered under FERS are the only ones eligible to receive the agency matching contributions, we will provide you with the figures for that retirement system only. From calendar year 1988 through calendar year 1992, 56% or 36 employees have elected to maximize their contributions into their Thrift Savings Plan accounts therefore making them eligible to receive the full 5% agency matching contribution. In addition, 7% or 5 employees have elected to reduce their contributions.

In terms of actual dollars spent on the Agency Matching of TSP Contributions, the following figures apply from calendar years 1989 through 1992.

CY	AMOUNT	% OF INCREASE
1989	$56,141.11	
1990	$70,803.54	26.12%
1991	$100,770.76	42.33%
1992	$133,331.40	32.32%

The amount of the increases can be credited to the fact that the majority of all newly hired employees are covered under FERS, making them eligible to receive matching agency contributions to their TSP Contributions. In addition, annual pay adjustments, promotions, and within grade increases have also had an impact on the amount the agency is spending on TSP, since every salary increase affects the agency's matching contribution. For example, the agency share of TSP matching increased after the recent January 1993 COLA by 11.33%, much higher than the straight 3.7% increase in the rate of pay. Therefore, more employees increased their participation in the matching portion of TSP. Similar increases in previous FY's indicate that, with each COLA, more employees increase their participation in TSP.

(Additional questions submitted for the record by Congressman Istook and the answers thereto follow:)

EQUIPMENT

1. Please provide a summary of your computer filing system; provide an inventory of what you have and what your future plans are for expansion.

A. SUMMARY OF COMPUTER FILING SYSTEM:

Mandated by the Congress under the Federal Election Campaign Act of 1971 as amended (Title 2 of the United States Code), the Federal Election Commission is charged with facilitating disclosure of federal campaign finance activity and insuring compliance with reporting and financial limitations contained within the Act.

A major function of the Commission is disclosure of the financial activity undertaken by candidates, political committees, and others in federal elections. Committees and individuals involved in federal campaign finance must file reports of their activity with the Commission on a periodic basis. Since the 1983-84 election cycle the FEC, on a biannual basis, has dealt with over 8,000 filers reporting a total financial activity in excess of $1 billion. The official record of the Federal Election Commission is the set of microfilm files containing all documents filed with the Commission. Selected information from these documents is entered into the Disclosure Data Base which supports a variety of on-line and batch generated reports and indices for internal and external use. Data is available for all organizations filing reports in each election cycle beginning in 1977-78. The public has access to this information through the Public Records Office and the Press Office which make available computer generated indices and reports as well as microfilm copies of original documents. Data and indices are also available to remote users via a vendor supplied telecommunications network.

Data generated from financial reports, along with the reports themselves, also are used to monitor compliance with contribution limitations and other requirements of the Federal Election Campaign Act. Documents are reviewed to insure internal consistency and completeness of reporting and also to insure that limitations on contributions from individuals and committees are complied with.

The Data Systems Development Division (DSDD), has designed a data processing system which facilitates the achievement of the Commission objectives and provides computer-based information systems support to the agency's administrative and general operating systems. The development of these systems has been the product of a three-phase approach.

1. DSDD provides the computer resources needed to process the large volume of data received by the FEC. These resources are currently provided by a commercial vendor through the use of a central processing unit which manipulates the data in an on-line and batch processing environment; tape and disk units for storage; video display units (VDT) to enter and access data; printing devices (line printers) to produce indices and listings; and communications facilities which link the equipment located at the federal unit.

2. DSDD develops the computer software systems required to process the data. Over 3,000 software programs have been developed by the FEC staff. These programs are written in a variety of computer languages to perform the editing, updating, summarization and reporting of information. Organizational information systems include:

a. Disclosure; candidate/committee data base.

The FEC maintains a computer-based indexing and information retrieval system for the processing and review of reports and statements filed by federal candidates and political committees. Financial data and other information entered from campaign reports are formatted and cross-referenced for immediate on-line inquiry and the monthly processing of up to 200 regularly scheduled indices and 400 batch requests. In addition, special programs generate reports of financial activity which present selected receipt and disbursement information for political committees and candidates and give cross-tabulations for the display of the relationships among certain types of financial activity. The Commission has established procedures in place which are followed when a candidate does not file the required disclosure reports and other information in a timely fashion. We are able to automatically trigger the issuance of Western Union mailgrams to candidates and committees who have failed to file their pre-election reports.

b. Legal support services

Several systems have been developed to support our legal department. We have two text retrieval systems (Court Abstracts and Advisory Opinions), an index of closed matters under review (MURs) and a set of ASCII file production programs, the products of which are transferred from the contracted computer to the FEC owned VAX computers for ALL-IN-ONE usage. The MUR system is one of the major responsibilities of the Office of General Counsel, supporting an on-line multi-user capability for both inquiry and retrieval. Updates including full file reports and cross-tabulations are created quarterly. This software package utilizes both COBOL and DBMS System 1032.

c. Operations and production

The dynamic nature of data included in the system along with heavy demand for various outputs require significant overnight updating and production efforts. A large number of files are updated with new entries and changes on a daily basis. A variety of hard copy reports and magnetic tapes are produced following the nightly update in response to staff, public and press demand.

d. Direct/Remote Access

In 1984 and 1985, the Commission began a program of providing access to its disclosure database through a telecommunications network supplied by the FEC's computer vendor. The program has proved to be very successful especially with researchers, universities, and the media. The program was extensively expanded and improved in 1990, and the number of users continues to expand. All programs used within the system were developed by the Commission for these users. This client base is defined as users from offices of state election administrators and users from the general public. Combined usage for these groups tabulated on a monthly basis approaches between $4,000 to $6,000. This revenue directly pays for the cost of the computer resources used.

B. PROVIDE AN INVENTORY OF CURRENT CONFIGURATION:

The FEC currently uses, under contract from Digital Equipment Corp (DEC), two VAX 8650 computers. Each machine has an internal memory which exceeds 96 mega bytes. In addition to these central machines, the FEC stores approximately 6 giga bytes (6 billion characters) of data on hard drives located at both the Vendor's and the FEC's site. The FEC communicates with the vendor in Medford, Massachusetts, via three 56 Kb (kilo bits) lines. Located at the FEC are two high speed printers needed to print reports. Staff communicate directly with the remote facility using eighty eight VT220 terminals.

Also, in the FEC's data center are three VAX 6310 computers, another 7 giga bytes of on-line storage, which services 210 users. Two of the VAX 6310 computers are used primarily to support the commission's word processing and electronic mail requirement. The third VAX 6310 is used to directly support the Audit Division's processing requirements for performing the tasks associated with the Presidential matching funds, and audits associated with this program. Augmenting the central computer systems for the staff are several portable (Laptop and Notebook style) computers. These units aid both the legal and auditing staff when they are doing off-site work.

By the end of this fiscal year the FEC will have implemented the Document Imaging (DI) System. The purpose of this new system is to replace the existing microfilm process. The system that will be installed this year will accommodate at least twenty retrieval/workstations. Each will be able to retrieve and print documents that previously have been scanned. Documents will be retrievable by either the individual page or by document. The initial system will have a capacity to hold about 700,000 pages of financial reports.

C. FUTURE PLANS FOR EXPANSION

The DI system does not address the conversion of historical data currently stored on microfilm to optical imaging; nor does it address the requirement to develop an interface between the FEC and the House and Senate for the purpose of receiving their images of financial data. These two project areas will be studied at a later time. Other areas that will require an in-depth review are the processing requirements for electronic filing, enhancing the DI system, and exploring technologies that will assist the FEC in its future processing needs.

ATTACHMENT A

PUBLIC FINANCING

Presidential Election Campaign Fund (revised 1993)
Section: 26 U.S.C. §6096

Recommendation: Without Congressional action, there will be a shortfall in the Presidential Election Campaign Fund in 1996. There will be no money available for primary candidates and less than a full entitlement for the general election candidates. If Congress wishes to preserve the Presidential public funding system, a legislative remedy is essential.

In addition, Congress may want to examine the priorities for distributing public funds among the party nominating conventions, the general election nominees and the primary election candidates.

Explanation: Although the Fund did not experience a shortfall during the 1992 Presidential year,1/ the Commission has informed Congress that a serious public funding shortage is assured in 1996. One of the reasons for this is a structural flaw in the checkoff program. The payout to candidates and parties (for their conventions) is indexed to inflation, but the dollar checkoff is not. Spending limits are increased each election cycle to reflect the change in the cost-of-living index. In 1974, the statutory spending limit for the general election was established at $20 million. This year, each party nominee received over $55 million, representing a 280 percent increase over the 1974 amount. Thus, as the consumer price index increases, the Fund needs more and more checkoff dollars to make the appropriate payments to qualified candidates and parties. If the checkoff amount had been increased at the same rate as the payments, there would be no shortfall in 1996.

Another reason for the shortfall is the shrinking participation of taxpayers in the checkoff program. After peaking at 28 percent in 1980, the percentage of tax forms on which the taxpayer checked yes has fallen to approximately 19 percent.

1/ The Commission's projection that a shortfall would occur in 1992 did not materialize because the assumptions on which that projection was based changed. First, matching fund requests were considerably smaller than had been expected, based on the experience of previous years. Second, total checkoff receipts deposited into the Fund in 1991 declined much less than had been anticipated. The FEC had expected a decline of $2 million. In fact, the checkoff dollars to the Fund declined by approximately $140,000. Third, the inflation rate was lower than had been expected, which decreased the expected demand on the Fund.

Without a legislative remedy, the FEC predicts that the shortfall in 1996 will be a serious problem. The law requires that priority be given first to party nominating conventions, then to general election nominees and last to primary election candidates. There will not be enough money in the Fund to cover all phases. We estimate that $124 million will have accumulated in the fund through 1996. This amount will only fully fund the two major party conventions, at about $12 million each. The two general election nominees, who will be entitled to more than $60 million each, will not be fully funded. There will be no money for the primary candidates. Consequently, the shortfall will force candidates to become more dependent on large contributions from individuals and groups and, ultimately, defeat the purpose of the public funding process.

Primary Election Audits (1993)
Section: 26 U.S.C. §§9032, 9033, 9035, 9038, 9039(a)(1)

Recommendation: Congress may want to eliminate the requirement under the Presidential Primary Matching Payment Account Act that matching funds be used only for "qualified campaign expenses" and substitute instead specific criteria to be used in Commission audits of publicly funded primary candidates.

Explanation: To carry out the current requirement contained in 26 U.S.C. §9038(a), the Commission has had to determine, through audits, whether campaigns were using public funds to make qualified campaign expenses or unqualified campaign expenses. That determination has required considerable government resources. Additionally, the effort has resulted in prolonged audits, whose results have often not been published until 4 years after the election was over. One way of reducing the time and expense of these complex audits would be to eliminate the requirement that the Commission determine which disbursements were "qualified campaign expenses" and which were not. The test for whether or not a candidate used his or her public funds for legitimate campaign purposes would be based, instead, on the public's judgment. In order to make that judgment, full disclosure of campaign finance operations would be required. All disbursements, including their purpose, would be disclosed in full. With that information, the public would express its judgment, through the ballot box, on whether the candidate had spent the funds wisely and fairly.

The Commission would continue, however, to audit campaigns to ensure that they complied with the Federal Election Campaign Act and the Presidential Primary Matching Payment Account Act, including provisions on expenditure limits2/ and the limits and prohibitions on contributions. Additionally, the audits would be conducted to ensure that campaigns did not use funds for any illegal purpose, that campaigns did not convert excess campaign

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2/ This proposal assumes that Congress would also repeal the state-by-state expenditure limits, leaving only a national expenditure limit for the Commission to enforce.

funds to personal use, that matching funds were used only for expenses incurred during the candidate's period of eligibility, and that all contributions were properly matched. Any surplus funds would have to be repaid to the U.S. Treasury, as now required under the law. Similarly, campaigns would be required to make repayments if the Commission determined that they had not complied with the campaign laws or had used funds for illegal purposes.

Supplemental Funding for Publicly Funded Candidates (1993)
Section: 26 U.S.C. §§9003 and 9004

Recommendation: Congress may wish to consider whether publicly funded candidates should receive additional public funds when a nonpublicly funded candidate exceeds the spending limit.

Explanation: Major party Presidential candidates who participate in the general election public funding process receive a grant for campaigning. In order to receive the grant, the candidate must agree to limit expenditures to that amount. Candidates who do not request public funds may spend an unlimited amount on their campaign. Congress may want to consider whether the statute should ensure that those candidates who are bound by limits are not disadvantaged.

State Expenditure Limits for Publicly Financed Presidential Primary Campaigns (revised 1993)
Section: 2 U.S.C. §441a

Recommendation: The Commission recommends that the state-by-state limitations on expenditures for publicly financed Presidential primary candidates be eliminated.

Explanation: The Commission has now administered the public funding program in five Presidential elections. Based on our experience, we believe that the limitations could be removed with no material impact on the process.

Our experience has shown that, in past years, the limitations have had little impact on campaign spending in a given state, with the exception of Iowa and New Hampshire. In most other states, campaigns have been unable or have not wished to expend an amount equal to the limitation. In effect, then, the administration of the entire program has resulted in limiting disbursements in these two primaries alone.

If the limitations were removed, the level of disbursements in these states would obviously increase. With an increasing number of primaries vying for a campaign's limited resources, however, it would not be possible to spend very large amounts in these early primaries and still have adequate funds available for the later primaries. Thus, the overall national limit would serve as a constraint on state spending, even in the early primaries. At the same time, candidates would have broader discretion in the running of their campaigns.

Our experience has also shown that the limitations have been only partially successful in limiting expenditures in the early primary states. The use of the fundraising limitation, the compliance cost exemption, the volunteer service provisions, the unreimbursed personal travel expense provisions, the use of a personal residence in volunteer activity exemption, and a complex series of allocation schemes have developed into an art which, when skillfully practiced, can partially circumvent the state limitations.

In addition, experience has shown that one of the Congressional concerns motivating the adoption of state expenditure limits is no longer an issue. Congress adopted the state limits, in part, as a way of discouraging candidates from relying heavily on the outcome of big state primaries. The concern was that candidates might wish to spend heavily in such states as a way of securing their party's nomination. In fact, however, under the public funding system, this has not proven to be an issue. Rather than spending heavily in large states, candidates have spent large amounts in the early primaries, for example, in Iowa and New Hampshire.

Finally, the allocation of expenditures to the states has proven a significant accounting burden for campaigns and an equally difficult audit and enforcement task for the Commission.

For all these reasons, the Commission decided to revise its state allocation regulations for the 1992 Presidential election. Many of the requirements, such as those requiring distinctions between fundraising and other types of expenditures, were eliminated. Since the Commission has not yet completed its administration of this Presidential cycle, the full impact of these changes is not yet clear. However, the rules could not undo the basic requirement to demonstrate the amount of expenditures relating to a particular state. Given our experience to date, we believe that this change to the Act would still be of substantial benefit to all parties concerned.

Compliance Fund (1993)
Section: 2 U.S.C. §441a(b)(1)(B); 26 U.S.C. §§9002(11), 9003(b) and (c), 9004(c)

Recommendation: Congress may wish to clarify what funds Presidential Election Campaign Fund recipients may utilize to meet the accounting and compliance requirements imposed upon them by the Federal Election Campaign Act. If private funds are not to be used, Congress may wish to either raise the spending limits to accommodate such costs or establish a separate fund of the Treasury to be used for this purpose.

Explanation: Through regulation, the Commission has provided for the establishment by presidential committees of a General Election Legal and Accounting Compliance Fund (GELAC fund) consisting of private contributions otherwise within the limits acceptable for any other Federal election. The GELAC funds, which supplement funds provided out of the U.S. Treasury, may be used to pay for costs related to compliance with the campaign laws. Determining which costs may be paid is sometimes difficult and complex.

Contributions to the GELAC fund are an exception to the general rule that publicly funded Presidential general election campaigns may not solicit or accept private contributions. Congress should clarify whether GELAC funds are appropriate and, if not, specify whether additional federal grants are to be used. If GELAC funds are appropriate, Congress should provide guidelines indicating which compliance costs are payable from such funds.

Applicability of Title VI to Recipients of Payments from the Presidential Election Campaign Fund (1993)
Sections: 26 U.S.C. §§9006(b), 9008(b)(3) and 9037.

Recommendation: Congress should clarify that committees receiving public financing payments from the Presidential Election Campaign Fund are exempt from the requirements of Title VI of the Civil Rights Act of 1964, as amended.

Explanation: This proposed amendment was prompted by the decision of the U.S. District Court for the District of Columbia in Freedom Republicans, Inc., and Lugenia Gordon v. Federal Election Commission, No. 92-153 (CRR) (D.D.C. April 7, 1992), appeal pending, No. 92-5214 (D.C. Cir.). The Freedom Republicans' complaint asked the district court to declare that the Commission has jurisdiction to regulate the national parties' delegate selection process under Title VI. It also requested the court to order the Commission to adopt such regulations, direct the Republican Party to spend no more of the funds already received for its 1992 national nominating convention, and seek refunds of moneys already disbursed if the Republican Party did not amend its delegate selection and apportionment process to comply with Title VI. The court found that the Commission "does have an obligation to promulgate rules and regulations to insure the enforcement of Title VI. The language of Title VI is necessarily broad, and applies on its face to the FEC as well as to both major political parties and other recipients of federal funds." Slip op. at 6. The court gave the Freedom Republicans the opportunity to reassert their other claims after the Commission promulgates rules. Slip op. at 10.

The Commission appealed this ruling on a number of procedural and substantive grounds, including that Title VI does not apply to the political parties' apportionment and selection of delegates to their conventions. However, the court of appeals might overrule the district court decision on one of the non-substantive grounds leaving the door open for other lawsuits involving the national nominating conventions or other recipients of federal funds certified by the Commission.

In the Commission's opinion, First Amendment concerns and the legislative history of the public funding campaign statutes strongly indicate that Congress did not intend Title VI to permit the Commission to dictate to the political parties how to select candidates or to regulate the campaigns of candidates for federal office. Nevertheless, the potential exists for persons immediately prior to an election to invoke Title VI in the federal courts in a manner that might interfere with the parties' nominating process and the candidates' campaigns. The recommended clarification would help forestall such a possibility.

For these reasons, Congress should consider adding the following language to the end of each public financing provision cited above: "The acceptance of such payments will not cause the recipient to be conducting a 'program or activity receiving federal financial assistance' as that term is used in Title VI of the Civil Rights Act of 1964, as amended."

Deposit of Repayments
Section: 26 U.S.C. §9007(d)

Recommendation: Congress should revise the law to state that: All payments received by the Secretary of the Treasury under subsection (b) shall be deposited by him or her in the Presidential Election Campaign Fund established by section 9006(a).

Explanation: This change would allow the Fund to recapture monies repaid by convention-related committees of national major and minor parties, as well as by general election grant recipients. Currently the Fund recaptures only repayments made by primary matching fund recipients.

Enforcement of Nonwillful Violations
Section: 26 U.S.C. §§9012 and 9042

Recommendation: Congress should consider amending the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act to clarify that the Commission has authority for civil enforcement of nonwillful violations (as well as willful violations) of the public funding provisions.

Explanation: Section 9012 of the Presidential Election Campaign Fund Act and section 9042 of the Presidential Primary Matching Payment Account Act provide only for "criminal penalties" for knowing and willful violations of the spending and contribution provisions and the failure of publicly funded candidates to furnish all records requested by the Commission. The lack of a specific reference to nonwillful violations of these provisions has raised questions regarding the Commission's ability to enforce these provisions through the civil enforcement process.

In some limited areas, the Commission has invoked other statutes and other provisions in Title 26 to carry out its civil enforcement of the public funding provisions. It has relied, for example, on 2 U.S.C. §441a(b) to enforce the Presidential spending limits. Similarly, the Commission has used the candidate agreement and certification processes provided in 26 U.S.C. §§9003 and 9033 to enforce the spending limits, the ban on private contributions, and the requirement to furnish records. Congress may wish to consider revising the public financing statutes to provide explicit authority for civil enforcement of these provisions.

Eligibility Requirements for Public Financing (revised 1993)
Section: 26 U.S.C. §§9002, 9003, 9032 and 9033

Recommendation: Congress should amend the eligibility requirements for publicly funded Presidential candidates to make clear that candidates who have been convicted of a willful violation of the laws related to the public funding process or who are not eligible to serve as President will not be eligible for public funding.

Explanation: Neither of the Presidential public financing statutes expressly restricts eligibility for funding because of a candidate's prior violations of law, no matter how severe. And yet public confidence in the integrity of the public financing system would risk serious erosion if the U.S. Government were to provide public funds to candidates who had been convicted of felonies related to the public funding process. Congress should therefore amend the eligibility requirements to ensure that such candidates do not receive public financing for their Presidential campaigns. The amendments should make clear that a candidate would be ineligible for public funds if he or she had been convicted of fraud with respect to raising funds for a campaign that was publicly financed, or if he or she had failed to make repayments in connection with a past publicly funded campaign or had willfully disregarded the statute or regulations. In addition, Congress should make it clear that eligibility to serve in the office sought is a prerequisite for eligibility for public funding.

Eligibility Threshold for Public Financing
Section: 26 U.S.C. §§9003 and 9033

Recommendation: Congress should raise the eligibility threshold for publicly funded Presidential candidates.

Explanation: The Federal Election Commission has administered the public funding provisions in four Presidential elections, and is in the midst of doing so for the fifth time. The statute provides for a cost-of-living adjustment (COLA) of the overall primary spending limitation, which has increased by 280 percent over the statutory limit established in 1974. There is, however, no corresponding adjustment to the threshold requirement. It remains exactly the same as it was in 1974. An adjustment to the threshold requirement would ensure that funds continue to be given only to candidates who demonstrate broad national support. To reach this higher threshold, Congress could increase the number of states in which the candidate had to raise the qualifying amount of matchable contributions; and/or increase the total amount of qualifying matchable contributions that had to be raised in each of the states.

Contributions to Presidential Nominees Who Receive Public Funds in the General Election (revised 1993)
Section: 26 U.S.C. §9003

Recommendation: Congress may wish to clarify that the public financing statutes prohibit the making and acceptance of contributions (either direct or in-kind) to Presidential candidates who receive full public funding in the general election.

Explanation: The Presidential Election Campaign Fund Act prohibits a publicly financed general election candidate from accepting private contributions to defray qualified campaign expenses. 26 U.S.C. §9003(b)(2). The Act does not, however, contain a parallel prohibition against the making of these contributions. Congress should consider adding a section to 2 U.S.C. §441a to clarify that individuals and committees are prohibited from making these contributions.

Fundraising Limitation for Publicly Financed Presidential Primary Campaigns
Section: 2 U.S.C. §§431(9)(B)(vi) and 441a

Recommendation: The Commission recommends that the separate fundraising limitation provided to publicly financed Presidential primary campaigns be combined with the overall limit. Thus, instead of a candidate's having a $10 million (plus COLA3/) limit for campaign expenditures and a $2 million (plus COLA) limit for fundraising (20 percent of overall limit), each candidate would have one $12 million (plus COLA) limit for all campaign expenditures.

Explanation: Campaigns that have sufficient funds to spend up to the overall limit usually allocate some of their expenditures to the fundraising category. These campaigns come close to spending the maximum permitted under both their overall limit and their special fundraising limit. Hence, by combining the two limits, Congress would not substantially alter spending amounts or patterns. For those campaigns which do not spend up to the overall expenditure limit, the separate fundraising limit is meaningless. Many smaller campaigns do not even bother to use it, except in one or two states where the expenditure limit is low, e.g., Iowa and New Hampshire. Assuming that the state limitations are eliminated or appropriately adjusted, this recommendation would have little impact on the election process. The advantages of the recommendation, however, are substantial. They include a reduction in accounting burdens and a simplification in reporting requirements for campaigns, and a reduction in the Commission's auditing task. For example, the Commission would no longer have to ensure compliance with the 28-day rule, i.e., the rule prohibiting committees from allocating expenditures as exempt fundraising expenditures within 28 days of the primary held within the state where the expenditure was made.

3/ Spending limits are increased by the cost-of-living adjustment (COLA), which the Department of Labor calculates annually.

FEDERAL ELECTION COMMISSION
PRESS OFFICE
(202)219-4155
(800)424-9530

FEBRUARY 1993

PRESIDENTIAL FUND — INCOME TAX CHECK-OFF STATUS

CALENDAR YEAR	1992	1991	1990	1989	1988	1987	1986	1985	1984	1983
JANUARY	185,784	$55,917	$191,076	$51,752	$189,239	$180,021	$93,644	$22,489	$169,832	$319,570
FEBRUARY	5,350,532	3,859,981	3,851,840	3,350,332	3,577,465	2,193,578	2,433,902	758,295	3,769,428	4,077,295
MARCH	8,543,872	8,967,739	9,103,550	7,231,448	7,217,318	9,554,967	7,928,518	7,535,879	8,732,837	8,847,655
APRIL	5,731,339	8,419,427	8,395,132	8,300,921	8,998,789	7,148,608	9,944,248	8,590,753	5,482,270	7,527,099
MAY	5,808,728	5,854,209	5,519,508	7,536,090	7,295,836	8,815,806	8,718,371	8,235,644	8,465,697	5,778,132
JUNE	3,635,585	4,845,802	4,707,103	3,903,518	3,218,574	4,071,899	4,092,492	2,986,813	2,757,257	2,987,695
JULY	1,119,885	958,772	1,228,985	1,402,031	2,219,724	2,033,012	2,453,593	3,455,350	3,171,247	3,000,431
AUGUST	254,933	508,805	434,132	1,347,288	1,098,980	830,094	947,582	1,910,141	1,113,469	2,071,318
SEPTEMBER	502,316	364,392	545,024	669,189	686,710	100,870	890,992	587,237	869,569	583,082
OCTOBER	201,739	144,886	162,037	172,340	155,329	550,265	100,254	310,643	208,484	172,454
NOVEMBER	194,241	294,056	258,973	250,685	279,726	267,288	260,196	229,308	205,530	182,126
DECEMBER	63,781	50,570	65,819	70,052	80,317	105,541	90,065	90,209	291,141	84,213
TOTAL CHECK-OFF YEAR-TO-DATE	$29,592,735	$32,322,336	$32,462,979	$32,295,646	$33,013,987	$33,651,947	$35,753,837	$34,712,761	$35,036,761	$35,631,068
TOTAL REPAYMENTS YEAR-TO-DATE	$566,078.68	$595,419.14	$39,148.13	$22,024.32	$103,499.76	$357,307.09	$61,640.71	$61,839.97	$505,807.15	$21,899.13
TOTAL DISBURSEMENTS YEAR-TO-DATE	$153,191,152.59	$21,200,000.00	$2,426.42	$1,843,016.87	$158,560,804.63	$17,784,000.00	$5,596.22	$1,617,841.66	$120,149,768.18	$11,786,485.65
FUND BALANCE	$4,061,080.87	$127,144,468.62	$119,426,713.48	$82,827,012.77	$52,462,359.12	$177,905,678.99	$161,880,422.90	$125,870,541.41	$92,713,782.10	$177,320,982.13

NOTES:
- MONTHLY DEPOSIT FIGURES ARE NOT AVAILABLE FOR THE YEARS 1973 – 1975.
- 1973 TAX RETURNS PROVIDED TAXPAYERS THE OPPORTUNITY TO DESIGNATE FUNDS FOR 1972 AND 1973.
- FIGURES FOR 1973 THROUGH 1976 CAN NOT BE VERIFIED.
- ALL MONTHLY DEPOSIT FIGURES HAVE BEEN PROVIDED BY THE U.S. DEPARTMENT OF THE TREASURY

ACCORDING TO INTERNAL REVENUE SERVICE INFORMATION, THE PERCENTAGE OF TAX RETURNS PROCESSED INDICATING ONE- OR TWO-DOLLAR DESIGNATIONS WAS:

1976 RETURNS—27.5 %	1980 RETURNS—28.7 %	1984 RETURNS—23.0 %	1988 RETURNS—20.1 %
1977 RETURNS—28.6 %	1981 RETURNS—27.0 %	1985 RETURNS—23.0 %	1989 RETURNS—19.8 %
1978 RETURNS—25.4 %	1982 RETURNS—24.2 %	1986 RETURNS—21.7 %	1990 RETURNS—19.5 %
1979 RETURNS—27.4 %	1983 RETURNS—23.7 %	1987 RETURNS—21.0 %	1991 RETURNS—17.7 %

*IRS "adjustment" of $51,068.84 has also been debitted. No explanation available at this time.

(OVER)

ATTACHMENT "B"

FEDERAL ELECTION COMMISSION
PRESS OFFICE
(202)219-4155
(800)424-9530

PRESIDENTIAL FUND — INCOME TAX CHECK-OFF STATUS

CALENDAR YEAR	1982	1981	1980	1979	1978	1977	1976	1975	1974	1973
JANUARY	$457,372	$684,510	$326,184	$482,973	$689,488	$746,685	$876,771			
FEBRUARY	3,790,858	4,141,426	7,247,271	4,583,893	5,986,292	7,811,426	7,487,457			
MARCH	11,013,954	11,254,856	8,625,855	9,637,824	9,006,764	10,472,777	8,828,310			
APRIL	8,338,933	7,424,035	7,186,840	6,713,117	9,765,133	7,054,795	7,090,211			
MAY	7,427,745	7,665,407	6,563,699	6,581,790	5,941,997	6,029,693	6,073,861			
JUNE	4,145,029	4,592,000	3,933,738	4,233,077	4,851,826	3,618,171	2,725,832			
JULY	4,193,252	3,773,686	4,061,737	3,035,907	2,224,613	350,497	323,616			
AUGUST	1,049,706	871,842	409,085	264,192	409,288	225,626	128,536			
SEPTEMBER	272,412	300,194	235,375	168,705	136,750	222,142	88,078			
OCTOBER	143,312	140,723	109,983	123,841	127,755		47,965			
NOVEMBER	129,927	134,997	104,440	83,457	69,887	40,564	36,413			
DECEMBER	61,382	85,378	34,210	34,571	36,716	33,832	24,895			
TOTAL CHECK-OFF YEAR-TO-DATE	$36,023,882	$41,049,052	$38,838,417	$35,841,347	$36,248,689	$36,606,009	$33,731,945	$31,656,525	$27,591,546	$2,427,000
TOTAL REPAYMENTS YEAR-TO-DATE	$58,399.69	$202,287.60	$1,094,097.68	$23,473.82	$163,725.41	$1,037,029.10	-0-	-0-	-0-	-0-
TOTAL DISBURSEMENTS YEAR-TO-DATE	$1,070.22	$630,255.73	$101,427,115.89	$1,050,000.00	$6,000.00	$521,124.42	$69,467,521.18	$2,590,502.21	-0-	-0-
FUND BALANCE	$153,454,500.65	$114,373,289.18	$73,752,265.31	$135,246,808.52	$100,331,995.70	$80,827,571.29	$23,805,658.61	$58,551,244.79	$27,591,546.00	$2,427,000.00

(OVER)

WEDNESDAY, FEBRUARY 24, 1993.

OFFICE OF PERSONNEL MANAGEMENT

WITNESSES

PATRICIA W. LATTIMORE, ACTING DIRECTOR

JEAN M. BARBER, ACTING ASSOCIATE DIRECTOR FOR PERSONNEL SYSTEMS AND OVERSIGHT

CURTIS J. SMITH, ASSOCIATE DIRECTOR FOR RETIREMENT AND INSURANCE

Mr. HOYER. We will now hear from the Office of Personnel Management, one of the most important agencies in government. I want to welcome to the committee Patricia Lattimore, who is the Acting Director of the Office of Personnel Management. We are very pleased to have her here with us today, and Ms. Lattimore you may proceed in whichever manner you wish. We will include your full statement for the record at this time, and you might want to abbreviate and highlight those points that you particularly want to communicate to us.

You can introduce who you have with you at the table.

Ms. LATTIMORE. As you said, my name is Patricia Watkins Lattimore, and to my right is Curtis Smith, who is the Associate Director for the Retirement and Insurance programs, you may be somewhat familiar with, and to my left is Jean Barber, who is the Acting Associate Director for Personnel Systems and Oversight.

Mr. HOYER. You may proceed. Thank you very much.

Ms. LATTIMORE. To sum up the form of it, I guess I need to emphasize at the outset that I won't be able to comment on any specific programs and initiatives. We don't in fact have the President's budget as of yet. We will be glad to address any other questions you may have and if we do not have a director at the time the budget is issued, I will be glad to return and answer any questions you may have about our requests.

I thought I would just share with you as I did in our statement a number of things we think are somewhat significant. Basically, we are completing the automation of our 26 OPM service centers to improve our job information, applicant processing, and referral services. We are somewhat proud of our automated referral system that now includes job applicants, disabled veterans and displaced Department of Defense employees and, growing out of Hurricane Andrew, we now have established a database of volunteers for national disasters.

During the past year we have worked closely with DOD and the Labor Department to structure incentives and tools for downsizing to minimize adverse impact on employees' lives and to ease transition to a smaller Federal work force.

In the employee development and training area, we have instituted a number of policy initiatives, focusing on simplifying current procedures, enabling agencies to pay for academic degrees for employees as part of the long run staff development and assisting agencies in being prepared for possible replacement of a large number of executives who are eligible to retire starting in calendar year 1994.

As you know, we have been working closely with the other pay agent members and the Federal Salary Council to implement the locality pay provisions of the Federal Employees Pay Comparability Act, and we will continue to work closely with those groups to support the President's recent announcements regarding locality pay.

The Federal Employees Pay Comparability Act mandates that OPM develop a plan for a new pay and classification system for law enforcement officers and report on this plan to Congress. In conjunction with that, we conducted a study of law enforcement as well as Federal fire fighters and both those reports are under review by the administration and should be submitted shortly.

For several years, the Department of Defense has been under a congressional prohibition against using the number of subordinates as a factor in grading or titling supervisory positions, and after our initially working with DOD to develop a temporary guide meeting the congressional restriction, OPM decided to go beyond the statutory requirements and devise a guide that could be used by all agencies. We do not expect this guide which is soon to be published to change a lot of grades of existing supervisor positions, but we do think the new guide will better support agency efforts to reduce the size and number of subordinate organizations.

OPM is also actively engaged in promoting work and family programs in the Federal Government based on its April 1992 report to Congress: "A Study of the Work and Family Needs of the Federal Workforce," and through our work and family program centers, we are providing Government-wide leadership, guidance and comprehensive technical assistance.

We are also in the process of developing regulations to implement the recently enacted Family and Medical Leave Act. The Department of Labor, by statute, must prescribe regulations within 120 days for the private sector and although there is no statutory deadline for the Federal work force, we are working hand-in-hand with the Department of Labor and we anticipate issuing regulations for the Federal work force at the same time those are issued for the private sector in August of this year.

Mr. HOYER. Is August 1 the date?

Ms. LATTIMORE. August 5th, yes. OPM also administers the Federal employee retirement, health benefits and life insurance programs. We essentially operate a large scale financial services enterprise providing for a variety of benefit services to over 2.8 million active employees, and 2.3 million retirees and qualified dependents. Each year we disburse recurring annuity payments totaling over $33 billion, stop payments on 84,000 accounts and initiate payments to approximately 130,000 new beneficiaries.

Effective with the first pay period of this year under this program, we implemented significant reductions in the premiums charged to Federal employees with life insurance coverage and in

order to provide employees with an opportunity to add to their existing coverages or to enroll in the FEGLI program if they previously waived or canceled coverage, we will be sponsoring an open enrollment period starting on March 29th.

The final issue I would like to hit on today concerns the Federal Employees Health Benefits Program. As you know, before 1990, the Government share of the premiums for that program were determined by the "Big Six" cost-sharing formula. When Aetna withdrew from FEHB in 1990, Congress enacted a temporary formula often referred to as the Phantom Big–6 Formula. This arrangement specified that a replacement premium be calculated for the Aetna plan in order to preserve the Big Six base through calendar year 1993. With the expiration of that temporary authority, the Government maximum contribution for contract year 1994 will be calculated now using the Big Five plans. This will result in a shift of some of the premium costs from the Government to enrollees. The effect on individual enrollees will vary depending upon their plan selection and the portion of the premium for that particular plan that is currently being paid by their employing agency.

I hope our somewhat brief overview is helpful, and we are available to answer any questions that you may have.

[The statement follows:]

PATRICIA WATKINS LATTIMORE

Patricia Watkins Lattimore is currently serving as the Acting Director, United States Office of Personnel Management (OPM). Ms. Lattimore is OPM's Associate Director for Administration, with responsibility for OPM's nationwide administrative infrastructure--acquisition planning and procurement, human resource management, accounting and payroll systems, information resources management, telecommunications, facilities and property management.

Ms. Lattimore, a native of the District of Columbia, began her Federal career as a clerical employee with the U.S. Post Office Department immediately upon graduation from public high school in 1964. She is a graduate of Southeastern University and has engaged in graduate studies at both Federal City College and American University. During her twenty-eight year federal career, Ms. Lattimore progressed through a series of increasingly responsible positions in the legislative and executive branches of government.

From 1968 through 1971 Ms. Lattimore served as a legislative and press aide in the House of Representatives (former Representatives Samuel N. Friedel, MD, and Shirley Chisholm, NY). From 1972 to 1977 she served as a personnel management evaluator for the Office of Personnel Management in Philadelphia, Pennsylvania, and Washington, D. C.

In mid 1978, Ms. Lattimore joined the Department of Labor, and over an eight-year period served in a number of challenging positions -- supervisory personnel specialist, personnel officer, Regional Administrator, Director of Personnel Policy and Standards, and the Director, Office of Personnel Management Services, in a newly-formed organization -- the National Capital Service Center (NCSC). In 1986 she joined the Senior Executive Service (SES) when she became director of the entire NCSC, an organization that provides centralized administrative support for the Department of Labor.

Ms. Lattimore's career has been enhanced by her positive, professional attitude and boundless energy. She is the extremely proud mother of an eighteen-year old daughter, Courtney.

JEAN M. BARBER
Acting Associate Director for Personnel Systems and Oversight

Ms. Barber was appointed Deputy Associate Director, Personnel Systems and Oversight (PSO), in April 1990. In that capacity she serves as second-in-command of the OPM component responsible for the governmentwide classification and pay programs, personnel compliance and evaluations, performance management, workforce information, and employee and labor relations. The Office also approves and evaluates personnel research and demonstration projects to identify and test innovative approaches to solving specific personnel problems and improving human resources management in the Government.

Ms. Barber entered Government service in 1968 as a budget analyst with the Department of the Army and joined the Civil Service Commission in 1969 as a management intern. She has worked in a variety of functional areas, including personnel policy development, operations, and labor relations. Ms. Barber also served as director of the retirement and insurance programs covering Federal employees.

Ms. Barber is a graduate of Barnard College and holds a masters degree from Yale University. She has received several major awards.

- In 1978 she received the Commissioner's Award for Distinguished Service for her participation in the Personnel Management Project, which culminated in the Civil Service Reform Act of 1978.

- In 1982 she was given the Director's Award for Distinguished Service for directing a major study of the operation and management of the trust funds associated with the retirement and insurance programs.

- She received a Presidential Rank Award for Meritorious Service in 1987.

CURTIS J. SMITH
Associate Director for Retirement and Insurance

Appointed as Associate Director for Retirement and Insurance, Office of Personnel Management, in December 1989, Mr. Smith oversees the Civil Service Retirement System, the Federal Employees Retirement System, the Federal Employees Health Benefits Program, and the Federal Employees Group Life Insurance Program. He has both policy and operational responsibility for these programs. Most of his Federal career has been with the Office of Personnel Management. Mr. Smith began his OPM career in 1977. His early work involved development of legislative and policy matters regarding the Government's benefits programs, especially retirement and the design of the new Federal Employees Retirement System. He has held various senior level positions throughout OPM. In 1986 he was named Associate Director for Career Entry and Employee Development. In 1984 he was selected to be senior budget examiner for personnel issues at the Office of Management and Budget, returning to OPM in 1985 as Policy Advisor to the Director, Office of Personnel Management.

In 1989, Mr. Smith was awarded the Rank of Distinguished Executive.

STATEMENT OF
PATRICIA WATKINS LATTIMORE
ACTING DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT

at a hearing of the

SUBCOMMITTEE ON TREASURY, POSTAL SERVICE AND
GENERAL GOVERNMENT
COMMITTEE ON APPROPRIATIONS
U.S. HOUSE OF REPRESENTATIVES

on the

OVERVIEW OF THE MISSION
OF THE OFFICE OF PERSONNEL MANAGEMENT

FEBRUARY 24, 1993

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

MY NAME IS PATRICIA WATKINS LATTIMORE AND I AM PLEASED TO APPEAR TODAY TO DISCUSS THE OFFICE OF PERSONNEL MANAGEMENT'S (OPM) MAJOR PROGRAM ISSUES. IN TESTIFYING TODAY, I WANT TO EMPHASIZE AT THE OUTSET THAT THE ADMINISTRATION IS CURRENTLY FORMULATING THE PRESIDENT'S FY 1994 BUDGET. ACCORDINGLY, I AM NOT IN A POSITION TO PROVIDE YOU WITH THE ADMINISTRATION'S POSITION ON FUNDING FOR SPECIFIC PROGRAMS OR ACTIVITIES. AS SOON AS THE PRESIDENT'S 1994 BUDGET IS RELEASED, IF WE DO NOT HAVE A DIRECTOR CONFIRMED AT THAT TIME, I WOULD BE PLEASED TO ADDRESS ANY QUESTIONS YOU MAY HAVE ON THE OPM REQUEST.

WE ARE WORKING ON A NUMBER OF SIGNIFICANT ISSUES AT OPM TO EITHER IMPLEMENT NEW LAWS OR IMPROVE OUR ADMINISTRATION OF EXISTING AUTHORITIES.

CURRENTLY, WE ARE COMPLETING THE AUTOMATION OF OUR 26 OPM SERVICE CENTERS TO IMPROVE OUR JOB INFORMATION, APPLICANT PROCESSING, AND REFERRAL SERVICES. WE WILL BE TYING OUR CENTERS TOGETHER ELECTRONICALLY SO THAT OUR CUSTOMERS--THE FEDERAL AGENCIES AND THE AMERICAN PUBLIC--WILL RECEIVE INFORMATION ABOUT JOB OPPORTUNITIES AND AVAILABLE APPLICANTS INSTANTANEOUSLY ANYWHERE IN THE COUNTRY. OUR AUTOMATED REFERRAL SYSTEMS NOW INCLUDE JOB APPLICANTS, DISABLED VETERANS AND DISPLACED DEPARTMENT OF DEFENSE (DOD) EMPLOYEES--AND, GROWING OUT OF HURRICANE ANDREW, WE NOW HAVE ESTABLISHED A DATABASE OF VOLUNTEERS FOR NATIONAL DISASTERS. OUR CURRENT PLANS INCLUDE EXPANSION OF OUR AUTOMATED CAPABILITIES TO COVER DISPLACED EMPLOYEES FROM OTHER AGENCIES AND DISABLED CITIZENS WHO FEEL THEY ARE NOW ABLE TO RETURN TO WORK.

DURING THE PAST YEAR, WE WORKED CLOSELY WITH DOD AND THE LABOR DEPARTMENT TO STRUCTURE INCENTIVES AND TOOLS FOR DOWNSIZING, INCLUDING THE GRANTING OF 118 EARLY OUT RETIREMENT AUTHORITIES IN FY 1992. WE CONTINUE TO DEVELOP METHODS TO MINIMIZE ADVERSE IMPACT ON EMPLOYEES' LIVES AND TO EASE THE TRANSITION TO A SMALLER WORKFORCE.

IN SPITE OF DOWNSIZING, THE FEDERAL GOVERNMENT STILL HIRED OVER 60,000 CAREER CIVIL SERVANTS THIS PAST YEAR. IN CONJUNCTION WITH OUR HIRING ACTIVITIES, WE ARE PURSUING A

VARIETY OF VENTURES AND PARTNERSHIPS WITH SCHOOLS AND GROUPS TO ENHANCE THE DIVERSIFICATION OF THE FEDERAL WORKFORCE. DUE TO OUR EFFORTS WITH THE HISTORICALLY BLACK COLLEGES AND UNIVERSITIES, WE HIRED 1,250 STUDENTS FROM THOSE INSTITUTIONS INTO OUR SUMMER EMPLOYMENT PROGRAMS LAST YEAR. SIMILAR ACTIVITIES ARE BEING PURSUED WITH A NUMBER OF HISPANIC-SERVING EDUCATIONAL INSTITUTIONS. IN SPITE OF AREAS NEEDING IMPROVEMENT, THE FEDERAL GOVERNMENT LEADS THE NATION IN DIVERSIFYING ITS WORKFORCE.

IN THE EMPLOYEE DEVELOPMENT AND TRAINING AREA, RECENT POLICY INITIATIVES HAVE FOCUSED ON SIMPLIFYING CURRENT PROCEDURES; ENABLING AGENCIES TO PAY FOR ACADEMIC DEGREES FOR EMPLOYEES AS PART OF THEIR LONG-RANGE STAFF DEVELOPMENT EFFORTS; AND THE NECESSITY FOR ENGAGING IN SYSTEMATIC NEEDS ASSESSMENTS BASED ON WORKPLACE REQUIREMENTS PRIOR TO MAKING SPENDING DECISIONS ON TRAINING AND OTHER DEVELOPMENTAL ACTIVITIES.

ADDITIONALLY, WE HAVE DEVELOPED MATERIALS AND PROCESSES TO ASSIST AGENCIES IN OPERATING MANAGEMENT SUCCESSION PROGRAMS TO PREPARE CANDIDATES, PARTICULARLY WOMEN AND MINORITIES, TO REPLACE THE LARGE NUMBER OF EXECUTIVES EXPECTED TO RETIRE STARTING IN CALENDAR YEAR 1994.

AS YOU KNOW, OPM HAS BEEN WORKING CLOSELY WITH THE OTHER PAY AGENT MEMBERS AND THE FEDERAL SALARY COUNCIL TO IMPLEMENT THE

LOCALITY PAY PROVISIONS OF THE FEDERAL EMPLOYEES PAY COMPARABILITY ACT OF 1990 (FEPCA) BY JANUARY 1994. WE WILL CONTINUE TO WORK CLOSELY WITH THOSE GROUPS TO SUPPORT THE PRESIDENT'S RECENT ANNOUNCEMENT THAT HE WILL SEEK LEGISLATION TO DELAY IMPLEMENTATION OF LOCALITY PAY UNTIL 1995.

SECTION 412 OF FEPCA MANDATED THAT OPM DEVELOP A PLAN FOR A NEW PAY AND CLASSIFICATION SYSTEM FOR LAW ENFORCEMENT OFFICERS AND REPORT ON THIS PLAN TO CONGRESS. AS PART OF THE STUDY, OPM ENGAGED IN FORMAL CONSULTATION, THROUGH AN ADVISORY COMMITTEE, WITH THE MAJOR EMPLOYING AGENCIES AND WITH EMPLOYEE GROUPS THAT REPRESENT EMPLOYEES ENGAGED IN LAW ENFORCEMENT WORK. AN OPM STAFF PROPOSAL FOR A NEW SEPARATE JOB EVALUATION SYSTEM USING EVALUATION FACTORS DIRECTLY RELATED TO LAW ENFORCEMENT WORK AND FOR A VARIETY OF PAY FLEXIBILITIES WAS PRESENTED IN NOVEMBER 1992 WITH AN OPPORTUNITY FOR INTERESTED PARTIES TO COMMENT. THE FINAL REPORT OF THE STUDY IS UNDER REVIEW WITHIN THE ADMINISTRATION.

IN CONJUNCTION WITH OUR STUDY OF LAW ENFORCEMENT OCCUPATIONS, WE CONDUCTED A SIMILAR STUDY FOR FEDERAL FIREFIGHTERS, AND THAT REPORT IS ALSO UNDER REVIEW BY THE ADMINISTRATION.

OPM HAS, OVER THE PAST 2 YEARS, UNDERTAKEN A MAJOR INITIATIVE TO RE-EXAMINE THE FEDERAL PERFORMANCE MANAGEMENT SYSTEM AS WE

WERE CHARGED WITH DEVELOPING RECOMMENDED CHANGES AND ANY NECESSARY LEGISLATION SO THAT NEW PROVISIONS COULD BE IMPLEMENTED BY OCTOBER 1, 1993, WHEN THE PERFORMANCE MANAGEMENT AND RECOGNITION SYSTEM (PMRS) AUTHORIZING LEGISLATION "SUNSETS".

ALTHOUGH THERE IS WIDESPREAD DISSATISFACTION WITH THE VARIOUS FEDERAL PERFORMANCE MANAGEMENT SYSTEMS, THERE IS A LACK OF CONSENSUS REGARDING WAYS TO RESOLVE THE PROBLEMS. WITH OPM SUPPORT, THESE SYSTEMS WERE STUDIED INTENSIVELY BY THE NATIONAL ACADEMY OF SCIENCES' COMMITTEE ON PERFORMANCE APPRAISAL FOR MERIT PAY AND BY SPECIALLY CONSTITUTED ADVISORY COMMITTEES INCLUDING REPRESENTATIVES OF EMPLOYEES AND MANAGEMENT. THE DIRECTOR OF OPM THEN CONVENED A WORKING GROUP OF AGENCY DIRECTORS OF PERSONNEL TO DEVELOP A SPECIFIC PROPOSAL FOR CHANGE, DRAWING EXTENSIVELY ON THE ADVISORY REPORTS. THE RESULT OF THAT PROCESS IS A DRAFT FRAMEWORK OF POLICY AND PROGRAM INITIATIVES FOR PERFORMANCE MANAGEMENT AND POSITION CLASSIFICATION.

OPM STAFF IS NOW WORKING TO CRAFT A DETAILED TECHNICAL PROPOSAL REFLECTIVE OF THESE STUDIES AND ADVISORY GROUP RECOMMENDATIONS.

FOR SEVERAL YEARS, DOD HAS BEEN UNDER A CONGRESSIONAL PROHIBITION AGAINST USING NUMBER OF SUBORDINATES AS A FACTOR

IN GRADING OR TITLING SUPERVISORY POSITIONS. AFTER INITIALLY WORKING WITH DOD TO DEVELOP A TEMPORARY GUIDE MEETING THE CONGRESSIONAL RESTRICTION, OPM DECIDED TO GO BEYOND THE STATUTORY REQUIREMENTS AND DEVISE A GUIDE THAT COULD BE USED BY ALL AGENCIES. THE RESULT IS A MORE USEFUL TOOL FOR CLASSIFYING SUPERVISORY JOBS THAN THE SUPERVISORY GRADE EVALUATION GUIDE (SGEG) IT REPLACES. ALTHOUGH WE DO NOT EXPECT IT TO CHANGE THE GRADES OF MANY EXISTING SUPERVISORY POSITIONS, THE NEW GUIDE WILL BETTER SUPPORT AGENCY EFFORTS TO REDUCE THE SIZE AND NUMBER OF SUBORDINATE ORGANIZATIONS BECAUSE OF THE RANGE OF CRITERIA IT TAKES INTO ACCOUNT AND BECAUSE IT DOES NOT USE NUMBERS OF SUBORDINATES TO CLASSIFY POSITIONS.

THROUGHOUT THE DEVELOPMENT PROCESS WE HAVE MET WITH THE AGENCIES TO DISCUSS THEIR PROBLEMS WITH EACH NEW DRAFT OF THE GUIDE AND HOW THEY CAN BE OVERCOME. WHEN WE DISTRIBUTED OUR PROPOSED FINAL VERSION FOR A LAST ROUND OF AGENCY COMMENTS, MANY EDITORIAL CHANGES WERE RECOMMENDED BUT MOST AGREED THAT THEIR MAJOR CONCERNS HAD BEEN RESOLVED. MANY OF THE CHANGES RECOMMENDED WERE MADE. THE FINAL STANDARD IS BEING PRINTED AND ADVANCE COPIES HAVE BEEN RELEASED. WE EXPECT PUBLICATION AND DISTRIBUTION BY EARLY APRIL 1993.

BECAUSE MORE THAN 175,000 OF THE MOST IMPORTANT POSITIONS IN THE AGENCIES WILL BE COVERED BY THE NEW GUIDE, WE HAVE

EXTENDED THE TIME WITHIN WHICH WE WOULD NORMALLY EXPECT AGENCIES TO COMPLETE APPLICATION OF THE NEW GUIDE FROM 6 MONTHS TO 18 MONTHS.

IN A DIFFERENT VEIN, IN RESPONSE TO A REQUEST FROM CONGRESS AS WELL AS ALLEGATIONS THAT CAME DIRECTLY TO OPM, WE HAVE COMPLETED AN INVESTIGATION OF ALLEGED MERIT SYSTEMS VIOLATIONS AT THE DEPARTMENT OF THE INTERIOR, INVOLVING THE MOVEMENT OF POLITICAL APPOINTEES INTO CAREER SERVICE AT TRANSITION TIME. OUR FINAL REPORT, INCLUDING REQUIREMENTS FOR CORRECTIVE ACTION, HAS BEEN FORWARDED TO THE DEPARTMENT OF THE INTERIOR, WITH COPIES TO OUR CONGRESSIONAL OVERSIGHT COMMITTEES AS WELL AS TO GAO AND THE OFFICE OF THE SPECIAL COUNSEL.

NOW, WE HAVE BEEN ASKED BY THE PRESIDENT TO UNDERTAKE A REVIEW OF PAY BONUSES AWARDED BY THE OUTGOING ADMINISTRATION IN ITS FINAL MONTHS, AND THAT REVIEW IS UNDERWAY.

WE ALSO WANT TO NOTE THAT OPM IS ACTIVELY ENGAGED IN PROMOTING WORK AND FAMILY PROGRAMS IN THE FEDERAL GOVERNMENT, BASED ON ITS APRIL 1992 REPORT TO CONGRESS: A STUDY OF THE WORK AND FAMILY NEEDS OF THE FEDERAL WORKFORCE.

THROUGH ITS WORK AND FAMILY PROGRAM CENTER, OPM IS PROVIDING GOVERNMENTWIDE LEADERSHIP, POLICY GUIDANCE, AND COMPREHENSIVE TECHNICAL ASSISTANCE.

IN COLLABORATION WITH THE INTERAGENCY PARTNERSHIP ON WORK AND FAMILY, OPM IS FOCUSING ON SEVERAL KEY ISSUES SUCH AS QUALITY STANDARDS FOR CHILD CARE CENTERS, MANAGERIAL TRAINING RELATED TO WORK AND FAMILY, AND IDENTIFYING AND MARKETING PROGRAM RESOURCE MATERIALS FOR AGENCIES.

WE ARE IN THE PROCESS OF DEVELOPING REGULATIONS TO IMPLEMENT THE RECENTLY ENACTED FAMILY AND MEDICAL LEAVE ACT OF 1993 (PUBLIC LAW 103-3). TITLE II OF THE ACT PROVIDES UNPAID FAMILY AND MEDICAL LEAVE FOR FEDERAL EMPLOYEES COVERED BY THE ANNUAL AND SICK LEAVE SYSTEM ESTABLISHED UNDER CHAPTER 63 OF TITLE 5, UNITED STATES CODE, AND CERTAIN OTHER FEDERAL EMPLOYEES.

THE DEPARTMENT OF LABOR (DOL) MUST PRESCRIBE REGULATIONS TO IMPLEMENT TITLE I WITHIN 120 DAYS AFTER ENACTMENT. ALTHOUGH THERE IS NO STATUTORY DEADLINE FOR OPM TO ISSUE REGULATIONS, WE ARE WORKING CLOSELY WITH DOL AND PLAN TO PUBLISH REGULATIONS IMPLEMENTING TITLE II AT APPROXIMATELY THE SAME TIME DOL IMPLEMENTS TITLE I FOR THE PRIVATE SECTOR.

THE 5-YEAR EXPERIMENTAL LEAVE TRANSFER/LEAVE BANK PROGRAM AUTHORIZED BY CONGRESS IN 1988 EXPIRES IN OCTOBER 1993, AND OPM IS REQUIRED TO MAKE A REPORT TO CONGRESS ON THE PROGRAM IN APRIL 1993.

UNDER THE LEAVE TRANSFER PROGRAM, EMPLOYEES ARE PERMITTED TO "DONATE" A PORTION OF THEIR ACCRUED ANNUAL LEAVE TO ANOTHER EMPLOYEE WHO NEEDS ADDITIONAL PAID TIME OFF BECAUSE OF A MEDICAL EMERGENCY OR A MEDICAL CONDITION AFFECTING THE EMPLOYEE OR THE EMPLOYEE'S FAMILY MEMBER. UNDER THE SEPARATE LEAVE BANK PROGRAM, USED EXPERIMENTALLY IN SIX FEDERAL AGENCIES, EMPLOYEES CONTRIBUTE ANNUAL LEAVE TO A COMMON LEAVE FUND WITHIN EACH AGENCY AND THEN APPLY TO WITHDRAW LEAVE FROM THE FUND IF THEY ENCOUNTER A PERSONAL OR FAMILY MEDICAL EMERGENCY.

OPM COLLECTED DATA FROM AGENCIES IN LATE 1992 AND WE ARE PREPARING A FINAL REPORT TO CONGRESS.

OF COURSE, OPM ALSO ADMINISTERS THE FEDERAL EMPLOYEE RETIREMENT, HEALTH BENEFITS, AND LIFE INSURANCE PROGRAMS. OPERATING ESSENTIALLY AS A LARGE SCALE FINANCIAL SERVICES ENTERPRISE, WE PROVIDE A WIDE VARIETY OF BENEFIT SERVICES TO OVER 2.8 MILLION ACTIVE EMPLOYEES AND 2.3 MILLION RETIREES AND QUALIFIED DEPENDENTS. EACH YEAR, WE DISBURSE RECURRING

ANNUITY PAYMENTS TOTALING OVER $33 BILLION, STOP PAYMENTS ON 84,000 ACCOUNTS, AND INITIATE PAYMENTS TO APPROXIMATELY 130,000 NEW BENEFICIARIES. IN ADDITION, WE COLLECT OVER $15 BILLION IN RETIREMENT CONTRIBUTIONS, $13 BILLION IN HEALTH INSURANCE PREMIUMS, AND $1 BILLION IN LIFE INSURANCE PREMIUMS. THESE MONIES ARE DEPOSITED IN THREE SEPARATE TRUST FUNDS WHOSE AGGREGATE BALANCES AT THE END OF FY 1992 TOTALED $305 BILLION. THE SCOPE OF THE BENEFIT PROGRAMS ADMINISTERED ENCOMPASSES THE POSTAL SERVICE, THE EXECUTIVE, LEGISLATIVE, AND JUDICIAL BRANCHES, AND FEDERAL INSTALLATIONS AND ANNUITANTS LOCATED THROUGHOUT THE WORLD.

EFFECTIVE WITH THE FIRST PAY PERIOD OF THIS YEAR, WE IMPLEMENTED SIGNIFICANT REDUCTIONS IN THE PREMIUMS CHARGED UNDER THE FEDERAL EMPLOYEES GROUP LIFE INSURANCE (FEGLI) PROGRAM. IN ORDER TO PROVIDE EMPLOYEES WITH THE OPPORTUNITY TO ADD TO THEIR EXISTING COVERAGES OR TO ENROLL IN FEGLI IF THEY PREVIOUSLY WAIVED OR CANCELED COVERAGE, WE WILL BE SPONSORING AN OPEN ENROLLMENT PERIOD TO BE HELD FROM MARCH 29 THROUGH APRIL 30, 1993. THIS WILL BE THE FIRST OPEN ENROLLMENT PERIOD OFFERED UNDER THE PROGRAM IN OVER SEVEN YEARS.

THE FINAL ISSUE I WOULD LIKE TO TOUCH ON TODAY CONCERNS THE FEDERAL EMPLOYEES HEALTH BENEFITS (FEHB) PROGRAM. BEFORE 1990, THE GOVERNMENT SHARE OF THE PREMIUMS FOR THAT PROGRAM

WAS DETERMINED BY THE "BIG SIX" COST-SHARING FORMULA. THE MAXIMUM GOVERNMENT CONTRIBUTION WAS 60 PERCENT OF THE UNWEIGHTED AVERAGE OF THE PREMIUMS FOR THE BIG SIX PLANS, DETERMINED SEPARATELY FOR SELF ONLY AND FAMILY PREMIUMS. THE BIG SIX WERE DEFINED BY STATUTE TO BE THE HIGH OPTIONS OF THE TWO GOVERNMENT-WIDE PLANS (BLUE CROSS/BLUE SHIELD AND AETNA), THE TWO LARGEST EMPLOYEE ORGANIZATION PLANS, AND THE TWO LARGEST HEALTH MAINTENANCE ORGANIZATIONS (HMO'S).

WHEN AETNA WITHDREW FROM THE FEHB PROGRAM IN 1989, CONGRESS ENACTED A TEMPORARY FORMULA, OFTEN REFERRED TO AS THE "PHANTOM BIG-6" FORMULA. THE OMNIBUS BUDGET RECONCILIATION ACT OF 1990 EXTENDED THE USE OF THIS FORMULA THROUGH CALENDAR YEAR 1993. THIS ARRANGEMENT SPECIFIED THAT A REPLACEMENT PREMIUM BE CALCULATED FOR THE AETNA PLAN IN ORDER TO PRESERVE THE "BIG-6" BASE. THE REPLACEMENT (PHANTOM) PREMIUM WAS CALCULATED BY APPLYING THE RATE OF INCREASE THAT OCCURRED FOR THE REMAINING FIVE PLANS TO THE PREMIUM FOR THE AETNA PLAN.

WITH THE EXPIRATION OF THAT TEMPORARY AUTHORITY, THE GOVERNMENT MAXIMUM CONTRIBUTION FOR CONTRACT YEAR 1994 WILL BE CALCULATED USING THE REMAINING "BIG-5" PLANS. THIS WILL SHIFT SOME PREMIUM COSTS FROM THE GOVERNMENT TO ENROLLEES. THE EFFECT ON INDIVIDUAL ENROLLEES WILL VARY DEPENDING ON THEIR PLAN SELECTION AND THE PORTION OF PLAN PREMIUM

CURRENTLY BEING PAID BY THEIR EMPLOYING AGENCY.

THESE ARE JUST SOME OF THE SIGNIFICANT ONGOING INITIATIVES WHICH ARE UNDERWAY AT THE OFFICE OF PERSONNEL MANAGEMENT. I HOPE THIS BRIEF REVIEW HAS BEEN HELPFUL TO THE SUBCOMMITTEE, AND I WILL BE GLAD TO ANSWER ANY QUESTIONS YOU MAY HAVE.

OFFICE OF PERSONNEL MANAGEMENT

FY 93 BUDGET

(dollars in thousands)

	FY 93	
	OBLIGATIONS	FTE
Salaries and Expenses	118,384 *	1,730
Transfers from the Trust Funds (annual)	82,532	1,582
Transfers from the Trust Funds (no-year) FAPS Project	13,475	18
Advances and Reimbursements	28,000	440
Revolving Fund	247,027	2,207
Human Resources Development	122,182	424
Investigations	116,216	1,492
Other	8,629	291
OPM TOTALS	489,418	5,977
Inspector General	10,727	123
Salaries & Expenses	4,227	51
Trust Funds	6,500	72
Advances & Reimbursements	0	0
TOTALS	500,145	6,100

* Excludes $616 transferred to GSA for the National Advisory Council on the Public Service. Total FY 93 S&E appropriation was $119,000.

LOCALITY PAY

Mr. HOYER. Thank you very much. Let me at the outset thank Charlene Luskey of your agency who has been very, very helpful to us on a recent matter. She was very responsive and effective and we appreciate it very much.

How much of the $1.361 billion savings projected for fiscal year 1994 is related to the pay freeze and how much to the delay in locality pay?

Ms. LATTIMORE. Jean, do you have some specific figures?

Ms. BARBER. All of the $1.3 as I understand it is related to the ECI adjustment.

Mr. HOYER. Do you have an estimation of the locality pay?

Ms. BARBER. No, we do not have an estimation of the locality pay. Current law said that we could spend up to $1.8 billion, but we have not calculated all the aspects, so it is not possible to give a firm figure on what that locality pay would have been.

Mr. HOYER. When is that scheduled to be completed?

Ms. BARBER. When is what scheduled to be completed, sir?

Mr. HOYER. The locality survey. That is what you said had not been completed yet, therefore you could not determine it.

Ms. BARBER. The surveys will not be completed until the end of September. The last one will be delivered in August. After that time, we meet with the Federal Salary Council and they did give us their recommendations and then the report actually goes to the President, I believe, in December.

VALIDITY OF BLS SURVEY

Mr. HOYER. I understand there have been some questions raised concerning the survey, with respect to the validity of the assessments which are being made. Obviously, as you know I was the sponsor of the study, it resulted in a joint effort between OPM, OMB, and the Congress, as well as, the White House itself. We have already made adjustments in three high cost areas of the country.

The question is now being raised as to the validity of the study, and therefore partly justifying the delay in implementing locality pay from January 1, 1994 to January 1, 1995. Will you discuss first of all the validity of the statistical and procedural proponents that are being followed to determine the locality disparity?

Ms. BARBER. Well, there are a number of issues that have been raised, Mr. Chairman, as BLS has been out conducting the surveys and then feeding the data back to us and we have shared it with OMB and the Federal Salary Council. We are basically following the same methodology that was followed when we made the nationwide comparison under the old system. There were some problems with that methodology then.

Those problems have been, we are finding, greatly exacerbated when you are looking at it not as a national economy or even the Government as a whole, but a little piece of the Government in one location and a little piece of the national economy in one location. Some of the distortions when you do it in that small framework become much greater. The structure of work is very different in the

private sector from the Federal Government and so this kind of comparison is inherently problematic.

It is often said that the private sector is more of a pyramid and we are more pear-shaped with more jobs sort of toward the middle range, and so when you need these comparisons, they are very hard to make. In the local areas, we have run into a number of problems. We have run into, in many cases, an inability to match jobs, especially at the higher levels, an inability to find the right matches and then of course BLS has a number of statistical screens that they have to pass through, and so we are losing a lot of data in some locations.

We are just unable to find the matches in order to help us pin that down. Some local economies just don't seem to have enough employment base to give us the right matches, and in other areas, it can be for any number of other reasons, a dominance problem that one industry dominates and BLS won't use the data if that is the case.

So we have run into just a complete set of different issues. It depends on each different locality as to which one is paramount. We are also finding that the almost serendipity of which jobs are published in a given locality, by publish, I mean they pass all the BLS specifics, et cetera, they are publishable and usable, we are finding that that has an enormous impact on the gap that you would calculate for that area, just almost the chance that this job publishes in locality A but not in locality B has a tremendous impact when you calculate the total gap, which may or may not have anything to do with the real difference there in salaries.

One example I can give you is the case of Atlanta. If we just look at the matches for clerical, technical, and administrative jobs in Atlanta and apply the old calculation methodology, we come up with a gap of 15 percent. We had just a very few jobs.

Mr. HOYER. Private sector over public sector?

Ms. BARBER. Yes. Yes. If we then add in the few professional jobs that publish and then make the calculation, the whole schedule is then off by 30 percent. The gap becomes 30 percent, so I think you have to ask whether you really want to do that, whether you really want to overpay the majority of people on the schedule because these very few jobs at the top of the schedule are in a sense, you know, torquing the whole thing up.

So it is that kind of a problem that we have run into, and it is going to take some work to see what alternative methodologies can be used to get a better assessment.

PAY GAP

Mr. HOYER. Ms. Barber, I have been involved in this for 12 years. You may have been involved in it longer than that.

Ms. BARBER. No, I have not.

Mr. HOYER. I don't know how long you have been at OPM. Dr. Devine, when he was the director of the Office of Personnel Management he started with the premise that the pay advisory committee's studies were badly flawed, or seriously flawed. I use that phrase because it is the phrase used in the President's report this year. He and I communicated back and forth, we had some confrontations and he tried to make some new configurations. They

put new people on the pay advisory committee, and the reports were pretty consistent. You may have a difference of three, four or five points, but essentially the pay gap was made very clear.

The Hudson Institute did a study back in 1985 or 1986 which showed the same thing. My concern is that if we delay this locality pay by a year, it will make it simply tougher for us to get there. As we reduce the size of our workforce we will maximize the necessity to have our best people retained, and have the tools necessary to be able to recruit good people. The principal responsibility of the Office of Personnel Management is to advise the executive department on how to get there from here.

Frankly, I am more concerned about the locality pay deferment than I am the pay freeze. I strongly dislike the pay freeze and I don't know that I will be able to do anything about it. The Federal employees have taken a pay freeze twice in the last 10 years and they won't like it if that happens in fiscal year 1994. However, if systematically we don't get up to the business in Atlanta, from what I hear you saying it is at least 15 percent.

Ms. BARBER. Based on that methodology, looking at the clerical, technical, administrative jobs.

Mr. HOYER. But it is at least 15 percent presumably at the low point, because you say if you include higher level jobs, it gets you up to 30 percent. I don't have any doubts that higher level jobs in the Federal service are paid at substantially less than private sector, furthermore, I don't think we are ever going to close that gap. On the other hand, you could not—there is not a corporate leader in America that has the responsibility that the Secretary of State has or the Secretary of Defense has or for that matter the Secretary of Treasury, and you are not going to pay them comparable wages.

We are not going to start paying those secretaries $4 or $5 million a year. Are we at a point where OPM cannot come up with a valid statistical analysis in August, three years after passage of the Pay Reform Act of 1990 so that we can implement locality-pay in January of 1994. Is that what I am being told?

Ms. BARBER. I think what you are hearing is that there are serious doubts about the methodology that has been employed heretofore, and until we begin getting sufficient surveys back from BLS, you couldn't see this, and so a great deal of this time, you mentioned we have had several years, has been getting the surveys in place, getting the data done, et cetera, and this becomes visible only really when the results are in, but I think there are grave doubts about it. I think there is even a doubt as to whether there should be a sole criterion, such as the results of a survey, that would trigger this, that would trigger an adjustment, as opposed to using multiple criteria as an alternative to putting all the weight on one measurement.

Mr. HOYER. Has that been discussed?

Ms. BARBER. Has it been discussed?

Mr. HOYER. Yes. In other words if that was a concern, bear in mind we are some three years now from the Pay Reform Act of 1990, two-and-a-half years, I guess—I am somewhat concerned that we haven't come to grips with this before now. If we have then I just missed my intention and maybe I have been negligent.

Ms. BARBER. Well, I don't think that these problems could have been totally foreseen without the actual data in hand.

Mr. HOYER. What is OPM doing at this point—let me ask you a question. You may not be able to answer this, Ms. Lattimore, but assuming we decide to implement the locality pay adjustment in January of 1994, could we do that, and what steps would OPM have to take in conjunction with BLS or others to ensure that we could do that rationally?

Ms. LATTIMORE. We would be dealing with the Federal Salary Council, having them look at the surveys as they formulate their recommendation and then the recommendation does need to be based on something other than only the survey results, but that would have been the next step in the process.

Mr. HOYER. If we made the determination at some time in the next two weeks to proceed with the locality pay adjustment for January 1994, would it be possible to do?

Ms. LATTIMORE. It is possible if we are going to continue along with the same methodology and game plan that we are using up to date.

Mr. HOYER. On the other hand, from what I hear Ms. Barber saying, OPM's position would perhaps be to—and I realize we don't have a director and there hasn't been discussion with the executive branch on this from what I hear you saying, you would advise the President and the Congress that you could not support the study with confidence based upon statistically justifiable findings?

Ms. LATTIMORE. I don't think you have that level of concern.

Ms. BARBER. Well, there are several concerns here. I think BLS has carried out its role as it was supposed to. I don't think anyone is questioning that. I think it is a question of whether the comparisons are set up in the right way and whether you can use these kinds of comparisons as the sole criterion for making an adjustment.

As I understand it, that is the concern, so it isn't a matter that the surveys haven't been carried out in the right way. They have been carried out in the right way to the best of my knowledge, the question is, is the comparison that we are trying to make a wholly accurate one, and a wholly feasible one, and if it is, is it—or if it isn't, is that alone, that factor alone enough to drive the adjustments?

Mr. HOYER. I understand that and I think you reiterated what I think I heard you say before. My question though is if a determination were made to proceed as the law now requires, would OPM be in a position of saying that that was a valid action? Could you advise the President that that was a valid action to pursue in January of 1994?

Ms. BARBER. I don't think we can answer that question now.

Mr. HOYER. All right, I won't pursue that further. Mr. Darden.

Mr. DARDEN. Please continue, Mr. Chairman.

DOWNSIZING

Mr. HOYER. I had a discussion yesterday with Archives and you may have heard my discussion here. It appeared to be directed at Archives, it was not. It just so happened that Archives is 110 below its authorized FTEs. It then just happens that 4 percent of their

FTEs is 110 and therefore appeared that if they stayed where they are now, they could successfully argue that we have cut 110 people, which is the President's 4 percent across the board.

I made the observation that the public is already cynical enough about government. If we simply cut from paper figures, authorized numbers but not real numbers, then we are going to be not very sanguine about our actions in Washington. Now having said that, as you understand the 100,000—although I saw the figure in the paper of 152,000 as it was apportioned to various agencies, first of all let me ask the question; Is the implementation of President Clinton's policy 100,000 reduction or 152,000 reduction?

Ms. LATTIMORE. We understood it to be 100,000.

Mr. HOYER. Did you see it in the Washington Post?

Ms. LATTIMORE. Yes, I did.

Mr. HOYER. Did you understand the difference?

Ms. LATTIMORE. We have not been able to reconcile that as of yet. It may be as you go for 4 percent across the board and handed it up in all the agencies, it gets you more than 100,000. We have looked at it by agency by agency comparisons.

Mr. HOYER. Of course, when you apply 4 percent, the Defense Department presumably will take a greater reduction than other agencies will because of the downsizing of the Defense Department itself; is that correct?

Ms. LATTIMORE. I am assuming that they are applying 4 percent to their fiscal year 1993 allocation, which would then mean that part of their downsizing would be part of that. But we have not had any discussions with Defense yet to know that for sure.

Mr. HOYER. Has OPM undertaken discussions with individual agency personnel managers with respect to how one manages the downsizing, and the incorporation of the downsizing through attrition without adversely affecting the performance of the agency or individual employment?

Ms. LATTIMORE. We have an ongoing dialogue with agencies just as a result of Defense initiatives that we have been doing, and also we have had sort of an eclectic group of people that were interested in the ideas and initiatives that were coming out of Defense. We have not had any specific dialogue with the personnel community as a result of the recent announcement about the downsizing.

Mr. HOYER. Do you intend to undertake those?

Ms. LATTIMORE. I would think where appropriate, yes. Agencies right now are still sort of jelling their plans.

Mr. HOYER. I understand that. It seems to me I would advise you to do it.

One of the experiences that we had which was very bad in 1981, 1982 and 1983—those of you who were here and remember—was a very disruptive undermining process which implied that a great number of people were going to be put on the street. The final result was not a whole lot of people put on the street through involuntary reductions-in-force, but instead many people were put through a lot of anguish because of the incredibly poor management of the personnel department of the Federal government in 1981 and 1982. It was a confrontational, political, demagogue process.

Other than that, I was relatively neutral on it, but I do not want to see that happen again. I really don't. I have no doubt that this administration is as sensitive as I am to this process.

Ms. LATTIMORE. We haven't given any signals that was the intent, and we would certainly work with agencies.

Mr. HOYER. The Office of Personnel Management will have the primary responsibility of the personnel managers in the agencies being well informed to the fact, if you manage this well, we can do it without any sweat. 100,000 out of 2.1 million is not a heavy load for us to carry. We have that attrition in probably seven months, don't we? I ask Ms. Lattimore that you carry that message.

Mr. Darden, do you have any questions?

Mr. DARDEN. Yes, sir, I just had——

Mr. HOYER. Why don't I yield to you?

Mr. DARDEN. I had one or two matters to bring up.

Being relatively new on the subcommittee—and I am not nearly so familiar with OPM as the Chairman. I do need to ask you, how many people fall under your jurisdiction? How many bodies?

Ms. LATTIMORE. 6,842.

Mr. DARDEN. No, no. How many——

Ms. LATTIMORE. Federal? 2 million.

Mr. DARDEN. Roughly 2 million.

Ms. LATTIMORE. Yes.

Mr. DARDEN. And excluded from OPM, I assume, would be legislative branch employees.

Ms. LATTIMORE. Yes.

Mr. DARDEN. Judicial.

Ms. LATTIMORE. Yes.

Mr. DARDEN. Are those all in two——

Ms. LATTIMORE. There would be some under sort of specific exceptions of some independent sort of type agencies, things that are excluded for some purposes of OPM where they have their own personnel authorities or they are part of excepted titles. But, when it gets to the benefits and retirement, everybody, just about everybody.

Mr. DARDEN. Generally speaking, with the exception of the legislative and judicial branch employees, all would fall under you?

Ms. LATTIMORE. Yes.

Mr. DARDEN. And you mentioned 6,842.

Ms. LATTIMORE. OPM staff, yes.

Mr. DARDEN. Thank you.

Mr. HOYER. Ms. Lattimore, let me go now to the question that you raised about the phantom, which was obviously to hold harmless, to sort of grant Federal employees from the additional premium. How much increase in premium do you project this will—this effect would have on an individual employee?

Mr. SMITH. On the individual employee, $23 or so a month, unless people go for cheaper plans in order to prevent this. If everybody stayed right where they are now, we think it would be about $23 on average.

Mr. HOYER. So that is somewhere in the neighborhood of $275 or $300 a year.

Mr. SMITH. Yes.

Mr. HOYER. Thank you.

Now, has this been calculated in the budget?

Mr. SMITH. Yes. It has been assumed in the budget.

Mr. HOYER. Assumed savings of how much?

Mr. SMITH. No, there are no assumed savings because it is the current services number. The budget baseline has this drop in the government contribution in it so the budget—I don't think addresses it separately as a savings.

Mr. HOYER. Because of the fact that the legislative——

Mr. SMITH. Because it expired, and so the baseline tracked the expiration of the temporary form.

Mr. HOYER. In order to fix that, if you will, so that the Federal employee is not subjected to a freeze in pay, a reduction in force, a cancellation of the locality pay and an increase in their Federal employee health benefits, how much would you have to put in the budget?

Mr. SMITH. The Government costs for everything, retirees and employees as well, is just under $700 million. That is shifting premium costs as a consequence of the change.

Mr. HOYER. Did you have any questions?

Mr. VISCLOSKY. I did, Mr. Chairman.

Mr. HOYER. Mr. Istook.

Mr. ISTOOK. Let me ask you, I know there has been some question about the differential between actual and authorized work force levels. Do you have that OPM document that is government-wide on that or that zeroes in, you know, perhaps on the executive branch that shows, overall, the difference between the authorized Federal work force and the actual Federal work force? Do you have that broken down by agencies?

Ms. LATTIMORE. I don't think we do have. We have the CDPF system, but I don't believe we track the difference between FTE and allocations. We track data on authorizations, but I don't think we have actual FTE usage by agency by year.

Mr. ISTOOK. You track it by authorized but not by actual, is that what you are——

Ms. LATTIMORE. We are tracking by actual. We know what the authorized is. We track by actual in terms of the personal actions that we are involved in. So our system would show actual people on board, but we don't, in the business we are in, necessarily go back and compare that to the agency's authorized strength.

Mr. ISTOOK. If you could supply to me a copy of what you do have, I would appreciate it.

Ms. LATTIMORE. Whatever we have, okay.

Mr. ISTOOK. And that way at least that enables me to cross reference it against some of the other figures that are going around.

I understand that, for example, when the President talks about a 4 percent cut, he uses the term of 100,000 people to match up with it. I have heard it questioned whether 4 percent might actually be 150,000, if it is a true 4 percent, and your figures might shed some light on that or perhaps you might shed some light on it if you know.

Ms. LATTIMORE. I don't know off the top for that in terms of just even applying that to us. The 4 percent would probably result in a significant cut in ours, and I guess the cut gets even more signifi-

cant because the dollars associated with those numbers of slot reductions go away also.

Mr. ISTOOK. Any information that you might provide that helps us get a handle on what it is throughout the government would certainly help.

Ms. LATTIMORE. We can do that.

Mr. ISTOOK. Thank you very much. Thank you.

[The information follows:]

U.S. GOVERNMENT CIVILIAN EMPLOYMENT AND WORK YEARS
SEPTEMBER 1992

	EMPLOYMENT SEPTEMBER 1992	CHANGE FROM CY 1988 AVG
TOTAL	3,086,254	-29,835
LEGISLATIVE BRANCH	38,509	508
JUDICIAL BRANCH	27,987	6,901
EXECUTIVE BRANCH	3,019,758	-37,244

EXECUTIVE BRANCH

TOTAL EMPLOYMENT

Compared to the Calendar Year 1988 Average, the Executive Branch agencies had 37,244 less employees. Agencies significantly below their 1988 average were: Army (-49,434), US Postal Service (-42,079), Navy (-40,429), Air Force (-38,930), Tennessee Valley Authority (-11,332) and Commerce (-5,623). Agencies above their 1988 average included: Other Defense Activities (+38,115), Justice (+21,952), Veterans Affairs (+14,500), Federal Deposit Insurance Corporation (+13,946), Agriculture (12,321), Defense Logistics Agency (+11,933), Interior (+10,845), Health and Human Services (+7,627), and Transportation (+7,504).

TOTAL RELATED-TO-CEILING EMPLOYMENT*

Non-Postal, Non-Defense (Military Functions)

Ceiling-related employment in the non-postal, non-Defense (military functions) portion of the Executive Branch was 1,237,975 for September 1992. *Compared to September 1991*, the Executive Branch non-postal non-Defense (military functions) agencies increased by 13,395. Significant increases occurred in Justice (+5,814), Veterans Affairs (+4,011), Interior (+3,382), Agriculture (+2,691), Federal Emergency Management Agency (+2,488), Health and Human Services (+1,334), Energy (+1,207) and Small Business Administration (+1,039). Significant decreases occurred in Tennessee Valley Authority (-5,377), Treasury (-4,923) and Housing and Urban Development (-1,236).

Department of Defense (Military Functions)

Compared to September 1991, the Department of Defense (military functions) employment decreased by 29,455. Due to major shifts within the Department of Defense, employment in Other Defense Activities increased by 20,837. Most of the increase occurred due to the transfer of employees from Army, Navy, and Air Force to: the Defense Commissary Agency (20,000); and the Defense Dependents Schools (1,000). Army decreased by 22,914, Navy decreased by 18,763, and Air Force decreased by 17,175 [Note: The Department of Defense imposed a partial prohibition on hiring civilian personnel in January 1990. Since then, Defense (military functions) declined by 89,650.]

FY 1992 ASSIGNED WORKYEAR CEILINGS*

The Office of Management and Budget assigned Executive Branch non-postal, non-military agencies an aggregate work year ceiling of 1,187,760 for FY 1992 (as updated in the President's FY 1993 Budget). OMB has revised this figure down by 7,611 to 1,179,649 due mainly to 6,475 fewer work years for Federal Deposit Insurance Corporation (including the Resolution Trust Corporation).

Through September 1992, non-postal, non-military agencies have used 1,169,626 work years--10,023 fewer work years than the projected year-end ceiling of 1,179,649 work years. While 100% of the ceiling year has elapsed, the rate of work year usage overall was 99.2% for the non-postal, non-military agencies. In its response to natural disasters, the Federal Emergency Management Agency has used 118% of its allocated work years.

* Excludes employees in the Youth Programs and Cooperative Education Program. Department of Defense (military functions) are not controlled by ceilings.

Prepared by: Office of Workforce Information, Personnel Systems and Oversight Group, U.S. Office of Personnel Management. For additional information contact John E. Cursow at (202) 606-2850.

U.S. GOVERNMENT CIVILIAN EMPLOYMENT AND WORK YEARS

SEPTEMBER 1992

AGENCY	TOTAL EMPLOYMENT A/		TOTAL RELATED TO CEILING EMPLOYMENT A/			WORK YEARS B/		
	SEPT 1992	CHANGE FROM CY 1991 AVERAGE	SEPT 1992	CHANGE FROM SEPT 1991	FY 1992 AVERAGE TO DATE	FY 1992 WORK YEARS THRU SEPT	CHANGE FROM FY 1991 (THRU SEPT)	FY 1992 % OF WY USED (100.0% ELAPSED)
LEGISLATIVE BRANCH	38,509	506	N/A	N/A	N/A	N/A	N/A	N/A
JUDICIAL BRANCH	27,987	8,901	N/A	N/A	N/A	N/A	N/A	N/A
EXECUTIVE BRANCH	3,018,758	-47,244						
STATE	25,734	150	26,045	47	26,234	25,531	122	98.6
TREASURY	161,961	-2,824	160,853	-4,823	166,903	162,778	2,564	99.8
DEFENSE, TOTAL	943,719	-78,817	874,136	-22,229	894,290	878,892	-14,079	N/A
DEFENSE, MILITARY TOTAL	952,512	-78,748	944,714	-29,456	966,960	949,011	-14,272	N/A
ARMY, MILITARY FUNCTIONS	297,258	-49,434	296,629	-22,814	309,318	306,043	-13,227	N/A
DEPT OF THE NAVY	304,999	-49,429	300,956	-18,799	319,041	307,194	-12,166	N/A
DEPT OF THE AIR FORCE	207,832	-38,930	206,144	-17,175	210,944	206,588	-16,017	N/A
DEFENSE LOGISTICS AGENCY	65,061	11,933	64,418	8,560	58,889	67,562	2,332	N/A
OTHER DEFENSE ACTIVITIES	78,202	38,118	77,565	20,637	76,728	99,330	24,806	N/A
DEFENSE, CIVIL TOTAL	31,196	-172	29,474	1,222	28,320	27,581	196	99.0 C/
JUSTICE	99,927	21,952	99,413	5,814	93,284	91,818	7,545	97.2
INTERIOR	85,260	10,845	83,915	8,362	78,752	75,708	6,362	101.1
AGRICULTURE	128,324	12,321	126,895	2,991	119,782	113,405	3,049	101.4
COMMERCE	38,088	-6,823	37,720	-11	37,384	35,159	-3,829	98.8
LABOR	17,889	-329	18,362	-2	18,340	18,080	340	99.0
HEALTH AND HUMAN SERVICES	131,191	7,827	126,678	1,334	128,961	126,183	6,042	100.3
HOUSING AND URBAN DEV	13,701	421	13,860	-1,236	14,079	14,047	446	98.0
TRANSPORTATION	70,658	7,804	68,337	885	69,038	68,439	2,428	97.8
ENERGY	20,962	4,039	20,196	1,207	19,835	19,588	1,796	99.2
EDUCATION	5,113	458	5,014	25	4,978	4,856	229	98.5
VETERANS AFFAIRS	260,205	14,500	251,987	4,011	248,612	222,174	4,509	100.7
ENVIRONMNTL PROTECTION AGCY	18,196	3,759	17,374	66	17,345	16,954	831	99.2
EQUAL EMPLOY OPP COMM	2,899	-321	2,837	-3	2,837	2,791	-6	99.9
FEDERAL DEPOSIT INS CORP	22,467	13,946	10,293	787	10,028	8,948	1,236	101.9
FEDERAL EMERGENCY MGMT AGCY	5,632	3,014	5,597	2,488	3,648	3,258	336	118.0
GENERAL SERVICES ADMIN	20,770	490	20,043	-521	20,423	20,034	330	100.3
NATIONAL AERO & SPACE ADMIN	25,425	2,451	24,693	-210	24,644	24,513	364	99.1
NATL LABOR RELATIONS BD	2,158	-185	2,148	8	2,157	2,119	-19	97.9
NUCLEAR REGULATORY COMM	3,528	182	3,508	8	3,528	3,396	96	101.8
OFFICE OF PERSONNEL MGMT	9,641	899	8,846	189	8,791	8,845	123	96.6
PANAMA CANAL COMMISSION	8,471	-266	8,471	-140	8,669	8,569	18	99.2
SMALL BUSINESS ADMIN	5,897	1,188	5,883	1,039	5,976	4,057	-830	97.6
SMITHSONIAN, SUMMARY	5,514	476	5,486	147	5,444	5,295	230	92.9
TENNESSEE VALLEY AUTHORITY	19,493	-11,332	19,493	-5,377	20,383	19,992	-2,281	90.0
U S. INFORMATION AGENCY	8,342	-484	8,332	126	8,256	8,183	-43	95.8
AGENCY FOR INTERNATL DEVEL	4,353	-341	4,273	-64	4,324	4,248	-99	93.1
US POSTAL SERVICE & POSTAL RATE COMM.	792,049	-42,079	N/A	N/A	N/A	N/A	N/A	N/A
ALL OTHER AGENCIES	28,012	849	26,511	548	26,270	25,289	734	96.3
EXEC BRANCH NON-POSTAL	2,227,709	6,836	2,162,689	-16,060	2,199,252			
EXEC BRANCH NON-POSTAL, NON-DOD(MIL)	1,275,197	83,580	1,237,975	13,395	1,227,292	1,199,626	28,732	99.2

N/A = Not Available or Not Applicable

A/ SOURCE: Monthly Report of Federal Civilian Employment (SF 113-A); covers on-board employment as of the end of the report period. Ceilings for State, Interior, Labor, and Energy include some small budget-related agencies. Total related to ceiling employment excludes employees in Youth Programs and Cooperative Education Program. DOD (Military functions) are not controlled by Office of Management and Budget ceilings.

B/ SOURCE: Monthly Report of Full-Time Equivalent/Work Year Civilian Employment (SF 113-G), covers employees subject to Presidential ceilings.

C/ Defense work years reported only for the Army Corps of Engineers portion of Defense (Civil) Functions.

TABLE 1 -- MONTHLY REPORT OF FULL-TIME EQUIVALENT/WORK-YEAR CIVILIAN EMPLOYMENT (PREPARED FOR OMB 11/09/92 FROM THE SF 113-G COVERING CURRENT PERIOD FROM 08/23/92 TO 09/19/92) A/ PERCENT OF CEILING YEAR ELAPSED = 100.0%

AGENCY		CONTRIBUTING EMPLOYMENT		FTE CURRENT PERIOD		WORK-YEARS CURRENT PERIOD		CUMULATIVE TO DATE (TO 09/19/92)		CEILING
		FTP	TOTAL	FTP	TOTAL	FTP	TOTAL	FTP	TOTAL	TOTAL
TOTAL B/	*	1,713,850	2,032,765	1,698,039	1,932,658	130,781	148,838	1,703,868	1,927,875	1,944,142
TOT EXCL USPS&POSTAL RT COM	*	1,082,992	1,234,237	1,073,416	1,182,755	82,732	91,229	1,089,402	1,169,633	1,179,674
PERSPTV PAYMT ASSESSMT CM	*	15	15	15	15	1	1	6	7	25
EXECUTIVE BRANCH C/	*	1,713,832	2,032,747	1,698,021	1,932,637	130,780	148,825	1,703,862	1,927,869	1,944,117
EXEC BR EXCL USPS&POSTAL RT	*	1,082,974	1,234,219	1,073,398	1,182,737	82,732	91,228	1,089,396	1,169,628	1,179,849
EXEC OFC OF THE PRESIDENT		1,566	1,810	1,553	1,760	117	122	1,939	1,787	1,901
*** WHITE HOUSE OFFICE		358	418	351	399	27	31	349	397	401
*** OFC OF VICE PRESIDENT		19	19	19	19	1	1	20	20	26
*** OFC OF MGMT & BUDGET		550	566	548	558	42	42	561	572	602
*** OFFICE OF ADMINISTRATION		211	226	211	225	16	17	202	230	234
*** COUNCIL ECONOMIC ADVISORS		32	33	32	32	2	2	31	31	41
*** COUNCIL ON ENVIRON QUAL		27	30	27	28	2	2	28	27	40
*** OFC NAT DRUG CONTL POLICY		96	121	96	117	7	9	88	111	126
*** OFC OF POLICY DEVELOPMENT		39	40	38	38	3	3	35	36	51
EXEC RESIDENCE AT WH		1	93	1	92	...	7	1	92	100
*** NATIONAL SECURITY COUNCIL		83	95	83	94	4	4	83	94	90
*** NATIONAL SPACE COUNCIL		8	8	8	8	...	...	6	6	7
*** OFC OF SCI & TECH POLICY		27	37	26	32	2	2	24	34	42
*** OFC OF US TRADE REP		148	186	146	159	11	12	145	186	180
MAJOR DEPARTMENTS D/	*	926,884	1,084,051	918,527	1,018,906	70,659	78,378	914,761	1,005,107	1,007,477
STATE, TOTAL E/		23,847	25,530	23,941	25,361	1,841	1,950	22,921	25,821	25,895
STATE		22,553	25,212	22,652	25,049	1,819	1,927	22,636	25,223	25,612
INT BOUNDARY&WATER COMM		269	283	263	277	20	21	259	278	248
INT BOUNDRY COMM(USACAN)		7	10	7	10	1	1	7	10	11
INT JOINT COMM(USACAN)		18	19	18	19	1	1	19	20	24
TREASURY		164,896	163,794	161,704	157,837	11,670	12,118	159,709	162,778	162,043
DEFENSE, CIVIL TOTAL	*	26,854	29,488	27,212	29,756	2,093	2,289	26,963	27,561	27,869
ARMY, CIVIL FUNC TOTAL	*	26,854	29,401	27,208	29,782	2,093	2,289	26,978	27,577	27,885
CORPS OF ENGINEERS		26,727	29,313	27,087	29,612	2,084	2,278	26,887	27,437	27,725
CEMETERIAL EXPENSES	*	127	148	121	140	9	11	121	140	140
AIR FORCE CIVIL FUNC	*	4	4	4	4	...	...	4	4	4
JUSTICE		91,134	98,546	90,093	93,471	6,930	7,190	88,013	91,618	94,286
INTERIOR		62,316	84,775	62,790	81,010	4,830	6,222	61,400	78,708	74,900
AGRICULTURE		96,753	129,152	96,096	120,283	7,392	9,253	95,090	113,405	111,882
COMMERCE		31,530	38,150	31,393	35,510	2,415	2,722	31,056	35,159	35,594

A/ COVERS EMPLOYMENT, FULL-TIME EQUIVALENT, AND WORK-YEARS OF STRAIGHT TIME HOURS ONLY
B/ EXCLUDES THE JUDICIAL BRANCH, DEFENSE MILITARY FUNCTIONS, AND THE LEGISLATIVE BRANCH AGENCIES (EXCEPT THE PERSPECTIVE PAYMENT ASSESSMENT COMMISSION)
C/ EXCLUDES DEFENSE MILITARY FUNCTIONS
D/ EXCLUDES DEFENSE MILITARY FUNCTIONS
E/ INCLUDES THE INTERNATIONAL BOUNDARY AND WATER COMMISSION, INTERNATIONAL BOUNDARY COMMISSION, AND INTERNATIONAL JOINT COMMISSION
F/ INCLUDES THE NATIONAL COMMISSION FOR EMPLOYMENT POLICY AND PENSION BENEFIT GUARANTY CORPORATION
* PRELIMINARY OR ESTIMATED FIGURES (OR PORTIONS THEREOF) WERE USED FOR CURRENT REPORT PERIOD AS REPORT FOR CURRENT PERIOD WAS NOT RECEIVED BY INPUT CUT-OFF DATE
*** THIS AGENCY REPORTED DATA ON A DIFFERENT REPORT PERIOD BASIS (E.G. MONTHLY) INSTEAD OF THE BIWEEKLY PAY PERIOD BASIS

TABLE 1 -- MONTHLY REPORT OF FULL-TIME EQUIVALENT/WORK-YEAR CIVILIAN EMPLOYMENT
(PREPARED FOR OMB 11/09/92 FROM THE SF 113-G COVERING CURRENT PERIOD FROM 09/23/92 TO 09/19/92) A/
PERCENT OF CEILING YEAR ELAPSED = 100.0%

AGENCY	CONTRIBUTING EMPLOYMENT		FTE CURRENT PERIOD		WORK-YEARS CURRENT PERIOD		WORK-YEARS CUMULATIVE TO DATE (TO 09/19/92)		CEILING
	FTP	TOTAL	FTP	TOTAL	FTP	TOTAL	FTP	TOTAL	TOTAL
LABOR F/	17,543	19,522	17,378	18,037	1,337	1,386	17,387	18,060	18,241
HEALTH AND HUMAN SERVICES	117,884	130,713	116,339	126,364	8,949	9,720	116,312	126,163	125,784
HOUSING & URBAN DEV	13,275	13,926	13,163	13,633	1,013	1,049	13,411	14,047	14,331
TRANSPORTATION	56,917	69,149	66,667	68,493	5,128	5,269	66,589	68,438	70,134
ENERGY(INC ALASKA NAT GAS)	19,426	20,330	19,323	20,038	1,488	1,541	18,834	19,588	19,950
ENERGY .	19,428	20,330	19,323	20,038	1,486	1,541	18,633	19,586	19,947
ALASKA NAT GAS TRANS SYS	...	...	...	...	...	...	1	2	3
EDUCATION	4,561	4,987	4,524	4,849	348	373	4,524	4,859	4,927
VETERANS AFFAIRS	198,924	240,112	197,904	224,567	15,223	17,274	196,533	222,174	220,641
LARGE INDEPENDENT AGENCIES	60,129	61,982	59,766	61,136	4,598	4,703	59,982	61,501	62,335
ENVIRONMTL PROTECT AGCY	16,472	17,471	16,315	17,011	1,255	1,309	16,210	16,954	17,822
GENERAL SVCS ADMIN	19,450	19,906	19,302	19,680	1,485	1,514	19,539	20,034	19,976
NATL AERO SPACE ADMIN	24,207	24,603	24,149	24,445	1,858	1,880	24,233	24,513	24,737
OTHER INDEPENDENT AGENCIES *	725,253	904,904	718,175	850,832	55,410	65,621	727,280	859,494	872,404
OTH INDE AGY EXCL USPS&PRC *	94,395	106,378	93,552	101,932	7,362	8,014	93,114	101,251	107,936
ACTION	412	425	408	421	31	32	409	423	432
ADMIN CONFERENCE US	21	25	20	23	2	2	20	23	24
ADV COMM ON INTGOVTL REL	19	21	18	19	1	1	20	20	20
ADV COUNCIL HIST PRESERV	33	46	32	37	2	3	32	37	39
AFRICAN DEVELOPMT FOUNDTN	37	40	37	40	3	3	37	40	45
AMER BATTLE MONUMNTS COMM	375	395	366	386	28	30	368	387	387
APPALACHIAN REGIONAL COMM	10	10	10	10	1	1	8	8	11
ARCH & TRANS BAR COMP BD	26	39	26	30	2	2	29	34	36
ARMS CONT & DISARM AGCY	185	225	183	208	14	16	177	205	252
ARTIC RESEARCH COMM	3	3	3	3	...	...	3	3	4
BARRY GOLDWATER SCH&EX FD	2	2	2	2	...	...	2	2	3
BD INTERNTL BRDCASTING	10	18	10	11	1	1	10	12	19
BD OF GOV, FED RSRV SYS *	1,450	1,614	1,443	1,490	111	115	1,454	1,501	1,490
C COLMBUS QUINC JUBI COMM	1	1	1	1	...	...	1	1	5
COMMISSION OF FINE ARTS	7	7	7	7	1	1	7	7	7
COMM BICENT OF US CONSTIT Q/	...	...	...	...	...	...	12	12	10
COMM ON CIVIL RIGHTS	72	88	72	82	6	6	71	82	78
COMM ON MINORITY BUS DEV	2	4	2	3	...	...	4	5	6
COMM NATL&COMMUNITY SERV	11	13	11	13	1	1	4	6	11
COMPETIT POLICY COUNCIL	1	8	1	5	...	...	1	2	10
CNTE PUR PRD BLD&SVLY HCP	15	21	14	18	1	1	14	16	18

A/ COVERS EMPLOYMENT, FULL-TIME EQUIVALENT, AND WORK-YEARS OF STRAIGHT TIME HOURS ONLY
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D/ EXCLUDES DEFENSE MILITARY FUNCTIONS
E/ INCLUDES THE INTERNATIONAL BOUNDARY AND WATER COMMISSION, INTERNATIONAL BOUNDARY COMMISSION, AND INTERNATIONAL JOINT COMMISSION
F/ INCLUDES THE NATIONAL COMMISSION FOR EMPLOYMENT POLICY AND PENSION BENEFIT GUARANTY CORPORATION
Q/ AGENCY ABOLISHED
* PRELIMINARY OR ESTIMATED FIGURES (OR PORTIONS THEREOF) WERE USED FOR CURRENT REPORT PERIOD AS REPORT FOR CURRENT PERIOD WAS NOT RECEIVED BY INPUT CUT-OFF DATE
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TABLE 1 -- MONTHLY REPORT OF FULL-TIME EQUIVALENT/WORK-YEAR CIVILIAN EMPLOYMENT (PREPARED FOR OMB 11/09/92 FROM THE SF 113-G COVERING CURRENT PERIOD FROM 08/23/92 TO 09/19/92) A/ PERCENT OF CEILING YEAR ELAPSED = 100.0%

AGENCY	CONTRIBUTING EMPLOYMENT		FTE CURRENT PERIOD		WORK-YEARS CURRENT PERIOD		CUMULATIVE TO DATE (TO 09/19/92)		CEILING
	FTP	TOTAL	FTP	TOTAL	FTP	TOTAL	FTP	TOTAL	TOTAL
COMMODITY FUT TRDG COMM	571	611	565	589	43	45	558	592	621
CONSUMER PRODUCT SAF COMM	493	520	490	509	38	39	479	508	515
DEF NUC FACILITIES SAF BD	72	80	71	77	5	6	58	65	80
DELAWARE RIVER BASIN COMM	1	2	1	2	...	...	1	2	2
EQUAL EMPLOY OPP COMM	2,757	2,611	2,737	2,770	211	213	2,781	2,781	2,821
EXPORT-IMPORT BANK OF US	325	449	288	386	22	30	279	360	361
FARM CREDIT ADMIN	459	473	458	469	35	36	471	485	513
FARM CREDIT SYS ASSIST BD	18	20	16	19	1	1	18	19	21
FARM CREDIT SYS INS CORP	9	9	9	9	1	1	8	8	9
FEDERAL COMMUNICATNS COMM	1,743	1,818	1,724	1,763	133	137	1,718	1,789	1,778
FEDERAL DEPOSIT INS CORP	9,705	10,455	9,620	10,237	740	787	9,535	9,648	9,785
FEDERAL ELECTION COMM	253	269	252	264	19	20	252	266	266
FED EMERGENCY MGMT AGCY	2,368	5,642	2,554	4,490	197	345	2,525	3,258	2,762
FED FIN INSTITS EXAM COUN	8	8	8	8	1	1	8	8	4
FED HOUSING FINANCE BD	97	122	95	108	7	8	90	104	101
FED LABOR RELATIONS AUTH	237	255	236	248	18	19	235	244	253
FEDERAL MARITIME COMM	212	213	212	213	15	16	215	215	231
FED MED & CONCIL SVC	316	326	316	321	24	25	307	311	315
FED MN SAF&HLTH RVW COMM	48	52	48	51	4	4	45	48	56
FED RET THRIFT INVEST BD	89	98	86	89	7	7	63	89	87
FEDERAL TRADE COMM	918	976	899	929	69	71	910	938	953
HOLOCAUST MEMORIAL COUNCL	25	78	25	63	2	5	23	59	51
HS TRUMAN SCH FOUNDATION	5	5	5	5	...	...	5	5	5
INTERAGY COUN ON HOMELESS	1	11	1	11	...	1	...	12	12
INTER-AMERICAN FOUNDATION	58	70	68	70	5	5	66	69	76
INT CULTRL&TRADE CTR COMM	...	...	...	...	...	...	3	3	10
INTERNATIONAL TRADE COMM *	465	505	459	486	38	37	456	485	488
INTERSTATE COMMERCE COMM	606	623	601	613	48	47	604	613	636
JAMES MADISON MEM FOUNDTN	7	7	7	7	1	1	6	6	7
JAPAN-US FRIENDSHIP COMM	4	13	3	5	...	...	4	5	6
MARINE MAMMAL COMM	10	16	10	11	1	1	10	12	12
MARTIN L KING JR FED COMM	2	2	2	2	...	...	4	4	5
MERIT SYS PROTECTION BD	289	316	287	305	22	23	284	305	318
NATL ADV COUNCIL PUB SERV	3	3	3	3	...	...	1	1	1
NATL ARCHIVES&RECDS ADMIN	2,089	3,149	2,076	2,631	160	202	2,041	2,636	2,750
NATL CAPITAL PLNG COMM	48	49	48	49	4	4	44	48	55

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*** THIS AGENCY REPORTED DATA ON A DIFFERENT REPORT PERIOD BASIS (E.G. MONTHLY) INSTEAD OF THE BIWEEKLY PAY PERIOD BASIS

TABLE 1 -- MONTHLY REPORT OF FULL-TIME EQUIVALENT/WORK-YEAR CIVILIAN EMPLOYMENT
(PREPARED FOR OMB 11/09/92 FROM THE SF 113-Q COVERING CURRENT PERIOD FROM 08/23/92 TO 09/19/92) A/
PERCENT OF CEILING YEAR ELAPSED = 100.0%

AGENCY	CONTRIBUTING EMPLOYMENT		FTE CURRENT PERIOD		WORK-YEARS CURRENT PERIOD		CUMULATIVE TO DATE (TO 09/19/92)		CEILING
	FTP	TOTAL	FTP	TOTAL	FTP	TOTAL	FTP	TOTAL	TOTAL
NATL COMM AMER IND HOUS	4	4	4	4	...	...	4	4	4
NATL COMM ON CHILDREN	8	9	8	9	1	1	8	10	10
NATL COMM ON MIGRANT ED	2	14	2	5	...	...	3	6	6
NATL COMM LIB & INFO SCS	5	6	5	6	...	...	6	10	15
NATL COMM RESP FIN ED	3	12	3	5	...	...	3	4	3
NATL COMM SEV PUB HOUSING	3	3	2	2	...	...	7	7	8
NATL COUNCIL DISABILITY	10	18	8	12	1	1	7	9	10
NATL CREDIT UNION ADMIN	943	958	837	946	72	73	938	947	1,000
NATL FOUNDATN ON ARTS&HUM	497	570	488	548	36	42	493	554	558
NATL ENDOW FOR ARTS	223	269	219	261	17	20	224	289	279
NATL ENDOW FOR HUMANTIES	260	285	255	272	20	21	253	268	288
INSTITUTE OF MUSEUM SERV	14	18	14	15	1	1	16	17	17
NATL LABOR RELATIONS BD	2,068	2,179	2,048	2,113	158	163	2,048	2,119	2,165
NATL MEDIATION BOARD	49	56	49	55	4	4	48	54	58
NATL SCIENCE FOUNDATION	1,116	1,267	1,108	1,243	85	98	1,094	1,237	1,254
NATL TRANS SAFETY BD	340	360	334	347	26	27	335	349	360
NATL WOMENS BUS COUNCIL	4	5	3	4	...	...	3	4	4
NUCLEAR REGULATORY COMM	3,297	3,502	3,268	3,373	251	260	3,283	3,396	3,335
NUCLEAR WASTE TECH REV BD	19	19	18	18	1	1	17	18	27
OCC SAF & HLTH RVW COMM	68	77	68	76	5	6	68	75	77
OFC NAVAJO&HOPI IND RELO	89	91	86	90	7	7	87	90	97
OFC NUC WASTE NEGOTIATOR	10	12	8	10	1	1	9	11	15
OFC OF GOVERNMENT ETHICS	69	72	69	71	5	5	64	67	70
*** OFFICE OF PERSONNEL MGMT	5,524	6,670	5,453	5,840	587	629	5,502	6,885	6,156
OFFICE OF SPECIAL COUNSEL	85	92	79	84	6	6	86	89	101
PANAMA CANAL COMMISSION	7,161	8,487	7,112	8,382	547	648	7,106	8,589	8,603
PEACE CORPS	1,111	1,172	1,110	1,182	85	89	1,142	1,182	1,200
PENN AVE DEV CORP	33	42	32	35	2	3	30	34	36
RAILROAD RETIREMENT BOARD	1,757	1,825	1,749	1,801	135	139	1,745	1,790	1,830
SECURITIES & EXCHNGE COMM	2,584	2,656	2,539	2,605	195	200	2,395	2,469	2,843
SELECTIVE SERVICE SYSTEM	242	281	237	246	18	19	250	254	277
SMALL BUSINESS ADMIN	4,065	4,117	4,033	4,068	310	313	4,027	4,057	4,157
SMITHSONIAN, SUMMARY	4,860	5,602	4,791	5,369	369	413	4,815	5,285	5,686
NATIONAL GALLERY OF ART	766	896	753	849	58	65	750	864	884
SMITHSONIAN INSTITUTION	4,060	4,663	4,005	4,479	308	345	3,831	4,378	4,759
WOODROW WILSON CENTER	34	43	33	41	3	3	34	43	43

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C/ EXCLUDES DEFENSE MILITARY FUNCTIONS
D/ EXCLUDES DEFENSE MILITARY FUNCTIONS
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*** THIS AGENCY REPORTED DATA ON A DIFFERENT REPORT PERIOD BASIS (E.G. MONTHLY) INSTEAD OF THE BIWEEKLY PAY PERIOD BASIS

TABLE 1 -- MONTHLY REPORT OF FULL-TIME EQUIVALENT/WORK-YEAR CIVILIAN EMPLOYMENT (PREPARED FOR OMB 11/09/92 FROM THE SF 113-B COVERING CURRENT PERIOD FROM 08/23/92 TO 09/19/92) A/ PERCENT OF CEILING YEAR ELAPSED = 100.0%

AGENCY	CONTRIBUTING EMPLOYMENT		FTE CURRENT PERIOD		WORK-YEARS CURRENT PERIOD		CUMULATIVE TO DATE (TO 09/19/92)		CEILING
	FTP	TOTAL	FTP	TOTAL	FTP	TOTAL	FTP	TOTAL	TOTAL
SOLDIERS & AIRMENS HOME	824	915	816	878	63	67	821	883	957
SUSQUEHANNA RIV BAS COMM	1	2	1	2	...	...	1	2	2
TENNESSEE VALLEY AUTH	16,130	19,421	17,997	19,206	1,384	1,477	18,141	19,282	25,000
US INFORMATION AGENCY	7,936	8,389	7,881	8,232	606	633	7,688	8,183	8,543
US INSTITUTE OF PEACE	61	63	48	64	4	4	46	50	53
US INTNATL DEV COOP AGCY	4,224	4,448	4,210	4,393	324	338	4,215	4,422	4,749
AGCY FOR INTERNATL DEV	4,053	4,255	4,040	4,207	311	324	4,097	4,248	4,582
OVRSEAS PRI INVESTMT COR	144	165	143	159	11	12	134	149	155
TRADE AND DEV PROGRAM	27	28	27	27	2	2	24	25	32
US POSTAL SERVICE TOTAL *	830,858	798,528	824,823	748,900	48,048	57,607	834,188	758,243	784,468
••• US POSTAL SERVICE	830,798	798,468	824,586	748,842	48,044	57,603	834,109	758,185	784,410
POSTAL RATE COMMISSION *	60	62	57	58	4	4	57	58	58

A/ COVERS EMPLOYMENT, FULL-TIME EQUIVALENT, AND WORK-YEARS OF STRAIGHT TIME HOURS ONLY
B/ EXCLUDES THE JUDICIAL BRANCH, DEFENSE MILITARY FUNCTIONS, AND THE LEGISLATIVE BRANCH AGENCIES (EXCEPT THE PERSPECTIVE PAYMENT ASSESSMENT COMMISSION)
C/ EXCLUDES DEFENSE MILITARY FUNCTIONS
D/ EXCLUDES DEFENSE MILITARY FUNCTIONS
E/ INCLUDES THE INTERNATIONAL BOUNDARY AND WATER COMMISSION, INTERNATIONAL BOUNDARY COMMISSION, AND INTERNATIONAL JOINT COMMISSION
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* PRELIMINARY OR ESTIMATED FIGURES (OR PORTIONS THEREOF) WERE USED FOR CURRENT REPORT PERIOD AS REPORT FOR CURRENT PERIOD WAS NOT RECEIVED BY INPUT CUT-OFF DATE
••• THIS AGENCY REPORTED DATA ON A DIFFERENT REPORT PERIOD BASIS (E.G. MONTHLY) INSTEAD OF THE BIWEEKLY PAY PERIOD BASIS

TABLE 2 -- FY 1992 WORK-YEARS OF TOTAL AND FULL-TIME WITH PERMANENT APPOINTMENT EMPLOYEES BY AGENCY (FROM 09/22/91 TO 09/19/92) A/
PERCENT OF CEILING YEAR ELAPSED = 100.0%
CURRENT PERIOD: 08/23/92 TO 09/19/92

AGENCY		TOTAL				FULL-TIME WITH PERMANENT APPOINTMENT	
		CURRENT PERIOD	OMB ASSIGNED CEILING	FY 1992 WORK-YEARS USED TO DATE	FY 1992 WORK-YEARS USED TO DATE AS PERCENT OF CEILING	CURRENT PERIOD	FY 1992 WORK-YEARS USED TO DATE
TOTAL B/	•	148,836	1,944,142	1,927,878	99.2	130,781	1,703,888
TOT EXCL USPS&POSTAL RT COM	•	81,228	1,179,874	1,169,833	99.1	82,733	1,089,402
PERSPTV PAYMT ASSESSMT CM	•	1	25	7	28.0	1	6
EXECUTIVE BRANCH C/	•	148,835	1,944,117	1,927,869	99.2	130,780	1,703,882
EXEC BR EXCL USPS&POSTAL RT	•	81,228	1,179,849	1,169,826	99.2	82,732	1,089,396
EXEC OFC OF THE PRESIDENT		133	1,901	1,767	93.0	117	1,539
••• WHITE HOUSE OFFICE		31	401	397	99.0	37	349
••• OFC OF VICE PRESIDENT		1	26	20	76.9	1	20
••• OFC OF MGMT & BUDGET		43	602	572	95.0	42	581
••• OFFICE OF ADMINISTRATION		17	234	230	98.3	16	203
••• COUNCIL ECONOMIC ADVISORS		2	41	31	75.6	2	31
••• COUNCIL ON ENVIRON QUAL		2	40	27	67.5	2	25
••• OFC NAT DRUG CONTL POLICY		9	136	111	81.6	7	88
••• OFC OF POLICY DEVELOPMENT		3	51	36	70.8	3	35
EXEC RESIDENCE AT WH		7	100	93	93.0	...	1
••• NATIONAL SECURITY COUNCIL		4	60	54	90.0	4	53
••• NATIONAL SPACE COUNCIL		...	7	6	85.7	...	6
••• OFC OF SCI & TECH POLICY		2	43	34	79.1	2	24
••• OFC OF US TRADE REP		12	160	158	97.5	11	145
MAJOR DEPARTMENTS D/	•	78,378	1,007,477	1,005,107	99.8	70,655	914,761
STATE, TOTAL E/		1,950	25,695	25,531	98.6	1,841	23,921
STATE		1,827	25,612	25,223	98.5	1,819	23,836
INT BOUNDARY&WATER COMM		21	246	278	112.1	20	259
INT BOUNDRY COMM(US&CAN)		1	11	10	90.8	1	7
INT JOINT COMM(US&CAN)		1	24	20	83.3	1	19
TREASURY		12,118	163,043	162,776	99.8	11,670	155,709
DEFENSE, CIVIL TOTAL	•	2,289	27,889	27,581	98.0	2,093	25,982
ARMY, CIVIL FUNC TOTAL	•	2,289	27,865	27,577	98.0	2,093	25,978
CORPS OF ENGINEERS		2,278	27,725	27,437	99.0	2,084	25,857
CEMETERIAL EXPENSES	•	11	140	140	100.0	9	121
AIR FORCE CIVIL FUNC	•	...	4	4	100.0	...	4
JUSTICE		7,190	94,288	91,618	97.2	6,930	88,013
INTERIOR		6,232	74,900	75,708	101.1	4,830	61,400
AGRICULTURE		9,259	111,882	113,406	101.4	7,392	95,090
COMMERCE		2,732	35,594	35,158	98.8	2,415	31,056

A/ COVERS WORK-YEARS OF STRAIGHT TIME HOURS ONLY
B/ EXCLUDES THE JUDICIAL BRANCH, DEFENSE MILITARY FUNCTIONS, AND THE LEGISLATIVE BRANCH AGENCIES (EXCEPT THE PERSPECTIVE PAYMENT ASSESSMENT COMMISSION)
C/ EXCLUDES DEFENSE MILITARY FUNCTIONS
D/ EXCLUDES DEFENSE MILITARY FUNCTIONS
E/ INCLUDES THE INTERNATIONAL BOUNDARY AND WATER COMMISSION, INTERNATIONAL BOUNDARY COMMISSION, AND INTERNATIONAL JOINT COMMISSION
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••• THIS AGENCY REPORTED DATA ON A DIFFERENT REPORT PERIOD BASIS (E.G. MONTHLY) INSTEAD OF THE BIWEEKLY PAY PERIOD BASIS

TABLE 2 -- FY 1992 WORK-YEARS OF TOTAL AND FULL-TIME WITH PERMANENT APPOINTMENT EMPLOYEES BY AGENCY (FROM 09/22/91 TO 09/19/92) A/
PERCENT OF CEILING YEAR ELAPSED = 100.0%
CURRENT PERIOD: 08/23/92 TO 09/19/92

AGENCY	TOTAL				FULL-TIME WITH PERMANENT APPOINTMENT	
	CURRENT PERIOD	OMB ASSIGNED CEILING	FY 1992 WORK-YEARS USED TO DATE	FY 1992 WORK-YEARS USED TO DATE AS PERCENT OF CEILING	CURRENT PERIOD	FY 1992 WORK-YEARS USED TO DATE
LABOR F/	1,388	18,241	18,060	99.0	1,337	17,387
HEALTH AND HUMAN SERVICES	9,720	125,784	126,163	100.3	8,949	118,312
HOUSING & URBAN DEV	1,049	14,331	14,047	98.0	1,013	13,411
TRANSPORTATION	5,269	70,134	68,438	97.6	5,128	66,589
ENERGY(INC ALASKA NAT GAS)	1,541	19,950	19,588	98.2	1,486	19,234
ENERGY	1,541	19,947	19,586	98.2	1,486	19,232
ALASKA NAT GAS TRANS SYS	...	3	2	66.7	...	1
EDUCATION	373	4,927	4,859	98.6	348	4,624
VETERANS AFFAIRS	17,274	220,641	222,174	100.7	15,223	196,533
LARGE INDEPENDENT AGENCIES	4,703	62,335	61,501	98.7	4,598	59,982
ENVIRONMTL PROTECT AGCY	1,309	17,622	16,954	96.2	1,255	18,210
GENERAL SVCS ADMIN	1,514	19,978	20,034	100.3	1,485	19,539
NATL AERO SPACE ADMIN	1,880	24,737	24,513	99.1	1,858	24,233
OTHER INDEPENDENT AGENCIES *	55,621	872,404	859,494	98.5	55,410	727,280
OTH INDE AGY EXCL USPS&PRC *	8,014	107,936	101,251	93.8	7,362	93,114
ACTION	32	432	423	97.9	31	409
ADMIN CONFERENCE US	2	24	23	95.8	2	20
ADV COMM ON INTGOVTL REL	1	20	20	100.0	1	20
ADV COUNCIL HIST PRESERV	3	39	37	94.9	2	32
AFRICAN DEVELOPMT FOUNDTN	3	45	40	88.9	3	37
AMER BATTLE MONUMNTS COMM	30	387	387	100.0	28	368
APPALACHIAN REGIONAL COMM	1	11	8	72.7	1	8
ARCH & TRANS BAR COMP BD	2	36	34	94.4	2	29
ARMS CONT & DISARM AGCY	18	252	205	81.3	14	177
ARTIC RESEARCH COMM	...	4	3	75.0	...	3
BARRY GOLDWATER SCH&EX FD	...	3	2	66.7	...	2
BD INTERNTL BROCASTING	1	19	12	63.2	1	10
BD OF GOV, FED RSRV SYS *	115	1,490	1,501	100.7	111	1,484
C COLMBUS QUINC JUBI COMM	...	5	1	20.0	...	1
COMMISSION OF FINE ARTS	1	7	7	100.0	1	7
COMM BICENT OF US CONSTIT G/	...	10	12	120.0	...	12
COMM ON CIVIL RIGHTS	6	78	82	107.9	8	71
COMM ON MINORITY BUS DEV	...	6	5	83.3	...	4
COMM NATL&COMMUNITY SERV	1	11	6	54.5	1	4
COMPETIT POLICY COUNCIL	...	10	2	20.0	...	1
CMTE PUR PRO BLD&SVLY HCP	1	18	18	88.9	1	14

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D/ EXCLUDES DEFENSE MILITARY FUNCTIONS
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F/ INCLUDES THE NATIONAL COMMISSION FOR EMPLOYMENT POLICY AND PENSION BENEFIT GUARANTY CORPORATION
G/ AGENCY ABOLISHED
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TABLE 2 -- FY 1992 WORK-YEARS OF TOTAL AND FULL-TIME WITH PERMANENT APPOINTMENT EMPLOYEES BY AGENCY (FROM 09/22/91 TO 09/19/92) A/
PERCENT OF CEILING YEAR ELAPSED = 100.0%
CURRENT PERIOD: 08/23/92 TO 09/19/92

AGENCY	TOTAL				FULL-TIME WITH PERMANENT APPOINTMENT	
	CURRENT PERIOD	OMB ASSIGNED CEILING	FY 1992 WORK-YEARS USED TO DATE	FY 1992 WORK-YEARS USED TO DATE AS PERCENT OF CEILING	CURRENT PERIOD	FY 1992 WORK-YEARS USED TO DATE
COMMODITY FUT TRDG COMM	45	621	592	95.3	43	556
CONSUMER PRODUCT SAF COMM	39	515	508	98.6	38	479
DEF NUC FACILITIES SAF BD	6	80	65	81.3	5	58
DELAWARE RIVER BASIN COMM	...	2	2	100.0	...	1
EQUAL EMPLOY OPP COMM	213	2,821	2,791	98.9	211	2,761
EXPORT-IMPORT BANK OF US	30	361	360	99.7	22	276
FARM CREDIT ADMIN	38	513	485	94.5	35	471
FARM CREDIT SYS ASSIST BD	1	21	19	90.5	1	18
FARM CREDIT SYS INS CORP	1	9	8	66.7	1	6
FEDERAL COMMUNICATNS COMM	137	1,778	1,789	100.6	133	1,718
FEDERAL DEPOSIT INS CORP	787	9,785	9,946	101.6	740	9,535
FEDERAL ELECTION COMM	20	266	266	100.0	19	252
FED EMERGENCY MGMT AGCY	345	2,782	3,258	118.0	197	2,525
FED FIN INSTITS EXAM COUN	1	4	8	200.0	1	8
FED HOUSING FINANCE BD	8	101	104	103.0	7	90
FED LABOR RELATIONS AUTH	19	253	244	96.4	18	235
FEDERAL MARITIME COMM	16	231	215	93.1	16	215
FED MED & CONCIL SVC	25	315	311	98.7	24	307
FED MN SAF&HLTH RVW COMM	4	56	48	85.7	4	45
FED RET THRIFT INVEST BD	7	87	89	102.3	7	83
FEDERAL TRADE COMM	71	953	938	98.4	69	910
HOLOCAUST MEMORIAL COUNCL	5	51	59	115.7	2	23
HS TRUMAN SCH FOUNDATION	...	5	5	100.0	...	5
INTERAGY COUN ON HOMELESS	1	12	12	100.0	...	...
INTER-AMERICAN FOUNDATION	8	78	89	90.8	5	68
INT CULTRL&TRADE CTR COMM	...	10	3	30.0	...	2
INTERNATIONAL TRADE COMM *	37	488	486	100.0	36	459
INTERSTATE COMMERCE COMM	47	838	813	96.4	46	804
JAMES MADISON MEM FOUNDTN	1	7	6	85.7	1	6
JAPAN-US FRIENDSHIP COMM	...	6	5	83.3	...	4
MARINE MAMMAL COMM	1	12	12	100.0	1	10
MARTIN L KING JR FED COMM	...	5	4	80.0	...	4
MERIT SYS PROTECTION BD	33	318	305	95.9	22	284
NATL ADV COUNCIL PUB SERV	...	1	1	100.0	...	1
NATL ARCHIVES&RECDS ADMIN	202	2,750	2,638	95.9	160	2,041
NATL CAPITAL PLNG COMM	4	55	48	87.3	4	44

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PERCENT OF CEILING YEAR ELAPSED = 100.0%
CURRENT PERIOD: 08/23/92 TO 09/19/92

AGENCY	TOTAL				FULL-TIME WITH PERMANENT APPOINTMENT	
	CURRENT PERIOD	OMB ASSIGNED CEILING	FY 1992 WORK-YEARS USED TO DATE	FY 1992 WORK-YEARS USED TO DATE AS PERCENT OF CEILING	CURRENT PERIOD	FY 1992 WORK-YEARS USED TO DATE
NATL COMM AMER IND HOUS	...	4	4	100.0	...	4
NATL COMM ON CHILDREN	1	10	10	100.0	1	8
NATL COMM ON MIGRANT ED	...	6	6	100.0	...	3
NATL COMM LIB & INFO SCS	...	15	10	66.7	...	6
NATL COMM RESP FIN ED	...	3	4	133.3	...	2
NATL COMM SEV PUB HOUSING	...	6	7	116.7	...	7
NATL COUNCIL DISABILITY	1	10	9	90.0	1	7
NATL CREDIT UNION ADMIN	73	1,000	947	94.7	72	936
NATL FOUNDATN ON ARTS&HUM	42	556	554	99.3	38	492
NATL ENDOW FOR ARTS	20	273	269	98.5	17	224
NATL ENDOW FOR HUMANTIES	21	268	268	100.0	20	253
INSTITUTE OF MUSEUM SERV	1	17	17	100.0	1	18
NATL LABOR RELATIONS BD	163	2,165	2,119	97.9	158	2,046
NATL MEDIATION BOARD	4	58	54	93.1	4	46
NATL SCIENCE FOUNDATION	98	1,254	1,237	98.6	85	1,094
NATL TRANS SAFETY BD	27	360	349	96.9	26	335
NATL WOMENS BUS COUNCIL	...	4	4	100.0	...	2
NUCLEAR REGULATORY COMM	260	3,335	3,396	101.8	251	3,283
NUCLEAR WASTE TECH REV BD	1	27	18	68.7	1	17
OCC SAF & HLTH RVW COMM	6	77	75	97.4	5	66
OFC NAVAJO&HOPI IND RELO	7	97	90	92.8	7	87
OFC NUC WASTE NEGOTIATOR	1	15	11	73.3	1	9
OFC OF GOVERNMENT ETHICS	5	70	67	96.7	5	64
••• OFFICE OF PERSONNEL MGMT	629	8,158	5,888	99.6	587	5,602
OFFICE OF SPECIAL COUNSEL	8	101	88	88.1	6	88
PANAMA CANAL COMMISSION	645	6,603	8,589	99.6	547	7,108
PEACE CORPS	89	1,200	1,182	98.5	85	1,142
PENN AVE DEV CORP	3	36	34	94.4	2	30
RAILROAD RETIREMENT BOARD	139	1,830	1,790	97.8	136	1,748
SECURITIES & EXCHNGE COMM	200	2,643	2,469	93.4	195	2,395
SELECTIVE SERVICE SYSTEM	19	277	254	91.7	18	250
SMALL BUSINESS ADMIN	313	4,157	4,067	97.8	310	4,027
SMITHSONIAN, SUMMARY	413	5,686	5,285	92.9	366	4,816
NATIONAL GALLERY OF ART	65	884	864	97.7	58	750
SMITHSONIAN INSTITUTION	345	4,759	4,378	92.0	308	3,821
WOODROW WILSON CENTER	3	43	43	100.0	3	34

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TABLE 2 -- FY 1992 WORK-YEARS OF TOTAL AND FULL-TIME WITH PERMANENT APPOINTMENT EMPLOYEES
BY AGENCY (FROM 09/22/91 TO 09/19/92) A/
PERCENT OF CEILING YEAR ELAPSED = 100.0%
CURRENT PERIOD: 08/23/92 TO 09/19/92

AGENCY		TOTAL				FULL-TIME WITH PERMANENT APPOINTMENT	
		CURRENT PERIOD	OMB ASSIGNED CEILING	FY 1992 WORK-YEARS USED TO DATE	FY 1992 WORK-YEARS USED TO DATE AS PERCENT OF CEILING	CURRENT PERIOD	FY 1992 WORK-YEARS USED TO DATE
SOLDIERS & AIRMENS HOME		67	957	883	92.3	63	821
SUSQUEHANNA RIV BAS COMM		...	2	2	100.0	...	1
TENNESSEE VALLEY AUTH		1,477	25,000	19,992	80.0	1,384	18,141
US INFORMATION AGENCY		833	8,643	8,183	95.8	606	7,688
US INSTITUTE OF PEACE		4	53	50	94.3	4	46
US INTNATL DEV COOP AGCY		328	4,749	4,422	93.1	324	4,216
AGCY FOR INTERNATL DEV		324	4,562	4,248	93.1	311	4,097
OVRSEAS PRI INVESTMT COR		12	156	149	98.1	11	134
TRADE AND DEV PROGRAM		2	32	25	78.1	2	24
US POSTAL SERVICE TOTAL	•	57,607	784,468	758,243	99.2	46,048	834,166
••• US POSTAL SERVICE		57,603	784,410	758,185	99.2	46,044	834,109
POSTAL RATE COMMISSION	•	4	58	58	100.0	4	57

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U.S. GOVERNMENT CIVILIAN EMPLOYMENT AND WORK YEARS
DECEMBER 1992

	EMPLOYMENT DECEMBER 1992	CHANGE FROM NOV. 92	CHANGE FROM CY 1988 AVG
TOTAL	3,081,419	+39,992	-34,670
LEGISLATIVE BRANCH	38,507	-100	506
JUDICIAL BRANCH	28,141	-95	7,055
EXECUTIVE BRANCH	3,014,771	+40,187	-42,231

EXECUTIVE BRANCH

TOTAL EMPLOYMENT

Since November 1992, employees in the Executive Branch agencies increased 40,187 due primarily to Christmas seasonal hires in the U.S. Postal Service (+45,673). *Compared to the Calendar Year 1988 Average*, the Executive Branch agencies had 42,231 fewer employees. Agencies significantly below their 1988 average were: Army (-55,276), Navy (-49,245), Air Force (-41,266), US Postal Service(-14,427), Tennessee Valley Authority (-11,619) and Commerce (-6,089). Agencies above their 1988 average included: Other Defense Activities (+45,309), Justice (+22,917), Veterans Affairs (+14,863), Federal Deposit Insurance Corporation (+13,820), Defense Logistics Agency (+11,716), Health and Human Services (+7,381) and Transportation (+7,358).

TOTAL RELATED-TO-CEILING EMPLOYMENT*

Non-Postal & Defense (Non-Military Functions)

Ceiling-related employment in the non-postal and Defense (non-military functions) portion of the Executive Branch was 1,215,273 for December 1992. *Compared to December 1991*, the Executive Branch non-postal and Defense (non-military functions) agencies increased by 6,112. Significant increases occurred in Justice (+5,028), Veterans Affairs (+4,543), Interior (+1,901), Federal Emergency Management Agency (+1,331) and Agriculture (+1,033). Significant decreases occurred in Treasury (-7,990) and Tennessee Valley Authority (-1,686).

Department of Defense (Military Functions)

Compared to December 1991, the Department of Defense (military functions) employment decreased by 36,579. Navy decreased by 22,727, Army decreased by 21,022, and Air Force decreased by 8,362, while Defense Logistics and Other Defense Agencies increased by 15,532. [Note: The Department of Defense imposed a partial prohibition on hiring civilian personnel in January 1990. Since then, Defense (military functions) declined by 99,392.]

FY 1993 ASSIGNED WORKYEAR CEILINGS*

The Office of Management and Budget assigned Executive Branch non-postal and Defense (non-military functions) agencies an aggregate work year ceiling of 1,187,929 for FY 1993 (as updated in the President's FY 1993 Budget). OMB has revised this figure down by 6,237 to 1,181,692 due mainly to 6,480 fewer work years for Federal Deposit Insurance Corporation (including the Resolution Trust Corporation).

Through December 1992, non-postal and Defense (non-military functions) agencies have used 313,654 work years, creating a lapse from projected year-end ceiling of over 4,200 work years (this will vary from month to month due to seasonal fluctuations). While 26.9% of the ceiling year has elapsed, the rate of work year usage overall was 26.5% for the non-postal and Defense (non-military functions) agencies. In its response to natural disasters, the Federal Emergency Management Agency has used 40.6% of its allocated work years.

* Excludes employees in the Youth Programs and Cooperative Education Program. Department of Defense (military functions) are not controlled by ceilings.

Prepared by: Office of Workforce Information, Personnel Systems and Oversight Group, U.S. Office of Personnel Management. For additional information contact John E. Curnow at (202) 606-2850.

U.S. GOVERNMENT CIVILIAN EMPLOYMENT AND WORK YEARS

DECEMBER 1992

AGENCY	TOTAL EMPLOYMENT A/		TOTAL RELATED TO CEILING EMPLOYMENT A/			WORK YEARS B/		
	DEC 1992	CHANGE FROM CY 1988 AVERAGE	DEC 1992	CHANGE FROM DEC 1991	FY 1993 AVERAGE TO DATE	FY 1993 WORK YEARS THRU DEC	CHANGE FROM FY 1992 (THRU DEC)	FY 1993 % OF WY USED (20.9% ELAPSED)
LEGISLATIVE BRANCH	38,507	606	N/A	N/A	N/A	N/A	N/A	N/A
JUDICIAL BRANCH	29,141	7,065	N/A	N/A	N/A	N/A	N/A	N/A
EXECUTIVE BRANCH	3,014,771	-42,231						
STATE	29,985	401	29,276	227	29,043	6,817	1	23.2
TREASURY	160,884	-3,991	159,720	-7,980	159,518	41,948	-1,035	25.8
DEFENSE, TOTAL	972,540	-60,367	962,799	-38,976	963,313	240,866	-9,534	N/A
DEFENSE, MILITARY TOTAL	842,495	-58,762	834,972	-36,579	834,866	233,140	-9,063	N/A
ARMY, MILITARY FUNCTIONS	281,418	-56,276	259,879	-21,022	260,899	73,073	-6,069	N/A
DEPT OF THE NAVY	395,953	-49,346	392,061	-22,727	389,430	73,865	-6,344	N/A
DEPT OF THE AIR FORCE	206,296	-41,296	203,730	-8,362	204,576	61,380	-2,270	N/A
DEFENSE LOGISTICS AGENCY	64,834	11,716	64,284	8,978	64,286	18,073	1,931	N/A
OTHER DEFENSE ACTIVITIES	85,396	48,906	85,028	6,884	81,674	18,719	1,906	N/A
DEFENSE, CIVIL TOTAL	29,745	-1,825	27,797	504	28,447	7,248	-171	26.3 C/
JUSTICE	87,892	22,917	86,263	5,028	86,162	25,374	1,391	25.9
INTERIOR	78,271	3,856	76,730	1,901	78,236	20,390	822	27.6
AGRICULTURE	116,680	877	114,474	1,033	117,801	30,464	372	27.4
COMMERCE	37,620	-6,089	37,229	285	37,325	8,450	20	26.5
LABOR	17,820	-392	18,328	-64	18,375	4,849	6	26.5
HEALTH AND HUMAN SERVICES	130,945	7,381	128,393	188	128,844	33,774	124	25.9
HOUSING AND URBAN DEV	13,429	146	13,409	-954	12,486	3,623	-288	26.2
TRANSPORTATION	70,412	7,368	69,254	227	69,290	18,505	131	26.4
VERGY	20,952	4,029	20,127	834	20,120	5,366	252	26.9
DUCATION	5,077	422	4,975	23	4,995	1,313	8	26.1
VETERANS AFFAIRS	280,566	14,863	262,114	4,543	252,206	69,485	1,113	27.6
ENVIRONMNTL PROTECTION AGCY	18,430	2,993	17,565	254	17,518	4,601	53	25.7
EQUAL EMPLOY OPP COMM	3,914	-306	2,862	27	2,860	758	2	24.7
FEDERAL DEPOSIT INS CORP (Inc RTC)	22,341	13,820	10,324	540	10,293	2,752	173	25.2
FEDERAL EMERGENCY MGMT AGCY	4,549	1,931	4,517	1,331	4,649	1,125	346	40.6
GENERAL SERVICES ADMIN	20,785	485	20,081	-568	20,065	5,281	-164	26.6
NATIONAL AERO & SPACE ADMIN	29,254	2,280	24,466	-290	24,499	5,962	-66	26.3
NATL LABOR RELATIONS BD	2,140	-203	2,130	-7	2,135	566	1	26.8
NUCLEAR REGULATORY COMM	3,548	182	3,525	-5	3,525	910	-2	26.8
OFFICE OF PERSONNEL MGMT	6,884	352	6,793	-25	6,802	1,401	-45	22.8 D/
PANAMA CANAL COMMISSION	8,448	-291	8,446	-216	8,418	2,247	-54	26.1
SMALL BUSINESS ADMIN	5,870	1,181	5,858	949	6,038	1,089	7	26.6
SMITHSONIAN, SUMMARY	5,536	500	5,506	103	5,501	1,446	47	24.6
TENNESSEE VALLEY AUTHORITY	19,206	-11,619	19,206	-1,686	19,348	5,153	-782	22.4
U.S. INFORMATION AGENCY	8,318	-508	8,310	108	8,322	2,229	40	26.7
AGENCY FOR INTERNATL DEVEL	4,293	-401	4,217	-96	4,236	1,122	-21	26.2
US POSTAL SERVICE & POSTAL RATE COMM.	819,701	-14,427	N/A	N/A	N/A	N/A	N/A	N/A
ALL OTHER AGENCIES	27,789	626	26,378	32	26,499	6,614	118	25.5
EXEC BRANCH NON-POSTAL	2,195,070	-27,804	2,150,245	-30,467	2,156,293			
EXEC BRANCH NON-POSTAL, NON-DOD(MIL)	1,252,575	60,958	1,215,273	6,112	1,221,428	313,854	2,201	26.5

N/A - Not Available or Not Applicable

A/ SOURCE: Monthly Report of Federal Civilian Employment (SF 113-A); covers on-board employment as of the end of the report period. Ceilings for State, Interior, Labor, and Energy include some small budget-related agencies. Total related to ceiling employment excludes employees in Youth Programs and Cooperative Education Program. DOD (Military functions) are not controlled by Office of Management and Budget ceilings.

B/ SOURCE: Monthly Report of Full-Time Equivalent/Work Year Civilian Employment (SF 113-G); covers employees subject to Presidential ceilings.

C/ Defense work years reported only for the Army Corps of Engineers portion of Defense (Civil) Functions.

D/ Because of different reporting schedules, percent of FY 1993 elapsed is 23.8% for OPM.

TABLE 1 -- MONTHLY REPORT OF FULL-TIME EQUIVALENT/WORK-YEAR CIVILIAN EMPLOYMENT — PD 1
(PREPARED FOR OMB 02/11/93 FROM THE SF 113-G COVERING CURRENT PERIOD FROM 11/29/92 TO 12/26/92) A/
PERCENT OF CEILING YEAR ELAPSED = 26.9%

AGENCY	CONTRIBUTING EMPLOYMENT		FTE CURRENT PERIOD		WORK-YEARS CURRENT PERIOD		WORK-YEARS CUMULATIVE TO DATE (TO 12/26/92)		CEILING
	FTP	TOTAL	FTP	TOTAL	FTP	TOTAL	FTP	TOTAL	TOTAL
TOTAL B/	• 1,679,420	2,028,152	1,658,585	1,909,921	127,577	146,912	452,042	516,977	1,939,515
TOT EXCL USPS&POSTAL RT COM	• 1,079,599	1,205,504	1,070,696	1,156,470	82,355	88,955	288,585	313,655	1,161,717
PERSPTV PAYMT ASSESSMT CM		2	15	2	4	...	...	1	1	25
EXECUTIVE BRANCH C/	• 1,679,418	2,028,137	1,658,583	1,909,917	127,577	146,912	452,041	516,676	1,939,490
EXEC BR EXCL USPS&POSTAL RT	• 1,079,597	1,205,489	1,070,694	1,156,466	82,355	88,955	288,584	313,654	1,161,692
EXEC OFC OF THE PRESIDENT		1,587	1,819	1,576	1,772	121	135	364	412	1,928
••• WHITE HOUSE OFFICE		356	414	354	402	27	31	82	93	414
••• OFC OF VICE PRESIDENT		28	29	28	28	2	2	6	6	26
••• OFC OF MGMT & BUDGET		543	559	540	551	42	42	125	126	605
••• OFFICE OF ADMINISTRATION		221	228	218	223	17	17	50	52	234
••• COUNCIL ECONOMIC ADVISORS		33	35	33	34	3	3	8	8	41
••• COUNCIL ON ENVIRON QUAL		27	30	27	30	2	2	6	7	40
••• OFC NAT DRUG CONTL POLICY		101	133	100	118	8	9	23	27	137
••• OFC OF POLICY DEVELOPMENT		40	42	39	40	3	3	9	9	51
••• NATL CRIT MATERIALS COUN		2	2	2	2	...	...	...	...	3
EXEC RESIDENCE AT WH		2	95	2	95	...	7	1	25	100
••• NATIONAL SECURITY COUNCIL		52	56	52	55	4	4	12	13	65
••• NATIONAL SPACE COUNCIL		5	5	5	5	...	...	1	1	7
••• OFC OF SCI & TECH POLICY		30	34	30	33	2	3	7	7	43
••• OFC OF US TRADE REP		147	157	146	156	11	12	34	36	162
MAJOR DEPARTMENTS D/	• 923,326	1,036,731	915,464	892,205	70,421	78,323	247,043	289,598	1,009,598
STATE, TOTAL E/		23,964	26,108	23,861	25,468	1,837	1,960	6,434	6,817	26,013
STATE		23,667	25,802	23,592	25,168	1,815	1,936	6,356	6,737	25,730
INT BOUNDARY&WATER COMM		272	279	264	271	20	21	71	73	248
INT BOUNDRY COMM(US&CAN)		7	7	7	7	1	1	2	2	11
INT JOINT COMM(US&CAN)		18	20	18	20	1	2	6	8	24
TREASURY		152,226	162,239	149,599	155,497	11,508	11,981	40,403	41,948	162,516
DEFENSE, CIVIL TOTAL	•	23,974	25,209	23,105	24,114	1,777	1,855	6,633	7,248	27,588
ARMY, CIVIL FUNC TOTAL	•	23,970	25,205	23,101	24,110	1,777	1,855	6,632	7,247	27,584
CORPS OF ENGINEERS		23,843	25,057	22,960	23,970	1,766	1,844	6,599	7,209	27,444
CEMETERIAL EXPENSES	•	127	148	121	140	9	11	33	38	140
AIR FORCE CIVIL FUNC	•	4	4	4	4	...	...	1	1	4
JUSTICE		91,779	95,666	91,307	94,457	7,024	7,266	24,821	25,374	97,958
INTERIOR		63,098	76,855	62,564	73,843	4,813	5,880	16,902	20,390	74,000
AGRICULTURE		96,560	117,176	95,853	108,374	7,373	8,338	25,866	30,454	111,021

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C/ EXCLUDES DEFENSE MILITARY FUNCTIONS
D/ EXCLUDES DEFENSE MILITARY FUNCTIONS
E/ INCLUDES THE INTERNATIONAL BOUNDARY AND WATER COMMISSION, INTERNATIONAL BOUNDARY COMMISSION, AND INTERNATIONAL JOINT COMMISSION
F/ INCLUDES THE NATIONAL COMMISSION FOR EMPLOYMENT POLICY AND PENSION BENEFIT GUARANTY CORPORATION
• PRELIMINARY OR ESTIMATED FIGURES (OR PORTIONS THEREOF) WERE USED FOR CURRENT REPORT PERIOD AS REPORT FOR CURRENT PERIOD WAS NOT RECEIVED BY INPUT CUT-OFF DATE
••• THIS AGENCY REPORTED DATA ON A DIFFERENT REPORT PERIOD BASIS (E.G., MONTHLY) INSTEAD OF THE BIWEEKLY PAY PERIOD BASIS

TABLE 1 -- MONTHLY REPORT OF FULL-TIME EQUIVALENT/WORK-YEAR CIVILIAN EMPLOYMENT
(PREPARED FOR OMB 02/11/93 FROM THE SF 113-D COVERING CURRENT PERIOD FROM 11/29/92 TO 12/26/92) A/
PERCENT OF CEILING YEAR ELAPSED = 26.9%

AGENCY	CONTRIBUTING EMPLOYMENT		FTE CURRENT PERIOD		WORK-YEARS CURRENT PERIOD		CUMULATIVE TO DATE (TO 12/26/92)		CEILING
	FTP	TOTAL	FTP	TOTAL	FTP	TOTAL	FTP	TOTAL	TOTAL
COMMERCE	31,714	37,598	31,707	35,065	2,439	2,697	8,480	9,450	35,682
LABOR F/	17,510	18,420	17,364	17,882	1,336	1,383	4,802	4,849	18,265
HEALTH AND HUMAN SERVICES	116,989	128,807	115,952	125,290	8,919	9,638	31,242	33,774	125,704
HOUSING & URBAN DEV	13,150	13,523	13,067	12,368	1,005	1,028	3,928	3,623	13,837
TRANSPORTATION	67,301	89,317	87,069	88,708	5,159	5,285	18,051	18,505	70,212
ENERGY(INC ALASKA NAT GAS)	19,409	20,148	19,223	19,902	1,486	1,531	6,206	5,388	19,950
ENERGY	19,409	20,148	19,323	19,902	1,488	1,531	6,208	5,388	19,950
EDUCATION	4,623	4,981	4,581	4,878	352	378	1,231	1,313	5,032
VETERANS AFFAIRS	201,028	240,708	200,112	225,268	16,393	17,328	53,682	60,485	221,818
LARGE INDEPENDENT AGENCIES	60,149	61,913	59,821	61,095	4,601	4,699	18,097	18,444	62,744
ENVIRONMTL PROTECT AGCY	15,854	17,613	16,523	17,179	1,271	1,321	4,424	4,601	17,817
GENERAL SVCS ADMIN	19,374	19,799	19,244	19,597	1,480	1,507	5,185	5,281	19,860
NATL AERO SPACE ADMIN	24,121	24,501	24,054	24,318	1,850	1,871	6,488	6,562	24,947
OTHER INDEPENDENT AGENCIES *	694,396	927,674	681,702	854,842	52,434	65,755	188,537	230,522	865,220
OTH INDE AGY EXCL USPS&PRC *	94,535	105,026	93,813	101,391	7,212	7,798	25,080	27,200	107,422
ACTION	411	425	408	421	31	32	110	113	432
ADMIN CONFERENCE US	20	24	19	22	1	2	5	6	24
ADV COMM ON INTGOVTL REL	20	24	20	20	2	2	5	5	20
ADV COUNCIL HIST PRESERV	33	47	33	38	3	3	9	10	39
AFRICAN DEVELOPMT FOUNDTN	37	40	37	40	3	3	10	11	41
AMER BATTLE MONUMNTS COMM	378	399	372	392	29	30	100	105	387
APPALACHIAN REGIONAL COMM	10	10	10	10	1	1	3	3	11
ARCH & TRANS BAR COMP BD	29	35	29	33	2	3	8	9	38
ARMS CONT & DISARM AGCY	211	250	206	232	16	18	54	60	252
ARCTIC RESEARCH COMM	3	8	3	3	...	...	1	1	4
BARRY GOLDWATER SCH&EX ED *	3	3	3	3	...	...	1	1	3
BD INTERNTL BRDCASTING	12	22	12	14	1	1	3	4	19
BD OF GOV, FED RSRV SYS *	1,450	1,514	1,443	1,490	111	115	388	401	1,490
C COLUMBUS QUINC JUBI COMM	1	1	1	1	...	...	...	...	4
COMMISSION OF FINE ARTS	7	7	7	7	1	1	2	2	7
COMM ON CIVIL RIGHTS	72	87	71	80	6	6	19	22	85
COMM ON MINORITY BUS DEV *	5	5	5	5	...	...	1	1	9
COMM NATL&COMMUNITY SERV	17	18	17	17	1	1	4	5	17
CMTE PUR PRO BLD&SVLY HCP *	17	20	17	18	1	1	5	5	18
COMMODITY FUT TRDG COMM	557	583	553	574	43	44	149	155	527
CONSUMER PRODUCT SAF COMM	483	510	490	501	38	39	132	136	515

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TABLE 1 -- MONTHLY REPORT OF FULL-TIME EQUIVALENT/WORK-YEAR CIVILIAN EMPLOYMENT
(PREPARED FOR OMB 02/11/93 FROM THE SF 113-G COVERING CURRENT PERIOD FROM 11/29/92 TO 12/26/92) A/
PERCENT OF CEILING YEAR ELAPSED = 26.9%

AGENCY	CONTRIBUTING EMPLOYMENT		FTE CURRENT PERIOD		WORK-YEARS CURRENT PERIOD		CUMULATIVE TO DATE (TO 12/26/92)		CEILING
	FTP	TOTAL	FTP	TOTAL	FTP	TOTAL	FTP	TOTAL	TOTAL
DEF NUC FACILITIES SAF BD	74	79	74	79	6	6	20	21	100
DELAWARE RIVER BASIN COMM	1	2	1	2	...	...	...	1	2
EQUAL EMPLOY OPP COMM	2,824	2,854	2,803	2,822	216	217	751	758	3,071
EXPORT-IMPORT BANK OF US	333	468	327	450	25	35	88	120	462
FARM CREDIT ADMIN	449	462	444	454	34	35	121	124	517
FARM CREDIT SYS ASSIST BD	11	17	11	16	1	1	3	5	7
FARM CREDIT SYS INS CORP	9	10	9	9	1	1	2	2	16
FEDERAL COMMUNICATNS COMM	1,732	1,805	1,722	1,783	132	137	464	481	1,778
FEDERAL DEPOSIT INS CORP	9,573	10,405	9,506	10,241	731	788	2,569	2,752	10,489
FEDERAL ELECTION COMM	259	277	258	269	20	21	68	72	276
FED EMERGENCY MGMT AGCY	2,541	4,561	2,524	3,909	194	301	683	1,125	2,771
FED FIN INSTITS EXAM COUN	8	9	8	9	1	1	2	2	4
FED HOUSING FINANCE BD	98	118	97	109	7	8	26	29	110
FED LABOR RELATIONS AUTH	235	253	233	245	18	19	63	68	251
FEDERAL MARITIME COMM	212	212	210	210	16	16	56	56	231
FED MED & CONCIL SVC	318	322	318	321	24	25	85	86	315
FED MN SAF&HLTH RVW COMM	44	50	44	50	3	4	12	13	60
FED RET THRIFT INVEST BD	89	99	86	90	7	7	23	24	95
FEDERAL TRADE COMM	938	1,014	909	935	70	72	244	251	977
HOLOCAUST MEMORIAL COUNCL	26	56	26	44	2	3	7	12	128
HS TRUMAN SCH FOUNDATION	5	5	5	5	...	...	1	1	5
INTERAGY COUN ON HOMELESS	1	11	1	11	...	1	...	3	12
INTER-AMERICAN FOUNDATION	65	69	65	68	5	5	18	19	76
INT CULTRL&TRADE CTR COMM	...	...	...	...	...	...	1	1	10
INTERNATIONAL TRADE COMM *	465	505	459	486	35	37	124	131	486
INTERSTATE COMMERCE COMM	600	618	596	611	46	47	161	165	550
JAMES MADISON MEM FOUNDTN *	6	8	6	7	...	1	2	2	7
JAPAN-US FRIENDSHIP COMM	4	5	4	4	...	...	1	1	6
MARINE MAMMAL COMM	10	15	10	11	1	1	3	3	12
MARTIN L KING JR FED COMM	2	2	2	2	...	...	...	...	6
MERIT SYS PROTECTION BD	289	316	288	308	22	24	77	82	318
NATL ADV COUNCIL PUB SERV	4	5	4	4	...	...	1	1	1
NATL ARCHIVES&RECDS ADMIN	2,111	3,169	2,095	2,626	161	202	564	708	2,750
NATL CAPITAL PLNG COMM	48	48	48	48	4	4	13	13	55
NATL COMM AMER IND HOUS	4	4	4	4	...	...	1	1	4
NATL COMM ON CHILDREN	8	9	8	9	1	1	2	2	3

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TABLE 1 -- MONTHLY REPORT OF FULL-TIME EQUIVALENT/WORK-YEAR CIVILIAN EMPLOYMENT
(PREPARED FOR OMB 02/11/93 FROM THE SF 113-G COVERING CURRENT PERIOD FROM 11/29/92 TO 12/26/92) A/
PERCENT OF CEILING YEAR ELAPSED = 26.9%

AGENCY	CONTRIBUTING EMPLOYMENT		FTE CURRENT PERIOD		WORK-YEARS CURRENT PERIOD		CUMULATIVE TO DATE (TO 12/26/92)		CEILING
	FTP	TOTAL	FTP	TOTAL	FTP	TOTAL	FTP	TOTAL	TOTAL
NATL COMM ON MIGRANT ED G/	...	...	...	...	...	...	...	...	0
NATL COMM LIB & INFO SCS	5	8	5	5	...	...	1	2	12
NATL COMM RESP FIN ED	3	4	3	4	...	...	1	1	2
NATL COMM SEV PUB HOUSING	3	3	3	3	...	...	1	1	7
NATL COUNCIL DISABILITY	5	10	5	6	...	...	2	2	11
NATL CREDIT UNION ADMIN	938	949	936	941	72	72	252	253	1,002
NATL FOUNDATN ON ARTS&HUM	504	568	500	559	38	43	134	149	556
NATL ENDOW FOR ARTS	229	276	227	271	17	21	61	72	272
NATL ENDOW FOR HUMANTIES	260	278	258	272	20	21	69	73	268
INSTITUTE OF MUSEUM SERV	15	16	15	16	1	1	4	4	16
NATL LABOR RELATIONS BD	2,041	2,131	2,029	2,093	156	161	546	560	2,195
NATL MEDIATION BOARD	45	52	45	52	3	4	12	14	58
NATL SCIENCE FOUNDATION	1,121	1,253	1,117	1,240	86	95	301	334	1,288
NATL TRANS SAFETY BD	351	372	349	364	27	28	93	97	360
NATL WOMENS BUS COUNCIL	4	5	4	4	...	...	1	1	4
NUCLEAR REGULATORY COMM	3,289	3,506	3,284	3,377	251	260	880	910	3,377
NUCLEAR WASTE TECH REV BD	18	21	18	19	1	1	5	5	27
OCC SAF & HLTH RVW COMM	67	77	67	77	5	6	16	21	79
OFC NAVAJO&HOPI IND RELO	91	93	91	92	7	7	24	25	97
OFC NUC WASTE NEGOTIATOR	9	12	8	10	1	1	2	3	5
OFC OF GOVERNMENT ETHICS	71	75	69	73	5	6	18	19	101
*** OFFICE OF PERSONNEL MGMT	5,496	6,612	5,446	5,838	419	449	1,297	1,401	8,156
OFFICE OF SPECIAL COUNSEL	87	94	88	91	7	7	22	22	101
PANAMA CANAL COMMISSION	7,253	8,444	7,201	8,349	554	642	1,928	2,247	8,603
PEACE CORPS	1,158	1,239	1,144	1,206	88	93	306	321	1,212
PENN AVE DEV CORP	31	40	31	33	2	3	8	9	35
RAILROAD RETIREMENT BOARD	1,782	1,844	1,767	1,815	136	140	473	486	1,857
SECURITIES & EXCHNGE COMM	2,621	2,727	2,603	2,667	200	206	697	713	2,745
SELECTIVE SERVICE SYSTEM	247	261	244	249	19	19	66	67	277
SMALL BUSINESS ADMIN	4,051	4,114	4,034	4,068	310	313	1,080	1,089	4,097
SMITHSONIAN, SUMMARY	4,910	5,527	4,866	5,381	375	414	1,304	1,448	6,801
NATIONAL GALLERY OF ART	776	867	766	846	59	65	205	227	894
SMITHSONIAN INSTITUTION	4,099	4,816	4,065	4,492	313	346	1,090	1,207	4,862
WOODROW WILSON CENTER	35	44	35	43	3	3	9	12	45
SOLDIERS & AIRMENS HOME	613	906	606	677	62	67	219	237	957
SUSQUEHANNA RIV BAS COMM	1	2	1	2	...	...	...	1	2

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G/ AGENCY ABOLISHED
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TABLE 1 -- MONTHLY REPORT OF FULL-TIME EQUIVALENT/WORK-YEAR CIVILIAN EMPLOYMENT
(PREPARED FOR OMB 02/11/93 FROM THE SF 113-G COVERING CURRENT PERIOD FROM 11/29/92 TO 12/26/92) A/
PERCENT OF CEILING YEAR ELAPSED = 36.9%

AGENCY		CONTRIBUTING EMPLOYMENT		FTE CURRENT PERIOD		WORK-YEARS CURRENT PERIOD		WORK-YEARS CUMULATIVE TO DATE (TO 12/26/92)		CEILING
		FTP	TOTAL	FTP	TOTAL	FTP	TOTAL	FTP	TOTAL	TOTAL
TENNESSEE VALLEY AUTH		18,096	19,339	17,929	19,087	1,379	1,467	4,839	5,153	23,000
US INFORMATION AGENCY		8,007	8,391	7,968	8,268	613	636	2,144	2,229	8,679
US INSTITUTE OF PEACE		47	62	47	53	4	4	13	14	53
US INTNATL DEV COOP AGCY		4,187	4,391	4,164	4,336	320	333	1,125	1,173	4,647
AGCY FOR INTERNATL DEV		4,016	4,205	3,993	4,151	307	319	1,079	1,122	4,454
OVRSEAS PRI INVESTMT COR		144	158	144	157	11	12	39	43	161
TRADE AND DEV PROGRAM		27	28	27	28	2	2	7	8	32
US POSTAL SERVICE TOTAL	*	590,821	822,848	587,889	753,451	45,222	57,957	163,457	203,322	757,798
*** US POSTAL SERVICE		590,761	822,586	587,832	753,393	45,218	57,952	163,442	203,306	757,740
POSTAL RATE COMMISSION	*	60	62	57	58	4	4	15	16	58

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TABLE 2 -- FY 1993 WORK-YEARS OF TOTAL AND FULL-TIME WITH PERMANENT APPOINTMENT EMPLOYEES BY AGENCY (FROM 09/20/92 TO 12/26/92) A/
PERCENT OF CEILING YEAR ELAPSED = 26.9%
CURRENT PERIOD: 11/29/92 TO 12/26/92

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AGENCY		TOTAL CURRENT PERIOD	TOTAL OMB ASSIGNED CEILING	TOTAL FY 1993 WORK-YEARS USED TO DATE	TOTAL FY 1993 WORK-YEARS USED TO DATE AS PERCENT OF CEILING	FULL-TIME WITH PERMANENT APPOINTMENT CURRENT PERIOD	FULL-TIME WITH PERMANENT APPOINTMENT FY 1993 WORK-YEARS USED TO DATE
TOTAL B/	*	148,912	1,939,515	518,977	26.7	127,577	452,042
TOT EXCL USPS&POSTAL RT COM	*	88,955	1,181,717	313,855	26.5	82,355	288,585
PERSPTV PAYMT ASSESSMT CM		...	25	1	4.0	...	1
EXECUTIVE BRANCH C/	*	148,912	1,939,490	518,978	26.7	127,577	452,041
EXEC BR EXCL USPS&POSTAL RT	*	88,955	1,181,692	313,854	26.5	82,355	288,584
EXEC OFC OF THE PRESIDENT		135	1,928	412	21.4	121	364
••• WHITE HOUSE OFFICE		31	414	93	22.5	27	82
••• OFC OF VICE PRESIDENT		2	26	6	23.1	2	6
••• OFC OF MGMT & BUDGET		42	605	128	21.2	42	125
••• OFFICE OF ADMINISTRATION		17	234	52	22.2	17	50
••• COUNCIL ECONOMIC ADVISORS		3	41	8	19.5	3	8
••• COUNCIL ON ENVIRON QUAL		2	40	7	17.5	2	8
••• OFC NAT DRUG CONTL POLICY		9	137	27	19.7	8	23
••• OFC OF POLICY DEVELOPMENT		3	51	9	17.6	3	9
••• NATL CRIT MATERIALS COUN		...	3	...	...	...	...
EXEC RESIDENCE AT WH		7	100	25	25.0	...	1
••• NATIONAL SECURITY COUNCIL		4	85	13	20.0	4	12
••• NATIONAL SPACE COUNCIL		...	7	1	14.3	...	1
••• OFC OF SCI & TECH POLICY		3	43	7	18.3	2	7
••• OFC OF US TRADE REP		12	182	38	22.2	11	34
MAJOR DEPARTMENTS D/	*	78,323	1,009,598	289,598	28.7	70,421	247,043
STATE, TOTAL E/		1,960	26,013	6,817	28.2	1,837	6,434
STATE		1,938	25,730	6,737	28.2	1,818	6,356
INT BOUNDARY&WATER COMM		21	248	73	29.4	20	71
INT BOUNDRY COMM(US&CAN)		1	11	2	18.2	1	2
INT JOINT COMM(US&CAN)		2	24	5	20.8	1	5
TREASURY		11,961	182,818	41,948	23.0	11,508	40,403
DEFENSE, CIVIL TOTAL	*	1,855	27,588	7,248	26.3	1,777	6,833
ARMY, CIVIL FUNC TOTAL	*	1,855	27,584	7,247	26.3	1,777	6,832
CORPS OF ENGINEERS		1,844	27,444	7,209	26.3	1,788	6,799
CEMETERIAL EXPENSES	*	11	140	38	27.1	9	33
AIR FORCE CIVIL FUNC	*	...	4	1	25.0	...	1
JUSTICE		7,288	97,958	25,374	25.8	7,024	24,521
INTERIOR		5,880	74,000	20,390	27.6	4,813	16,902
AGRICULTURE		8,338	111,021	30,454	27.4	7,373	25,888

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CURRENT PERIOD: 11/29/92 TO 12/26/92

AGENCY		TOTAL CURRENT PERIOD	TOTAL OMB ASSIGNED CEILING	TOTAL FY 1993 WORK-YEARS USED TO DATE	TOTAL FY 1993 WORK-YEARS USED TO DATE AS PERCENT OF CEILING	FULL-TIME WITH PERMANENT APPOINTMENT CURRENT PERIOD	FULL-TIME WITH PERMANENT APPOINTMENT FY 1993 WORK-YEARS USED TO DATE
COMMERCE		2,697	35,682	9,450	26.5	2,439	8,480
LABOR F/		1,383	18,265	4,849	26.5	1,336	4,662
HEALTH AND HUMAN SERVICES		9,638	125,704	33,774	26.9	8,919	31,242
HOUSING & URBAN DEV		1,028	13,837	3,623	26.2	1,005	3,528
TRANSPORTATION		5,285	70,212	18,505	26.4	5,159	18,051
ENERGY(INC ALASKA NAT GAS)		1,531	19,950	5,368	26.9	1,486	5,208
ENERGY		1,531	19,950	5,368	26.9	1,486	5,208
EDUCATION		375	5,032	1,313	26.1	352	1,231
VETERANS AFFAIRS		17,328	221,818	60,485	27.3	15,393	53,662
LARGE INDEPENDENT AGENCIES		4,699	62,744	16,444	26.2	4,601	16,097
ENVIRONMTL PROTECT AGCY		1,321	17,917	4,601	25.7	1,271	4,424
GENERAL SVCS ADMIN		1,507	19,880	5,281	26.6	1,480	5,185
NATL AERO SPACE ADMIN		1,871	24,947	6,562	26.3	1,850	6,488
OTHER INDEPENDENT AGENCIES	•	65,755	865,220	230,522	26.6	52,434	188,537
OTH INDE AGY EXCL USPS&PRC	•	7,798	107,422	27,200	25.3	7,212	25,080
ACTION		32	432	113	26.2	31	110
ADMIN CONFERENCE US		2	24	6	25.0	1	5
ADV COMM ON INTGOVTL REL		2	20	5	25.0	2	5
ADV COUNCIL HIST PRESERV		3	39	10	25.6	3	9
AFRICAN DEVELOPMT FOUNDTN		3	51	11	21.6	3	10
AMER BATTLE MONUMNTS COMM		30	387	105	27.1	29	100
APPALACHIAN REGIONAL COMM		1	11	3	27.3	1	3
ARCH & TRANS BAR COMP BD		3	36	9	25.0	2	8
ARMS CONT & DISARM AGCY		18	252	60	23.8	18	54
ARCTIC RESEARCH COMM		...	4	1	25.0	...	1
BARRY GOLDWATER SCH&EX ED	•	...	3	1	33.3	...	1
BD INTERNTL BRDCASTING		1	19	4	21.1	1	3
BD OF GOV, FED RSRV SYS	•	115	1,490	401	26.9	111	389
C COLMBUS QUINC JUBI COMM		...	4	...	...	...	...
COMMISSION OF FINE ARTS		1	7	2	28.8	1	2
COMM ON CIVIL RIGHTS		6	85	22	25.9	5	18
COMM ON MINORITY BUS DEV	•	...	6	1	16.7	...	1
COMM NATL&COMMUNITY SERV		1	17	5	29.4	1	4
CMTE PUR PRO BLD&SVLY HCP	•	1	18	5	27.8	1	5
COMMODITY FUT TRDG COMM		44	627	155	24.7	43	149
CONSUMER PRODUCT SAF COMM		39	515	136	26.4	38	132

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PERCENT OF CEILING YEAR ELAPSED = 26.9%
CURRENT PERIOD: 11/29/92 TO 12/26/92

AGENCY		TOTAL CURRENT PERIOD	TOTAL OMB ASSIGNED CEILING	TOTAL FY 1993 WORK-YEARS USED TO DATE	TOTAL FY 1993 WORK-YEARS USED TO DATE AS PERCENT OF CEILING	FULL-TIME WITH PERMANENT APPOINTMENT CURRENT PERIOD	FULL-TIME WITH PERMANENT APPOINTMENT FY 1993 WORK-YEARS USED TO DATE
DEF NUC FACILITIES SAF BD		6	100	21	21.0	6	20
DELAWARE RIVER BASIN COMM		...	2	1	50.0	...	...
EQUAL EMPLOY OPP COMM		217	3,071	758	24.7	216	751
EXPORT-IMPORT BANK OF US		35	462	120	26.0	25	68
FARM CREDIT ADMIN		35	517	124	24.0	34	121
FARM CREDIT SYS ASSIST BD		1	7	5	71.4	1	2
FARM CREDIT SYS INS CORP		1	16	2	12.5	1	2
FEDERAL COMMUNICATNS COMM		137	1,778	481	27.1	132	464
FEDERAL DEPOSIT INS CORP		788	10,489	2,752	26.2	731	2,569
FEDERAL ELECTION COMM		21	276	72	26.1	20	68
FED EMERGENCY MGMT AGCY		301	2,771	1,125	40.6	194	663
FED FIN INSTITS EXAM COUN		1	4	2	50.0	1	2
FED HOUSING FINANCE BD		8	110	29	26.4	7	26
FED LABOR RELATIONS AUTH		19	251	66	26.3	18	63
FEDERAL MARITIME COMM		16	231	68	24.2	16	56
FED MED & CONCIL SVC		25	315	86	27.3	24	85
FED MN SAF&HLTH RVW COMM		4	80	13	21.7	3	12
FED RET THRIFT INVEST BD		7	95	24	25.3	7	23
FEDERAL TRADE COMM		72	977	251	25.7	70	244
HOLOCAUST MEMORIAL COUNCL		3	128	12	9.4	2	7
HS TRUMAN SCH FOUNDATION		...	5	1	20.0	...	1
INTERAGY COUN ON HOMELESS		1	12	3	25.0	...	...
INTER-AMERICAN FOUNDATION		5	76	19	25.0	5	18
INT CULTRL&TRADE CTR COMM		...	10	1	10.0	...	1
INTERNATIONAL TRADE COMM	*	37	486	131	27.0	35	124
INTERSTATE COMMERCE COMM		47	550	165	30.0	46	161
JAMES MADISON MEM FOUNDTN	*	1	7	2	28.6	...	2
JAPAN-US FRIENDSHIP COMM		...	6	1	16.7	...	1
MARINE MAMMAL COMM		1	12	3	25.0	1	3
MARTIN L KING JR FED COMM		...	8	...	...	...	...
MERIT SYS PROTECTION BD		24	318	82	25.8	22	77
NATL ADV COUNCIL PUB SERV		...	1	1	100.0	...	1
NATL ARCHIVES&RECOS ADMIN		202	2,750	708	25.7	161	564
NATL CAPITAL PLNG COMM		4	55	13	23.6	4	13
NATL COMM AMER IND HOUS		...	4	1	25.0	...	1
NATL COMM ON CHILDREN		1	3	2	66.7	1	2

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PERCENT OF CEILING YEAR ELAPSED = 28.9%
CURRENT PERIOD: 11/29/92 TO 12/26/92

AGENCY	TOTAL				FULL-TIME WITH PERMANENT APPOINTMENT	
	CURRENT PERIOD	OMB ASSIGNED CEILING	FY 1993 WORK-YEARS USED TO DATE	FY 1993 WORK-YEARS USED TO DATE AS PERCENT OF CEILING	CURRENT PERIOD	FY 1993 WORK-YEARS USED TO DATE
NATL COMM ON MIGRANT ED G/	...	6	...	...	...	...
NATL COMM LIB & INFO SCS	...	12	2	16.7	...	1
NATL COMM RESP FIN ED	...	2	1	50.0	...	1
NATL COMM SEV PUB HOUSING	...	7	1	14.3	...	1
NATL COUNCIL DISABILITY	...	11	2	18.2	...	2
NATL CREDIT UNION ADMIN	72	1,002	253	25.2	72	252
NATL FOUNDATN ON ARTS&HUM	43	558	149	26.7	38	134
NATL ENDOW FOR ARTS	21	272	72	26.5	17	61
NATL ENDOW FOR HUMANTIES	21	268	73	27.2	20	69
INSTITUTE OF MUSEUM SERV	1	18	4	22.2	1	4
NATL LABOR RELATIONS BO	161	2,195	566	25.8	156	548
NATL MEDIATION BOARD	4	58	14	24.1	3	12
NATL SCIENCE FOUNDATION	95	1,288	334	25.9	86	301
NATL TRANS SAFETY BD	28	360	97	26.9	27	93
NATL WOMENS BUS COUNCIL	...	4	1	25.0	...	1
NUCLEAR REGULATORY COMM	260	3,377	910	26.9	251	880
NUCLEAR WASTE TECH REV BD	1	27	5	18.5	1	5
OCC SAF & HLTH RVW COMM	6	79	21	26.6	5	18
OFC NAVAJO&HOPI IND RELO	7	97	25	25.8	7	24
OFC NUC WASTE NEGOTIATOR	1	5	3	60.0	1	2
OFC OF GOVERNMENT ETHICS	6	101	19	18.8	5	18
*** OFFICE OF PERSONNEL MGMT	449	6,156	1,401	22.8	419	1,297
OFFICE OF SPECIAL COUNSEL	7	101	23	22.8	7	22
PANAMA CANAL COMMISSION	642	8,603	2,247	26.1	554	1,928
PEACE CORPS	93	1,213	321	26.5	88	306
PENN AVE DEV CORP	3	35	9	25.7	2	8
RAILROAD RETIREMENT BOARD	140	1,857	486	26.2	136	473
SECURITIES & EXCHNGE COMM	205	2,745	713	26.0	200	697
SELECTIVE SERVICE SYSTEM	19	277	67	24.2	19	66
SMALL BUSINESS ADMIN	313	4,097	1,089	26.6	310	1,080
SMITHSONIAN, SUMMARY	414	5,801	1,446	24.9	375	1,304
NATIONAL GALLERY OF ART	65	894	227	25.4	59	205
SMITHSONIAN INSTITUTION	346	4,662	1,207	24.6	313	1,090
WOODROW WILSON CENTER	3	45	12	26.7	3	9
SOLDIERS & AIRMENS HOME	67	957	237	24.6	62	219
SUSQUEHANNA RIV BAS COMM	...	2	1	50.0	...	...

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TENNESSEE VALLEY AUTH		1,467	23,000	5,153	22.4	1,370	4,839
US INFORMATION AGENCY		636	8,679	2,229	25.7	613	2,144
US INSTITUTE OF PEACE		4	53	14	26.4	4	13
US INTNATL DEV COOP AGCY		333	4,647	1,173	25.2	320	1,125
AGCY FOR INTERNATL DEV		319	4,454	1,122	25.2	307	1,078
OVRSEAS PRI INVESTMT CDR		12	161	43	26.7	11	39
TRADE AND DEV PROGRAM		2	32	8	26.0	2	7
US POSTAL SERVICE TOTAL	*	57,957	757,798	203,322	26.8	46,222	163,457
*** US POSTAL SERVICE		57,953	757,740	203,308	26.8	46,218	163,442
POSTAL RATE COMMISSION	*	4	56	16	27.6	4	15

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Mr. HOYER. Mr. Visclosky.

DRUG TESTING

Mr. VISCLOSKY. Mr. Chairman, thank you very much.

Ms. Lattimore, one of the issues that was covered in last year's hearing was the issue of drug testing and Ms. Newman, when she was here, indicated that there was a major policy statement upon which agencies have agreed. Do you have any sense of whether or not that policy will continue or whether there will now be a change in drug testing of Federal employees?

Ms. LATTIMORE. As far as I know, we are moving on that same pathway. We are doing reasonable suspicion testing—some agencies have some random testing. Most of them do testing for testing—designated positions. I have not been aware of any major shift in the policy direction in that regard. There have been no issues addressed with us today.

Mr. VISCLOSKY. One other question I would have on all of these, given the specificity of questions previously answered for the record, I would like clarification of information that was provided by Ms. Newman for the record in last year's hearing.

My request was, how many people have been tested and what were the positive results of those tests and is there a cost figure? And, if I could just point out, a portion of her answer indicated that in fiscal year 1991—October 1, 1990, to September 30, 1991—agencies tested 105,930 people—or at least conducted that many tests. One-half of 1 percent were verified as positive. The number of those that were random tested were 55,000. Six hundred and thirty-five of those, four-tenths of 1 percent, were verified as positive. But the cost was $7,334,632.

The second piece of information was a study done by the House Post Office Committee's Subcommittee on Civil Service. A different time period a year earlier, April 1, 1989, to March 31, 1990, indicated that there were 28,872 tests. Positive results, again, were essentially the same, .5 percent. Of those, almost all, except for 600, were random tests with a .31 percent positive for random.

Two questions. Really, there is almost a threefold increase from the period study by the Post Office Committee from April, 1989, to March of 1990 to October 1, 1990, to September 30, 1991. Were there different samplings or was that a significant change in terms of the numbers of tests that were then being administered? I mean, you are talking about a threefold increase in terms of the numbers and the language used in the answer. It sounded as though both figures for those time periods were inclusive for all of the Federal agencies.

Secondly, there is a huge discrepancy in cost figure. The Post Office Committee indicated that for one-third the number of tests, where earlier you assume, for the inflation, all kinds of procedures is less, they indicate the cost for 28,000 tests was $11.7 million. HHS said that for 105,000 tests a year-and-a-half later it was $7.3 million.

So if there could be some clarification—and, to be very frank, my concern is I don't think that the Federal work force is riddled with drug abusers. Clearly, if there is probable cause, and people ought to be assisted if they are having an individual problem. But to have

105,000 tests, many of which are random at a cost of $7 million or $11 million, I am wondering if that is a wise investment of each one of those dollars, if those dollars in terms of drugs might not be better used in rehabilitative services.

Ms. LATTIMORE. We will get you some specifics.

[The information follows:]

DRUG TESTING

Question."Were there different samplings or was that a significant change in terms of the numbers of tests that were being administered?"

Answer. The sampling itself was somewhat different for the two different surveys. The March, 1990 data was based on responses from 96 agencies while the HHS data from September, 1991, was based on responses from 133 agencies. The primary reason for the increase in the number of tests done was that, by 1991, most agencies has implemented their testing programs. These agencies had, by that time, completed labor negotiations, had their plans approved by HHS, had completed any litigation regarding the implementation of their drug-free workplace plans, and had begun testing employees.

Question. "Secondly, there is a huge discrepancy in cost figure."

Answer. There was a drop in the cost-per-test as more agencies began to test, which created an economy of scale in terms of the testing costs. Also, agencies were beginning to renegotiate testing contracts and were able to obtain lower costs. Specific data on testing costs and numbers of employees tested are gathered by HHS-SAMHSA (Substance Abuse and Mental Health Services Administration).

Mr. VISCLOSKY. Thank you, Mr. Chairman.

Mr. HOYER. Thank you.

Ms. Lattimore, again, not for response at this point in time, but I have indicated to other agencies I would like to have them address this.

The President has indicated a desire to cut administrative expenses in government by 3 percent a year for the next four years with a total of 14 percent. Obviously, four years would be 12, but a bump. Those expenses as I understand it, are applied to nonpersonnel and administrative. What do you consider administrative costs? What are your administrative costs? They don't include personnel. They don't include another item.

Ms. LATTIMORE. It would be equipment, travel, rent. But I think rent paid to GSA would be exempted from that particular cut.

Mr. HOYER. Rent. Rent and personnel. Are you in the process of preparing——

Ms. LATTIMORE. For OPM?

Mr. HOYER [continuing]. For OPM what that cut will be.

Ms. LATTIMORE. Yes, we are doing that.

Mr. HOYER. Now, in terms of the 4 percent, you indicated you had 6,800.

Ms. LATTIMORE. 6,842 on board.

Mr. HOYER. That is your authorized level.

Ms. LATTIMORE. No, we have an authorized level of 6,100. The number of actual bodies we have on board is 6,842. We have a number of people that are intermittent and part-time people that have been used in a number of testing and examining programs, so we are utilizing that 6,100 level through 6,842 actual people.

Mr. HOYER. So your reduction would be about what? What do you figure your reduction——

Ms. LATTIMORE. Two hundred and forty-four from our 6,193 level.

Mr. HOYER. Are you in the process of—will the budget reflect that reduction of 244?

Ms. LATTIMORE. Yes. It will reflect a reduction in the slots as well as the costs associated with those.

Mr. HOYER. Will that be from 6,400?

Ms. LATTIMORE. Yes, as I understand it, it is from the 1993 level, authorized level.

Mr. HOYER. That will be from the—they have 6,842 on board but, obviously, part of that is—because 6,100 is the FTE level. More bodies than there are slots because they utilize them differently. But that will get you a real number if you reduce the 244 from the 6,100 because they will then have to reduce the 6,842 commensurate.

Ms. LATTIMORE. Because the money will go away.

Mr. HOYER. Mr. Lightfoot, did you want to ask any questions?

Mr. LIGHTFOOT. Mr. Chairman, I just have some questions that I would like to submit that you folks can respond to on the record. It will take some research.

Mr. HOYER. Mr. Wolf may have questions that we will submit to you.

You mention in your statement some of the-he would call family-friendly actions in terms of shared leave and flex time and flexiplace and telecommuting centers that he and I are both interested in and OPM has been involved in, all of those things. I have some additional questions. We may well have OPM back when we get a budget and review it.

Ms. LATTIMORE. Hopefully, we will have a director by then.

Mr. HOYER. If not, I will be glad to deal with you. I want you to know that.

Ms. LATTIMORE. I will be as responsive as I can.

Mr. HOYER. Ms. Barber you are going to go back and work with your folks and get me a study by August 15th that shows we can do it accurately and with confidence and appropriately, aren't you?

Ms. BARBER. I will try.

[Questions and answers for the record follow:]

FEDERAL PAY

Question. How much of the $1.361 billion savings projected for fiscal year 1994 is related to the pay freeze and how much from delaying implementation of locality pay adjustments?

Answer. The $1.361 billion savings in 1994 is an estimate by the Office of Management and Budget (OMB) of the cost difference between a pay freeze and a projected pay raise of difference between a pay freeze and a projected pay raise of 3.2 percent used to calculate the budget baseline. In this context, the savings amount would include both savings from the ECI-based schedule adjustment and savings from delaying locality pay adjustments. The attached chart, which has been provided by OMB, gives more detail. It should be noted that the chart and the $1.361 billion savings relate to non-DOD agencies only. (Attachment #1)

WASHINGTON AREA PAY GAP

Question. We know that the pay gap between Federal and private sector employees was significant when the Federal Employees Pay Comparability Act (FEPCA) mandate was instituted. Does OPM have any information on what the cost differential is in the Washington Metropolitan area?

Answer. Under the pre-FEPCA methodology, the nationwide pay disparity between General Schedule and private sector pay was about 30 percent. However, we believe this pre-FEPCA methodology did not yield an accurate picture of the difference in pay levels.

The Federal Salary Council (FSC) has not yet submitted a methodology recommendation to the Pay Agent. Under FEPCA, the Pay Agent must consider the FSC's recommendations before making decisions on methodology. Hence, no official gap measurement for Washington, D.C., exists. If the pre-FEPCA methodology were applied to the data collected by BLS in the Washington, D.C., area, the pay gap here would be of the same order of magnitude as the nationwide pay gap derived under the old nationwide pay comparability system.

DOWNSIZING

Question. The Federal Government continues the order of downsizing, but also must keep in mind that the public expects and deserves efficient programs and service. In most cases agencies are going to be expected to do more for less. Are adequate policies being implemented which will ease the burden of managing programs and services which have been affected by employee streamlining?

Answer. Each agency has the authority and responsibility to administer its programs in the most efficient and effective way possible. While OPM has supported agencies in these efforts, the basic responsibility and accountability rests with each individual agency.

OPM has supported agencies by taking actions to help insure they have the ability to effectively manage their workforces. OPM has for a number of years emphasized the streamlining of procedures and the delegation of personnel authorities to agencies, such as authorizing the use of private sector temporary help services to maintain efficiency and productivity. But it is important to remember that, although agencies generally will be downsizing, they will often also be continuing to fill at least some critically needed positions. Therefore, our focus has been to make sure that policies and systems are in place that enhance the ability of agencies to attract and retain a highly qualified and skilled workforce.

To this end, OPM's simplified qualification standards system provides a flexible framework for agency staffing activities. It enables agencies to identify and target the specific knowledge, skills, and abilities needed for successful job performance, and to focus recruiting activities on those applicants most likely to be successful workers. In addition, the flexibilities in the system permit agencies to easily reassign current employees to positions in which they are likely to be successful performers.

Furthermore, we have made it significantly easier for agency managers to hire workers through improvements to our examining system and job information system. In the area of examining, our Automated Applicant Referral System allows agencies quick access via a touch-tone telephone to competitive inventories of available candidates maintained by OPM. It is used by agencies with direct-hire authority for hard-to-fill occupations. The system produces a referral list within 15 minutes via a fax machine. The occupations covered are Engineers, Physical Scientists, Mathematicians, Computer Specialists, and Clerical positions.

Our Automated Applicant Certification System also allows Federal agencies quick access via a touch-tone telephone to competitive inventories maintained by OPM. It produces a formal certificate of eligibles within 15 minutes via a fax machine. This system accesses the Accountant/Auditor, Administrative Careers With America Groups 3, 4, 5, and 6, Clerical, and Computer Specialist inventories.

The OPM Connection for Part-time Employment and Job Sharing is a system designed to match Federal employees who have registered their interest in part-time and/or shared jobs with agencies seeking such candidates. Agencies have quick access via a touch-tone telephone to the system, which produces a list of candidates within 15 minutes via a fax machine. This system covers all General Schedule occupations.

The Defense Outplacement Referral System is designed to allow Federal agencies and other employers rapid access to referral lists of current Department of Defense (DOD) military and civilian personnel and their spouses. The purpose is to provide maximum placement opportunity for these individuals who may be affected by base closures or downsizing. Referrals are made to other DOD activities, non-DOD Federal agencies, the private sector, and State and local governments. Agencies have quick access via a touch-tone telephone to the system, which produces a list of candidates within 15 minutes via a fax machine. This system covers all General Schedule and wage-grade occupations.

The Job Ready Disabled Veterans Connection is designed to aid the Department of Veterans Affairs in providing employment services to certain disabled veterans. It gives Federal agencies access to another source of qualified candidates who can be easily and directly appointed. Agencies have quick access via a touch-tone tele-

phone to the system, which produces a list of veterans within 15 minutes via a fax machine. This system covers all General Schedule and wage-grade occupations.

Our Clerical Local Application Scanning System provides quick clerical application processing through the use of high speed table top scanners, which enable OPM service centers to process written test and application documents locally. Service centers produce Notices of Results for applicants and provide next day referral of eligible candidates to agencies. Agencies have quick access via a touch-tone telephone to the system, which produces a list of eligible applicants within 15 minutes via a fax machine. This system covers Clerk Stenographer, GS–3/5, and 67 other clerical occupations at grades GS–2/4.

Our Telephone Application Processing System is a new application processing system that enables applicants to apply for employment consideration by transmitting their qualifications information through a touch-tone telephone. Applicants will dial directly into the OPM computer system. The computer will ask a series of questions concerning the applicant's qualifications and availability for an occupation. After the call is completed, the responses are processed and a Notice of Results is generated within 5 working days. This system will provide next day referral or certification to Federal agencies. Agencies will have quick access via a touch-tone telephone to the system, which produces a list of eligible applicants within 15 minutes via a fax machine. The first occupation will be Professional Nurse.

Our Microcomputer Assisted Rating System is a personal computer-based system, with which Personnel Staffing Specialists in examining offices will be able to create automated rating schedules for unassembled examinations. The system will guide them through developing rating schedules and will build a supplemental questionnaire and applicant instructions at the same time they create the rating schedule. Applicants will record their responses to the supplemental questionnaire on a standard computer scan form. This will permit high speed computer processing and rating of applications previously done manually.

Finally, our revised Displaced Employee Program provides referrals to agencies of civilian employees displaced due to base closures, downsizing, or other personnel reductions. Agencies will have access via a touch-tone telephone to the system, which will produce a list of displaced employees within 15 minutes via a fax machine. Additionally, agencies will have access to a centralized database of qualification summaries of all displaced employees. This system covers all General Schedule and wage-grade occupations.

In the job information area, OPM is pursuing policies designed to ensure that employees displaced in downsizing have easy access to information on employment opportunities. These actions were mandated by the Defense Authorization Act for Fiscal Year 1993. First we are requiring Federal agencies to submit listings of vacancy announcements for all jobs in the competitive service, including merit promotion vacancies, that are to be filled for more than 1 year, and that are open to applicants from outside the hiring agency. With this job information more readily available, agency managers will have access to an even larger pool of qualified candidates.

In addition, we are publicizing Federal employment opportunities through a variety of means, including printed lists of vacancy announcements such as the Federal Job Opportunities Listing, distribution of lists of open competitive vacancy announcements to State Employment Services offices, touch screen computers, automated telephone-based information systems, and electronic bulletin boards.

SUCCESSION PLANNING

Question. The Administration has ordered a 10 percent cut of the Government's middle and upper-level jobs. Although the jobs are expected to be eliminated by attrition, there will be employees remaining who may be anticipating promotions to higher level jobs in positions that no longer exist. Has OPM begun to identify what alternatives exist for those remaining employees who will be placed in this situation?

Answer. Agencies are in the best position to deal with these circumstances. They are the most knowledgeable of their programs, workforces, normal turnover rates, and employee expectations. Characteristics of agency workforces can vary greatly and are a major factor in agency succession planning and long range staffing plans. Thus, this is a matter most appropriately dealt with by the individual agencies themselves. Furthermore, OPM believes agencies have appropriate tools to deal with the situation, but will respond if additional Governmentwide needs are identified.

It should also be noted that, starting in 1994, we anticipate a significant number of retirements among career Senior Executive Service (SES) members as a result of the major pay increase in 1991. The higher rates determine an employee's high-three average salary used to compute the employee's retirement annuity. Approxi-

mately 36 percent of career SES appointees will be eligible for voluntary retirement in 1994. Among major agencies, the eligibility rate ranges from 14 percent to 55 percent. Although not all eligible employees will retire, the anticipated higher than normal rate will likely create additional promotional opportunities for employees in lower grades even with the proposed cutback in SES positions.

Furthermore, the simplified and more flexible qualification standards system that OPM has developed and implemented over the past several years will fully support agency efforts to effectively manage the downsized Federal workforce. For example, OPM's qualification standard system permits agencies to define the specific kind of specialized experience that is required for successful performance in a position. Thus, agencies are able to tailor the qualification requirements to their positions to insure that they can take full advantage of the skills of, and provide maximum opportunity to, their workforce.

In addition, for many kinds of inservice placement actions, primarily those which do not involve a promotion, agencies have the authority to modify the basic OPM qualification standards. This authority is most useful in cases where the agency believes that an employee possesses the knowledge, skills, and abilities necessary to be successful in a position, but is lacking some aspect of the experience required by an OPM qualification standard. Through the use of this authority, an agency is able to define the basic experience requirements of its positions, and appoint the person who best meets those job requirements. Thus, employees, will be able to more easily qualify for different kinds of jobs and agencies will be able to reassign employees to a broader range of positions.

PERFORMANCE MANAGEMENT

Question. FEPCA, enacted in 1990 to correct the pay comparability disparity between Federal employees and non-Federal employees will hopefully attract the best and the brightest people, in addition to paying present employees for good performance. In the interim, performance management issues continue to arise regarding poor performers and recognition for good performers, which are not directly linked to pay. The Performance Management and Recognition System (PMRS) is up for renewal in October. Has OPM been examining the current system and determined the effectiveness of the PMRS?

Answer. Since its inception, the PMRS has been examined by a variety of groups as well as in OPM's annual reports to the President and the Congress. Most recently, when the Congress last reauthorized the system in March 1991, it ordered OPM to establish a PMRS Review Committee to recommend changes in the system. OPM now has in hand that committee's report, as well as the reports and recommendations of other groups including GAO, the National Research Council, the Merit Systems Protection Board, and the Pay-for-Performance Labor-Management Committee mandated by FEPCA with respect to the Federal performance management systems. Common to all these assessments and reports is the view that there are serious problems and dissatisfactions with performance management, but no complete consensus concerning what should be done about it. We anticipate addressing performance management issues in a legislative proposal later this year.

FEDERAL WAGE SYSTEM

Question. OPM issued a report to Congress in June 1992 on the Federal Wage System (FWS). The chief problem associated with the system has to do with the substantial pay anomalies. Would you summarize the findings in the report for the subcommittee?

Answer. Our report points out that problems with the FWS derive from the combined effects of an overly generous pay structure under the FWS and a series of pay caps that have been imposed by specific legislation each year since 1979. The report notes that as of the end of fiscal year 1991, the overall average pay gap resulting from these pay caps was 9.55 percent at step 2, which is the market linkage point under current law, but only 1.43 percent at step 4, which is the average step for FWS employees. Current law sets step 4 at 108 percent of market rates. Thus, in the absence of pay caps, the Federal Government would pay approximately 8 percent above private sector market rates.

The chief problem associated with pay caps is not that FWS employees, in the aggregate, are paid at rates substantially below private sector pay rates for employees in comparable positions. Rather, years of successive pay limitations have produced substantial pay anomalies so that, on a grade-by-grade basis within areas and from one wage area to another, FWS pay rates are no longer aligned with prevailing levels for comparable work within the area. In addition, certain generous statutory aspects of the FWS would, without reform and in the absence of pay caps, result in

the Federal Government regularly paying higher rates than its competitors and would perpetuate serious inequities between the Federal blue-collar pay system and the white-collar system.

Our report recommends phasing out pay caps only in conjunction with other fundamental reforms needed to better align Federal pay with non-Federal pay. Major reforms include linking prevailing market rates to prevailing FWS rates, rather than to step 2 of the 5-step rate range; providing for flexibility to adjust FWS rates within a band between full market comparability and no more than 5 percent below market levels; discontinuing the use of out-of-area survey data in calculating local FWS pay rates by abolishing the so-called Monroney Amendment; adding coverage of State and local governments to FWS wage surveys; making the "90-day delay" in wage schedule effective dates permanent; and giving the President the authority to authorize alternative FWS pay adjustments.

WORKFORCE DIVERSITY

Question. One of OPM's many objectives should be to create a diversified Federal workforce. Studies have shown that the percentages of women and minorities present in the grade 13 positions and the Senior Executive Service (SES) positions are relatively low in comparison to the other Grades 2 through 11 in which they make up the majority. What is management's commitment to effectively carry out Affirmative Employment objectives?

Answer. Annually, OPM prepares the Federal Equal Opportunity Recruitment Program report to Congress. This report reflects a statistical analysis, including trend data of women, men, and minorities in the Federal workforce compared to the private sector. Further, it identifies accomplishments and initiatives of Federal agencies and OPM in improving representation of women and minorities in the Federal workforce.

Last year, OPM undertook a review of underrepresentation of minorities and women in professional and administrative occupations in the Federal Government. This review compared Federal workforce data to that of the civilian labor fore. The analysis included projections of employment trends for minorities and women showing the likely progress toward meeting or exceeding full representation at all levels by the year 2000.

Based on the review, called the *Pipeline Analysis,* which shows the percentages of women and minorities in the professional and administrative occupations, the Senior Executive Service (SES), and in the pipeline to the SES, OPM concluded that improving the Federal Government's record with regard to the advancement of minorities and women is a high priority. It will be necessary to conduct mission critical occupation analysis to determine specific underrepresentation. Once this is accomplished, OPM will be working with agencies to determine what barriers prevent eliminating underrepresentation.

Early in FY 1992, an internal OPM group was formed to look at what OPM might do in light of its leadership in the area of human resources development. This group made numerous recommendations that support and encourage the preparation and advancement of women and minorities into management and executive leadership positions. The group has been enlarged to include other key offices of OPM and other agencies, and its scope expanded to include a variety of human resources issues beyond training and development. OPM hosted two planning meetings in the fall of 1992. Directors of personnel, human resources development, and civil rights from more than a dozen agencies attended. These meetings mark the beginning of a Federal Government dialogue to explore actions that could be taken jointly.

In October 1992, the Merit Systems Protection Board issued the report "A Question of Equity: Women and the Glass Ceiling in the Federal Government." This report included a number of findings and recommendations, which OPM supports and plans to incorporate into our activities and guidance to assist, monitor, and evaluate agency Federal Equal Opportunity Recruitment Programs.

In addition, in April 1992, OPM cosponsored a conference on executive succession planning. One continuing theme throughout the conference and in subsequent presentations on succession planning has been the opportunity to substantially increase the diversity of the executive work force by identifying, recruiting, and developing women, minorities, and persons with disabilities for future executive vacancies. As OPM continues to focus attention on succession planning at all levels of the pipeline, we will incorporate the findings and recommendations of MSPB and other glass ceiling reports in our presentations and guidance to agencies.

Finally, OPM currently administers a number of Government Wide programs aimed at entry-level positions and pipeline opportunities, such as student programs, and programs for future supervisors, managers, and executives, that have signifi-

cant female and minority representation. The Presidential Management Intern Program for the entry of high potential graduate students has consistently had more than 50 percent female representation, and the representation of minorities has been steadily increasing. About 90 percent of the participants in the Women's Executive Leadership Program at the GS–11/12 levels are female (the program is open to both men and women) and 33 percent are minority. In the Executive Potential Program at GS–13/14, about 50 percent of the participants are women and 20 percent are minority. Additionally, agency SES Candidate Development Programs for potential executives who are primarily at the GS–15 leave have 25 percent female and 13 percent minority representation, which is significantly higher than their current representation in the SES.

PLACEMENT ASSISTANCE

Question. I have been hearing concerns regarding displaced employees. A strong demand for job placement assistance certainly exists today, and will probably become greater in the near future. Has OPM been successful in placing a high proportion of program registrants in jobs?

Answer. Agencies have primary responsibility for providing placement assistance to their own displaced employees, and when they do a good job, little OPM assistance is needed. By regulation, they are required to operate positive placement programs that assist employees before they are separated, and they must also maintain a Reemployment Priority List through which they give hiring priority to their employees separated by RIF. These programs are highly successful and when combined with OPM efforts, they account for 99 percent of all placements. This is as it should be. The earlier placement assistance is given, the more successful the efforts will be.

OPM's interagency programs were created as a supplement to agencies' efforts, for those situations where agencies were not able to place their employees, primarily after separation has already occurred. Therefore, individuals registered in these programs usually have unique skills that are not widely marketable, or are not willing or able to relocate to where these skills are needed.

In an effort to be more helpful to agencies as well as displaced employees, OPM is currently revising its Displaced Employee Program to simplify the registration process, make it more user friendly, and provide faster access to qualified and available employees. We hope to operate our revised program by the beginning of the next fiscal year.

COLLEGE RECRUITMENT

Question. OPM has made a considerable effort to rebuild the negative image of the Federal Government workforce by improving its employment practices. I have received positive feedback to this effect, and most Federal employees appear to be pleased with the results as well. I would be interested in knowing what OPM is doing about the Federal recruitment efforts directed towards the colleges and universities.

Answer. Phase I of the Career America recruiting program used a generic approach to improve the image of the Federal Government, to generate interest in Federal careers at colleges and universities by providing generic and targeted employment information, and to introduce progressive recruitment initiatives and strategies. This phase also included the development of three major recruitment videos covering career opportunities in the Federal Government, the Presidential Management Intern Program, and student employment programs. To assist students and placement officials in learning more about the missions and functions of Federal agencies, a Federal Career Directory and an automated Federal Occupational and Career Information System were developed. All were distributed to colleges and universities throughout the country including Historically Black Colleges and Universities and member institutions of the Hispanic Association of Colleges and Universities.

Phase II of the program goes beyond an image-enhancing and general employment focus to an occupation-specific approach to employment in mission critical, growth, and shortage occupations. Under this phase, occupational demand is the key element in developing recruitment strategies and employment information for use by the academic community at all levels.

This phase is being pursued to assist OPM and the Federal Government in developing a focused approach to academic relations and influencing the educational pipeline of the future. The benefits include improvements in the quality of career counseling and planning concerning public service careers, expansion of communications with faculty and departmental chairs, influence on curriculum development for

disciplines representing new technologies unique to the Federal sector, the development of partnerships to support the Government's workforce needs, improvements in the quality of employment information provided to students and placement officials, and the development of a streamlined occupationally focused marketing program.

In addition, there have been some collateral accomplishments as well. For example, we have established the "Career America Connection," which is a telephone hotline that provides callers with information on Federal employment opportunities, including programs of special interest to college students and graduates. This Connection also includes listings of examination announcements, application information for specific vacancies, and other information on the Federal Government as an employer.

We also have widened our work with colleges and universities by expanding our relationships with organizations such as the College Placement Council, Historically Black Colleges and Universities (HBCU's), and the Hispanic Association of Colleges and Universities (HACU's). This includes the creation of two Federal Employment Advisory Groups comprising agency Directors of Personnel, and Presidents of several HACU and BHCU institutions, as well as representatives from community-based organizations. The groups are involved in targeting ways to attract students from HBCU and HACU institutions into the Federal Government.

Finally, we have developed a comprehensive recruiter's training package as a means of professionalizing the Federal recruitment process. The three major courses that have been developed are Recruiting Foundations, Recruitiers Interviewing, and Recruiters Handbook.

WORK AND FAMILY

Question. The workforce needs of Federal employees are changing rapidly. The number of working women and both spouses in the labor force has increased dramatically over the years. Have these changes affected the way OPM does business?

Answer. Over the past fifteen years, OPM has been developing and promoting personnel tools to help employees balance the demands of work with those of caring for their families. For example, flexible and compressed work schedules were introduced as an experiment in 1978 and became permanent in 1985. The Federal Employees Part-time Career Employment Act of 1978 required agencies to expand job opportunities and benefits for part-time employees. In 1986, OPM issued policy guidance encouraging managers and supervisors to be flexible in granting leave to employees for parental and family responsibilities. OPM supported and encouraged the 1988 push by the General Services Administration (GSA) to establish on-site child care centers for children of Federal employees.

OPM has supported the 5-year experimental program for both annual leave transfer and leave banks in the Federal Government. Both the leave bank and transfer programs are set to expire in October, 1993. We are currently working on a report for Congress on these programs which we expect to issue in April, 1993.

OPM's initiative on family member employment has helped spouses whose careers are interrupted when they move overseas to accompany their sponsors on official assignments. Executive Order 12721 gives former overseas family member employees special entry into permanent civil service positions when they return to the States; they do not have to compete with other outside applicants. To qualify for non-competitive appointment, a family member must have worked in a temporary U.S. Government position overseas for at least 52 weeks and meet certain other eligibility criteria. Since 1982, Federal agencies have made more than 15,000 family member appointments. Special provisions for reinstatement now apply to family members who leave their Federal jobs to accompany their sponsors overseas. Generally, former Federal employees who have not yet achieved career tenure can be reinstated within a 3-year period. The period of reinstatement eligibility for family members who accompany their sponsors overseas is extended by the amount of time spent overseas in connection with the sponsor's assignment. Special provisions on career tenure also apply to family member employees. Normally when an employee goes off the rolls before achieving career tenure, he or she must begin a new 3-year period of service for career tenure. Within certain limitations, a family member who has a break in service to accompany a sponsor overseas does not have to begin a new 3-year period.

In Federal agencies throughout the Government, there has been significant development and growth in work and family programs. Longstanding Federal personnel policies in the areas of leave, health benefits, job security, flexible and compressed work schedules, and workforce re-entry offer Federal workers significant flexibility in meeting individual work and family needs. OPM continues to educate line staff,

supervisors, and managers about the options already available to employees and encourages agencies to maximize these options in meeting the needs of the Federal workforce. In June 1992 we opened the OPM Work and Family Program Center in order to centralize OPM's activities on work and family policies. The Center was a key measure identified by OPM in its April 1992 report to Congress, A Study of the Work and Family Needs of the Federal Workforce, to improve the effectiveness and utilization of dependent care policies in the Federal Government.

The Center provides leadership in developing work and family policies and provides guidance, information, and technical assistance to agencies. It coordinates Governmentwide work and family programs and will soon operate a clearinghouse for innovative agency programs. The Center also will develop products such as training modules for executives, managers, and supervisors, and awareness and educational materials.

The Center has established an Interagency Partnership on Work and Family to address child and adult dependent care issues. Partnership agencies include the General Services Administration, and the Departments of Defense, Health and Human Services, Justice, Labor, Transportation, and Veterans Affairs. The Center also sponsors an Interagency Adult Dependent Care Work Group. In collaboration with these interagency partnerships, OPM is focusing on several key issues such as quality standards for child care centers, managerial training related to work and family, and identifying and marketing program resource materials for agencies.

Finally, the Family and Medical Leave Act of 1993 was enacted on February 5, 1993. OPM is preparing regulations and Federal Personnel Manual guidance on administering that Act.

Question. How is OPM coming along with developing programs which indirectly affect a worker's attitude in this increasingly complex economic and social era. Particularly, have issues such as job-sharing, alternative work schedules, flexible work schedules, and leave-sharing among family members been researched by OPM and if so will you share those studies with the Committee?

Answer. OPM's 1992 Survey of Federal Employees (SOFE) was specifically designed to study general employee attitudes. The results, from nearly 32,000 respondents, have provided us with specific hard and perceptual data as pertains to flexible work schedules as well as training, leave benefits, dependents' care, and performance management. A copy of the report on that survey is attached. (Attachment #3) We are currently gearing up for the next SOFE survey, through which we anticipate delving more deeply into employee workplace attitude issues.

OPM is also actively promoting part-time employment and job sharing as flexibilities that help employees balance their work and family responsibilities. As one example, we are running a project called "The OPM Connection" in Boston, Chicago, Los Angeles, and Washington, D.C. Its purpose is to match potential job sharers with each other and also to give Federal agencies access to candidates for part-time or shared-jobs. Prior to launching The OPM Connection, OPM gave agencies detailed instructions on how to set up job-sharing arrangements.

In addition, in support of an even newer flexibility, we are giving agencies information and guidance on implementation of alternative worksite arrangements, commonly referred to as flexiplace. This effort was begun when the President's Council on Management Improvement sponsored the Flexiplace Project. An interagency team, led by OPM and GSA, actually operated the project in which approximately 900 employees from 14 Federal agencies participated. The objective was to test the feasibility of alternative work site arrangements in the Federal service. OPM recently evaluated the work-at-home component of the project. A copy of that report is attached. (Attachment #4) A second component, satellite work centers, is now beginning under GSA leadership.

Our evaluation characterizes the flexiplace arrangement as successful based on the high marks from participating employees and their supervisors. Supervisors reported that individual and organizational performance during the pilot was as good or better than before. Also, agencies spent very little money to implement the arrangement. Employees reported improved motivation, higher quality of work life and home life, reduced use of sick leave, and reduced expenses for commuting and other job-related expenses. In bringing these results to the attention of agency management, we routinely note that appropriate policies and procedures are necessary and that flexiplace, although a promising innovation, is not suitable in every situation. The next step is for us to issue formal guidance in the Federal Personnel Manual.

REVIEW OF CASH AWARDS

Question. OPM has been instructed by the President to review the handling of cash awards presented by the prior Administration's outgoing political appointees, to determine if unethical practices occurred. Is OPM able at this time to provide any information on this?

Answer. The President directed OPM to conduct a review of awards granted at the headquarters level of major Departments and Agencies during FY 1992 an during the first 4 months of FY 1993 in order to inform him whether these awards were granted consistent with established criteria and procedures, and whether new or revised procedures are needed. We have extracted the FY 1992 data from the Central Personnel Data File (CPDF) and have requested and received the FY 1993 data directly from the agencies, since the FY 1993 data has not yet been submitted to CPDF. We are analyzing the data now and plan to conduct on-site visits where the data and the agency submissions suggest the need for further review. The report will be submitted to the President by March 29th.

HIRING OF FORMER SUMMER EMPLOYEES

Question. In your testimony you stated that 1,250 students from Historically Black Colleges and Universities had been hired into your Summer Employment Program this past summer. How many, if any, of those students were hired into permanent Federal Government positions?

Answer. The Summer Employment Program provides for the temporary appointment of students as interns during the summer period (May 13 through September 30). It does not specifically lead to permanent Federal employment. However, after a student works for an organization for the summer they may ultimately compete for placement opportunities and be hired. There is no mechanism to record that data since the Federal Government's Central Personnel Data File system does not require identification of the college or university from which an employee graduated.

OPM SERVICE CENTERS

Question. When the automation of the 26 OPM Service Centers is completed, how often will the information be updated?

Answer. OPM Service Centers have access to current employment information which is updated nightly. This information is available to employment information specialists using the Federal Employment Data System, a personal computer-based system providing comprehensive employment information, and to the general public on touch-screen computers in OPM's employment information centers. Information is also updated nightly on OPM's nationwide electronic bulletin board for employment information, the Federal Job Opportunities Board, and the Career America Connection, a computerized, telephone-based employment information system.

FEHB—PHANTOM FORMULA

Question. A change in the current policy for calculating the Government's premium for the FEHBP is scheduled to be based on the "Big 5" insurers starting with 1994. As I understand it, this change will result in a reduction in the Government's share of premium cost. And an increase of approximately $300 a year in premium costs will go to the enrollee. Have Federal employees been informed of this future change in their premiums?

Answer. The 1989 News Bulletin releasing the 1990 FEHB premiums announced that due to Aetna's leaving the program, the Government maximum contribution would be calculated based on a "Phantom Formula" in lieu of the "Big 6." Although presented as a temporary measure at that time, it has not been an issue of concern to enrollees because legislation subsequently extended the use of the phantom formula through 1993.

Since that announcement, however, OPM has not made an official statement about the change to a "Big 5" formula scheduled to begin in 1994. This is primarily due to the fact that it won't affect enrollees until 1994. In addition, until rate negotiations are finalized, we cannot determine specifically how the change will impact individual premiums. We are aware that several newspapers have published articles reporting on the broader programmatic and budgetary outcomes that could result from the change. We have, of course, been discussing the issue with Congressional staff for several years.

FEHB PROGRAM EFFICIENCY

Question. Last year we talked about program reform for the FEHBP. Specifically, we addressed the steps being taken to improve the efficiency of the program and reducing the administrative costs. It has been suggested that some plans offered under FEHBP are operated less efficiently than others. Where does OPM stand on this issue today?

Answer. Over the last six months, we have held direct negotiations with each of the fee-for-service carriers to achieve appropriate reductions in their administrative expenses. We are pleased that this has resulted in each plan agreeing to make reductions beginning in calendar year 1993. The amounts in percentage terms range from two to four percent of plans' administrative costs.

It is important to note that these dollar reductions will be achieved without any reduction in the quality or timeliness of services to enrollees.

FEHB—COST CONTROL

Question. In addition to decreasing the administrative costs associated with operating the FEHBP, there are other costs which adversely affect the program, such as excessive fees charged by care providers. Considering the large number of Federal employees insured under the FEHBP, you should have a lot of economic power in controlling those costs. What can you do to be a leader in health care reform?

Answer. A number of things have been done both administratively and through legislation during the past few years to control costs in the FEHBP. For example, utilization controls such as precertification of hospital admissions and large case management were mandated for all fee-for-service plans, where unlike HMO's, they are not an intrinsic part of the delivery system. Many carriers developed extensive preferred provider networks in which carriers negotiate preferential rates with physicians, hospitals, and other providers, and structured their benefits packages to encourage their use.

As you know, the President has created a National Health Care Reform Task Force. Once the Task Force has completed its work, we should have a better idea of how the FEHBP might fit into the overall picture and in what direction we can best focus our future efforts.

[Additional questions submitted for the record by Congressman Lightfoot and the answers thereto follow:]

FEHB—PRESCRIPTION DRUGS

Mr. LIGHTFOOT. The retail pharmacy market is a very competitive one. The consumer's ability to select amongst competitors sustains this vigorous competition. The FEP/BCBS/PCS arrangement undermines what may be one of the few classically competitive healthcare related markets. How is it that the taxpayers, in OPM's view, benefit from such restrictions on competition?

Answer. The Blue Cross and Blue Shield/PCS contract you refer to is a good example of how the large scale purchasing power of the FEHB Program can be used to control costs. We estimate that the savings to the FEHBP associated with our acceptance of the BCBS proposal to implement the preferred pharmacy network will be around $136 million. This not only resulted in the enrollee and Government contributions for BCBS being lower than they would have been, but the out-of-pocket costs of those using the network pharmacies will be greatly reduced.

Mr. LIGHTFOOT. The subcommittee has not obtained the contract between BCBS and PCS. Please provide the subcommittee with the actual documents. I am also interested in receiving an update on any current OPM concerns.

Answer. Since OPM does not negotiate with the individual providers of services, we do not have a copy of the contract. However, we received and are supplying a copy of the request for proposals that was issued by BCBS. (Attachment #5)

As to any current concerns, we have none concerning the contract.

Mr. LIGHTFOOT. I have received reports that the contract has not yet been finalized. If this is the case, please explain.

Answer. We have been assured by BCBS that there is a signed contract between them and PCS.

Mr. LIGHTFOOT. I have received reports that BCBS and PCS are receiving manufacturer rebates. If this is the case, it's especially problematic since many in Congress recommended such rebates in lieu of restricting competition amongst retail pharmacies. Such rebates would have accrued for the benefit of taxpayers, not BCBS or PCS.

Answer. You will be happy to learn that there is a process for OPM to secure manufacturer-negotiated discounts and rebates and that these savings will be credited to the FEHB program, where they will help to lower costs to the Government and enrollees, so they will in fact accrue to taxpayers.

Mr. LIGHTFOOT. It appears from the report that I have received that actual access to pharmacies is even more limited than the very questionable restrictions supposedly in the BCBS/PCS contract.

Please provide detailed information indicating on a Congressional district basis which pharmacies in which locations have been selected for this program.

Answer. Although we do not have the information you requested by Congressional district, we are providing you with a 764-page printout of pharmacies in alphabetical order by State and, within a State, by city. (Attachment #6)

PAY REFORM IMPLEMENTATION

Mr. LIGHTFOOT. In view of the across-the-board productivity savings, along with the freeze in Federal pay, have you set up a plan under which you will be able to proceed with the Federal pay comparability reforms you are required to make? Do you have concerns about morale at this point in time?

Answer. We would be prepared to implement locality pay in 1994, but we believe that some revisions to the methodology for comparing Federal and non-Federal jobs are needed. Postponement of locality pay until 1995 would provide time for such revisions to be made. We would anticipate working closely with the Federal Salary Council and the other members of the Pay Agent to determine the necessary revisions.

While we expect that the pay freeze in 1994 will have some impact on employee morale, we feel confident that Federal employees will support the President's efforts to reduce the deficit and will continue to provide quality services to the public.

OUTLAY COSTS FROM PAY RAISE PROPOSAL
($ Millions)

NON-DOD DISCRETIONARY ONLY

	1994	1995	1996	1997	1998
Current Law					
ECI-Based	880	2,440	4,070	5,670	7,160
Locality Pay	880	1,710	2,460	3,240	4,080
Total	1,760	4,150	6,530	8,910	11,240
Baseline	1,710	3,550	5,290	7,090	8,950
Clinton Admin. Pay Proposal					
ECI-Based	0	800	1,800	2,750	4,010
Locality Pay	0	410	780	1,090	1,420
Total	0	1,210	2,580	3,840	5,430
Savings From Baseline (Government-wide)	-1,710	-2,340	-2,710	-3,250	-3,520
Savings From Baseline (Allocated to Accounts)	-1,628	-2,319	-2,691	-3,232	-3,495
Undistributed Offsetting Receipts	267	356	410	491	530
Net Savings	-1,361	-1,963	-2,281	-2,741	-2,965

ATTACHMENT #2

A Study of the Work and Family Needs of the Federal Workforce

A Report to Congress by the Office of Personnel Management April 1992

United States Office of Personnel Management

Office of Labor Relations and Workforce Performance

Personnel Systems and Oversight Group

1900 E Street, NW.
Washington, DC 20415-0001

PSO/OLRWP-2
April 1992

A STUDY OF THE WORK AND FAMILY NEEDS OF THE FEDERAL WORKFORCE

A Report to Congress by the
U.S. Office of Personnel Management
April 1992

EXECUTIVE SUMMARY

INTRODUCTION

Employers throughout the United States, both public and private, are giving increased attention to the inherently significant relationship between work and family. This increased attention is partly the result of changing social attitudes about the role of women in the workplace and the value of balance between work and family life. It is also driven by demographic trends, with women and single parents becoming an increasing segment of the labor supply and the workforce, and aging "baby-boomers" having, or expecting to have, increased responsibilities for the care of elderly parents or other relatives.

These trends have economic significance to employers as they compete to recruit and retain a quality workforce and to manage productivity. They have particular significance to the Government as an employer, since the complex and critical missions of the Federal sector require a highly qualified workforce. Workers with needed skills are hard to attract and expensive to replace.

The need to compete for top talent in the marketplace combined with a strong commitment to family values has prompted the Federal Government to embrace employment policies and programs which help Federal workers balance work and family responsibilities. These include child care centers, flexible and compressed work schedules, part-time employment and job-sharing, flexiplace, flexible leave policies, and leave sharing programs.

In Federal agencies throughout the Government, there has been significant development and growth of work and family programs. However, progress has been uneven and much remains to be done. In the Conference Report accompanying OPM's 1992 appropriation, Congress asked OPM to survey Federal agencies to assess the use of work and family programs and to report on measures that would make them more effective and increase their utilization. This report has been prepared in response to that request. It is designed to identify remaining challenges in the work and family area, as well as past efforts and successes.

Study Methodology

In conducting this review, OPM expanded its research beyond the agency survey suggested by Congress. In the past, analysis of work and family issues has been hampered by a striking lack of information about what segment of the Federal workforce has dependent care needs, what approaches employees find helpful in meeting those needs, and the extent to which existing flexibilities are in use in the workplace. To fill this vacuum, OPM embarked on a major data collection effort.

The key components of OPM's research included a survey of 92 agency Personnel Directors, interviews with personnel officials and managers at 29 agency installations across the country, and a comprehensive survey of 58,000 white collar Federal employees.

This report, *A Study of the Work and Family Needs of the Federal Workforce*, transmits general findings and conclusions and provides highlights of activity for each program area studied. It also describes the measures OPM is taking to improve existing programs and to identify areas for potential program changes.

GENERAL FINDINGS ON DEPENDENT CARE NEEDS

1. About one-third of all Federal employees have dependent care needs.

Approximately 35 percent of the Federal workforce is comprised of employees with child care needs or employees with adult dependent care needs. Employees with child care needs are defined as single parents or dual-income parents, with children under 13 years of age. Twenty-four percent of Federal employees have child care needs, and 12 percent of Federal employees have adult dependent care needs. Two percent of employees have both child and adult dependent care needs.

2. Most employees with dependent care needs are satisfied with the balance they have achieved between work and family.

About 69 percent of employees with dependent care needs are satisfied with the balance between their work and family lives, according to the employee survey. About 62 percent of single parents are satisfied with their work and family balance; this level holds for those with children under 13 and annual family income under $26,000.

3. About half (53 percent) of all Federal employees with dependent care needs believe their organizations understand and support employees' family responsibilities. Only 46 percent of single parents agree that their organizations show this understanding and support.

These sentiments reflect on agency or installation-level policies and practices, and not on those of first-line supervisors. When asked if their supervisors support their family responsibilities, 83 percent of all employees with dependent care needs believe they do. About 79 percent of single parents agree that their supervisors support their family role.

4. There is a limited availability of agency-sponsored dependent care services; the extent of such services varies greatly among agencies.

In recent years, many agencies have made serious efforts to increase the number and effectiveness of agency-sponsored dependent care services for employees. Most agencies now offer counseling services and some offer a broad range of programs. There are, however, significant differences between and within agencies concerning services offered, utilization of services, and extent of administrative and program problems. Agencies and installations also vary in the effectiveness with which they publicize the services they offer.

5. A significant number of employees with dependent care needs express an interest in using certain agency-sponsored dependent care services.

Employees with child care needs express a strong interest in child care centers, sick care, summer care, and after-school care. Resource and referral services are the most frequently requested adult dependent care services, according to the employee survey.

6. There are significant differences between the extent of expressed interest in specific programs and services and the extent to which they are actually used.

On the one hand, a significant number of employees with dependent care needs express an interest in using various agency-provided dependent care services. On the other hand, of such employees who indicate that their agencies provide dependent care services, a minority actually use these services.

7. Employees use a range of different personnel system flexibilities to meet their dependent care needs.

For meeting both child care and adult dependent care needs, the leave system and flexible and compressed work schedules were used during the past year by a substantial proportion of employees and were clearly the most widely used of the personnel flexibilities, according to the employee survey. Few employees reported using part-time employment or flexiplace to meet their dependent care needs.

8. A significant proportion of labor agreements in the Federal service include dependent care provisions.

OPM's review of labor agreements in the Federal service found that close to 30 percent of them contained at least one provision related to dependent care.

KEY FINDINGS BY PROGRAM AREA

1. Child Care

Prior to 1985, most Federal agency programs for child care were in the Department of Defense, which established its programs primarily for military personnel. Broader interest in child care services for Federal employees grew significantly with the 1985 enactment of legislation, commonly known as the "Trible Amendment," which authorized Federal agencies to establish on-site child care centers using appropriated funds. In the years that followed, the General Services Administration (GSA) promoted the development of new Federal child care centers, and OPM encouraged agencies to address the child care needs of their employees.

Child care programs are at various stages of development in many Federal agencies. Where programs exist, they range from inexpensive services such as resource libraries to major programs that offer a range of services including on-site child care centers. Currently, there are approximately 858 child care centers sponsored or co-sponsored by 34 Federal agencies: 80 are in GSA-controlled space, 74 are sponsored by civilian agencies in non-GSA-controlled space, and 704 are in the Department of Defense.

Key findings of the study related to child care are:

- Almost three-quarters of Federal employees with child care needs are satisfied with their current child care arrangements.

- Lack of affordability is one of the primary reasons given by employees for not using agency-sponsored child care centers. To help address this problem, a number of agencies suggested increased agency authority to (a) provide financial assistance to help lower-income employees pay for agency-sponsored child care centers; (b) use appropriated funds to support their on-site child care centers; and (c) obtain lower cost alternatives to on-site child care centers.

2. Adult Dependent Care

The Federal Government's initiative in the area of adult dependent care began with OPM's 1988 guidance to agencies that pointed out the increasing adult dependent care needs of Federal workers and encouraged Agency Heads to support programs to address these needs. Most adult dependent care programs educate employees regarding the full range of aging problems and the continuum of

services that are available to address those problems. Relatively few Federal agencies have adult dependent care programs, but interest in this area is growing.

Key findings of the study related to adult dependent care are:

- Twelve percent of Federal employees have significant adult dependent care responsibilities; an additional 13 percent anticipate having such responsibilities within the next 5 years.

- A significant number of employees with current adult dependent care responsibilities are interested in obtaining some type of agency-sponsored service.

- While some agencies have developed adult dependent care services for their employees, most agencies do not currently offer such services.

3. Flexible And Compressed Work Schedules

The use of flexible and compressed work schedules has grown steadily since the first experimental program was implemented in 1972. In 1985, Congress permanently authorized this flexibility in scheduling work.

The Merit Systems Protection Board (MSPB) in its November 1991 report, *Balancing Work Responsibilities and Family Needs: The Federal Civil Service Response*, noted that a higher percentage of Federal workers are on flexible work schedules than is the case for workers in any other sector of the economy.

Key findings of the study related to flexible and compressed work schedules are:

- About 54 percent of employees with dependent care needs work under flexible or compressed work schedules, and doing so is very important in their decision to remain with their agency.

- About 77 percent of employees with dependent care needs who do not work flexible or compressed work schedules are interested in doing so.

- While some managers express concern that flexible or compressed work schedules may not be appropriate for their agencies, most do not believe properly managed flexible or compressed work schedules adversely affect employee productivity.

4. Part-Time Employment And Job Sharing

The Federal Employees Part-time Career Employment Act of 1978 requires most Federal agencies to establish programs "to promote part-time opportunities in all grade levels." One objective of the legislation is to "provide parents opportunities to balance family responsibilities with the need for additional income."

Overall, part-time employees with permanent appointments make up 2.2 percent of the Federal white collar workforce (non-Postal Service). Recently, OPM initiated a pilot program to promote job sharing as a way of increasing part-time employment opportunities. OPM is also testing an automated system to match up employees who are looking for job sharing partners.

Key findings of the study related to part-time employment are:

- In the past year, 5 percent of employees with dependent care needs worked a part-time schedule to meet those needs, and doing so is of great importance to those employees.

- Nine percent of Federal employees with dependent care needs express a desire to work part-time instead of full-time (these data do not include those who say they cannot afford to work part-time), and most of these employees say they cannot work part-time because their jobs require full-time coverage.

- The use of part-time employment varies significantly from agency to agency. Data from the employee survey suggests that certain agencies may have created internal barriers that make supervisors reluctant to approve employee requests to work part-time.

5. Flexiplace

Many agencies have a long history of permitting informal work-at-home arrangements. In 1990, the President's Council on Management Improvement (PCMI), initiated a Governmentwide Federal Flexible Workplace Pilot Project. The project's primary purpose is to gain the experience and information needed to recommend formal policies and practices for broader implementation of flexible workplace arrangements. Under the pilot project, Federal employees are allowed to work at home or at geographically convenient satellite offices for designated portions of the workweek.

Key findings of the study related to flexiplace are:

- Few employees with dependent care needs currently work under flexiplace arrangements, but many would like to work at home on an occasional basis.

- Most employees with dependent care needs who are not participating in flexiplace say it is because they did not know about it. Many managers are also unaware of flexiplace authority.

6. The Federal Leave System

The major components of the Federal leave system are annual leave, sick leave, and leave without pay. Annual leave provides an employee time off with full pay for purposes such as vacation time, family responsibilities, or any other personal business. Sick leave provides an employee time off with full pay when the employee is incapacitated for duty; is receiving medical, dental, or optical examination or treatment; is required to give care and attendance to a family member afflicted with a contagious disease; or would jeopardize the health of others because of exposure to a contagious disease. Leave without pay allows an employee to continue receiving benefits during a period of unpaid absence, and guarantees return to the same or similar job. The Federal leave system sets no maximum duration for such leave.

Guidance issued by OPM in 1986 encourages agencies to be compassionate and flexible in granting annual leave, sick leave, and leave without pay, as appropriate, for parental and family responsibilities. For fiscal year 1991, Congress authorized Federal agencies to allow employees to use sick leave for adoption purposes.

Key findings of the study related to the Federal leave system are:

- Nineteen Federal agencies have formal dependent care leave policies.

- Employees with dependent care needs are generally satisfied with the annual and sick leave systems, but are somewhat less satisfied than employees without dependent care needs.

- Several survey respondents and reports have suggested a wide variety of reforms of the leave system, including: (1) merge annual and sick leave into a single leave category; (2) establish a permanent program to provide for the use of sick leave for adoption purposes; (3) permit the use of sick leave to care for sick family members; (4) permit the recredit of unused sick leave for all employees returning to

Federal employment; and (5) establish a Governmentwide family and medical leave policy.

7. The Leave Sharing Programs

In 1988, Congress established a 5-year experimental program for both annual leave transfer and leave banks in the Federal Government. Under these leave sharing programs, employees experiencing a medical emergency affecting themselves or a member of their family can receive donated annual leave from fellow employees to help offset the hardship caused by the medical emergency.

Key findings of the study related to leave sharing programs are:

- More than 96 percent of Federal employees with dependent care needs are satisfied with the Federal leave sharing program.
- About 14 percent of leave recipients used donated annual leave to care for a sick family member.

KEY MEASURES TO INCREASE THE EFFECTIVENESS OF WORK AND FAMILY PROGRAMS

The study findings suggest a number of key measures with potential for increasing the effectiveness of work and family programs. These measures include (1) actions to strengthen the usefulness and application of current resources and authorities, and (2) policy and program changes that need to be thoroughly assessed for possible implementation in the future.

1. OPM Will Urge Enhanced Agency Attention to and Emphasis on Work and Family Matters.

Agencies have considerable authority to develop and implement comprehensive and effective work and family programs. Some agencies have demonstrated the ability to do this and thus serve as examples of what can be done to help employees balance their work and family responsibilities. At the same time, the study results show that there are significant differences among agencies with regard to the extent to which they have initiated and implemented work and family programs. Employee survey data indicate employee interest in and need for additional work and family services, and that a substantial portion of the workforce does not believe their agencies understand and support employees' family responsibilities.

There are significant differences among agencies and within agencies regarding the nature and extent of work and family program needs. Therefore, it is essential that each agency assess its specific needs for work and family programs for its employees, and initiate specific programs to help meet those needs within available authorities and resources. To that end, OPM will urge enhanced agency attention to and emphasis on work and family matters. As discussed in the next two measures, OPM will enhance its capacity and services to help agencies undertake such program assessment and developmental work. This will include providing agencies with agency-specific data from the employee survey.

2. OPM Will Establish a Work and Family Program Center within OPM.

The study provides several indications that OPM should strengthen its leadership, policy development, and agency assistance role with respect to work and family matters. To that end, OPM will build on its current resources and activities related to work and family programs and establish a **Work and Family Program Center** within OPM. The Center will provide OPM the capacity to take a more comprehensive and integrated approach to both work and family related policy development and agency assistance. This in turn should facilitate the timely and efficient development of both Governmentwide proposals and specific agency programs for meeting the work and family challenge.

3. Through the Work and Family Program Center, OPM Will Provide a Comprehensive Assistance Program Consisting of Policy Guidance, Training, Program Development, Information Services, and Technical Assistance.

The primary purpose of this comprehensive assistance program will be to facilitate agency efforts to develop cost-effective programs in a timely and efficient manner. The program will include various activities such as (1) coordinated Governmentwide programs, (2) a clearinghouse of innovative programs, (3) guidance related to cost/benefit assessments of programs, (4) training, especially for executives, managers, and supervisors, (5) informational materials, and (6) an annual Director's Award for Outstanding Agency Work and Family Programs. A recent example of such an activity is the cooperative effort between the Department of Health and Human Services and the Office of Personnel Management to inform agencies and employees about Federal, State, and local services available to help custodial parents collect child support payments.

4. OPM Will Form an Interagency Partnership on Work and Family.

To strengthen the Government's ability to address problems and plan for the future, OPM proposes a Partnership on Work and Family. The Partnership will

include key agencies in the child and adult dependent care arena: the Departments of Defense, Health and Human Services, Labor, Transportation, and Veterans Affairs, and the General Services Administration. It will serve two basic purposes: (1) to provide a forum and experience base for helping agencies address ongoing needs and problems related to work and family matters, and (2) to provide a means by which further assessment can be made of potential changes to increase the effectiveness of work and family programs.

5. OPM Will Study and Consider Proposing Flexible Benefit Programs that have Dependent Care as a Key Component.

Many private sector companies have adopted flexible benefit plans which allow employees to choose those benefits most valuable to them within a fixed dollar amount. Several agencies, a Federal employee union, and the MSPB suggested that OPM study the feasibility of applying this concept to the Federal Government. The most popular aspect of "flexible plans" in the private sector, pre-tax spending accounts, is highly problematic for an employer who is also the tax collector. Employee survey data indicate, moreover, that Federal employees are not much interested in trading one benefit for another. Nonetheless, OPM will consider allowing greater employee choices between and among benefit programs as such programs are revised.

6. OPM will Take Steps to Strengthen the Programs for Part-Time Employment, Flexiplace, and Flexible and Compressed Work Schedules.

The study shows that these three programs can be very useful to certain employees in meeting their work and family needs, as well as serving other purposes. At the same time, there is evidence that more employees with dependent care needs are interested in using these flexibilities than are currently doing so. Also, all agencies may not have thoroughly assessed the extent to which they can be made available to and used by employees to help meet dependent care needs. Therefore, OPM will continue to encourage agencies to fully consider and apply these flexibilities as part of their overall work and family program and will take steps to enhance these programs to strengthen their work and family connection.

7. OPM Will Consider Proposals to Make the Federal Leave System More Responsive to Work and Family Needs.

The generous Federal leave system is clearly a major benefit to Federal employees with dependent care needs. At the same time, it appears that certain aspects of it detract from its usefulness. For example, it provides the least benefit to employees with the least amount of service, thus limiting its usefulness to many employees with child care needs; it allows for, but does not guarantee, the use of

unpaid leave for parental and family responsibilities, including childbirth and adoption; it does not permit agencies to recredit the sick leave earned by former Federal employees who return to Federal service after an absence of more than 3 years; and it does not allow employees to use sick leave to care for sick dependents unless a contagious disease is involved.

OPM is currently reviewing the Federal leave system to determine whether, and to what degree, changes are needed. The findings from this study will be carefully considered in the context of that comprehensive review. In the interim, OPM supports temporary re-authorization of provisions to allow use of sick leave for adoption.

CHAPTER I: THE WORK AND FAMILY CHALLENGE

A. Introduction

Employers throughout the United States, both public and private, are giving increased attention to the inherently significant relationship between work and family. Most employees, at some time in their careers, have had to balance family and work responsibilities, and to the best of their ability, manage conflicts between the two. What has changed is the growing awareness among employers of the work and family challenge, its direct relationship to the success of the organization, and the role an employer can take to help employees meet this challenge and thereby benefit both the employee and the organization.

There are many reasons for this growing emphasis. Among them are compelling demographic findings from census reports, the various "Workforce 2000" studies, and other demographic studies:

- Almost two-thirds of new entrants into the workforce between now and the year 2000 will be women.

- Single parents are a growing segment of the workforce. Their need for assistance with child care responsibilities is greater, and their ability to pay for the services available in the community is often a problem.

- As the "baby-boom" generation ages, many workers have, or expect to have, significant responsibility for the care of their own parents or other elderly relatives. Some are finding themselves part of the "sandwiched generation," responsible for the care of both children and elders.

The social trends that drive these statistics have affected the importance we attach to work and family programs in ways that do not show up in numbers. For instance, work and family is no longer viewed exclusively as a women's issue, as working fathers take on increasingly active roles in the care of their children. And to the extent work and family balance *is* a women's issue, it commands increasing attention, as employers examine the "glass ceiling" barriers that keep them from realizing the full potential of their female employees.

In this context of changing social values and changing demographic reality, employers are finding that work and family issues are relevant to recruitment, retention, and productivity. These economic concerns are particularly important to the Government as an employer, since the complex and critical missions of the Federal sector require a highly skilled workforce. Workers with needed skills are

often hard to attract and expensive to replace. The recently released GAO report on *The Changing Workforce: Demographic Issues Facing the Government*, challenged the conclusion of previous studies that jobs requiring high skills will soon out pace the number of qualified applicants. However, no one is contending that recruitment and retention of a quality workforce will be easier in the future.

The need to compete for top talent in the marketplace, combined with a strong commitment to family values, has prompted the Federal Government to embrace employment policies and programs that help Federal workers balance work and family responsibilities. These include child care centers, alternative work schedules, part-time employment and job-sharing, flexiplace, flexible leave policies, and leave sharing programs.

In the *Conference Report* of the **Committee of Conference for the Fiscal Year 1992 Appropriations for the Treasury Department, the U.S. Postal Service, the Executive Office of the President, and Certain Independent Agencies**, Congress directed OPM to survey Federal agencies to assess the current use of work and family programs and to report in April 1992 on measures that would make the programs more effective and increase their utilization. This report has been prepared in response to that request. It identifies remaining challenges in the work and family area, as well as past efforts and successes.

Some of the Federal Government's most "family-friendly" policies and programs, such as the leave system and flexible work schedules, have been in place for a number of years. Like other employers, however, the Government has given more attention to a comprehensive work and family perspective in the past 5 to 6 years. This has led to the development of new programs and services, such as the flexiplace pilot, the expansion of existing programs, such as flexible and compressed work schedules, and a reexamination of venerable programs like the Federal leave system.

The work and family achievements of the Federal Government to date have resulted from congressional initiatives and from the efforts of numerous Federal agencies, in many cases with the cooperation of Federal employee unions. The report attempts to capture and credit many of these contributions, but unfortunately cannot name them all. The report particularly notes the initiatives and accomplishments of the Department of Defense and the General Services Administration.

OPM, in its leadership role, has been able to take a number of steps to publicize the growing need for work and family programs and to assist agency efforts. It first described the demographic challenge, and urged agencies to incorporate work and family concerns in the administration of existing programs, with the issuance of guidance on parental leave in 1986. The guidance encouraged agencies to deal

compassionately and flexibly with employees who request leave because of parental responsibilities, including those related to adoption and foster care.

In 1988 and 1989 OPM took a number of initiatives to foster broader implementation of work and family programs. These included a memorandum to Agency Heads, Federal Personnel Manual guidance, a published report to the President and Federal officials on dependent care policy, a Governmentwide conference on dependent care, and the first *Directory of Federal Agency Dependent Care Programs*, which has since been reissued periodically to keep the information current. OPM also surveyed 175 Federal installations to find out what progress had been made in establishing responsive dependent care policies, and found that most agencies had established programs at the installation level, although some agencies had little or no program activity.

Since 1989, OPM has continued its education and outreach efforts through publications, seminars, symposia, and working groups. These efforts take a broad approach in some cases, such as the recently published brochure, *Dependent Care Policies for Federal Employees*. The brochure summarizes the personnel management tools agencies can use to help employees balance work and family concerns, including those highlighted in this report. In other cases the focus is on a very specialized topic, such as the recent cooperative effort between OPM and the Department of Health and Human Services to inform agencies and employees about services available to help custodial parents collect child support payments.

OPM has also worked with agencies to resolve specific program problems. For instance, many agency-sponsored child care centers have raised funds by participating in the Combined Federal Campaign (CFC) as a part of their efforts to keep the centers affordable. When some of these centers requested exceptions from the CFC regulatory restriction on additional, non-CFC fundraising on agency premises, OPM worked with GSA to authorize centers to continue participation in CFC while also conducting the additional fundraising.

Although OPM emphasizes services and programs that affect agencies Governmentwide, it also works one-on-one with agencies in various stages of planning, development, and program expansion or improvement. Based on its Governmentwide knowledge of programs, OPM is able to provide a range of technical assistance and information, and to direct program officials to other sources of information and support.

There has been a significant development and growth of work and family programs in the Federal Government. However, progress has been uneven and much remains to be done to ensure that all Federal agencies are responding to the work and family challenge as effectively as possible. There is also a need to develop a clear understanding of certain issues affecting work and family

programs, and to achieve a consensus about ways to deal with them.

B. Study Methodology

In planning the preparation of its work and family study, OPM decided it was necessary to expand its information gathering beyond the agency survey requested by Congress. In the past, analysis of work and family issues has been hampered by a striking lack of information about what segment of the Federal workforce has work and family needs, what approaches employees find helpful in meeting those needs, and the extent to which existing flexibilities are in use in the workplace. To fill this vacuum, OPM embarked on a major data collection effort which included the following key components:

(1) **Survey of Agency Personnel Directors.** OPM sent surveys to the Directors of Personnel of 92 Federal Departments and Agencies regarding their agencies' implementation of work and family programs.

(2) **The OPM Review of Selected Installations.** OPM collected written information and conducted interviews with personnel officers, managers, and supervisors at 29 selected installations nationwide.

(3) **Employee Survey.** OPM administered a comprehensive survey that included a major segment on work and family issues to approximately 58,000 white collar employees. Because of the random selection techniques used and the large sample size, estimates based on these responses at the 95 percent confidence level have margins of error of less than ± 3 percent in almost all cases. Percentages with a margin of error greater than ± 3 percent are footnoted throughout the report.

OPM also solicited comments on work and family issues from Federal employee unions and reviewed labor agreements to gauge the extent to which they address dependent care issues. Finally, the Merit Systems Protection Board (MSPB) report, *Balancing Work Responsibilities and Family Needs: The Federal Civil Service Response*, the General Accounting Office (GAO) report, *The Changing Workforce: Demographic Issues Facing the Government*, and the GAO draft report, *The Changing Workforce: Comparison of Federal and Nonfederal Work/Family Programs and Approaches*, were reviewed.

This report, *A Study of the Work and Family Needs of the Federal Workforce*, transmits general findings as well as more specific findings for each program area studied. It also describes the measures OPM is taking to improve existing programs and to identify areas for potential program changes.

CHAPTER II: OPM FINDINGS ON DEPENDENT CARE NEEDS AND PROGRAMS

A. GENERAL FINDINGS

The following findings are from the employee survey, the OPM Review of Selected Installations, the Survey of Agency Personnel Directors, and the review of Federal labor agreements.

1. About one-third of all Federal employees have dependent care needs.

Approximately 35 percent of the Federal workforce is comprised of employees with child care needs or employees with adult dependent care needs. Employees with child care needs are defined as single parents or dual-income parents, with children under 13 years of age. Twenty-four percent of Federal employees have child care needs, and 12 percent of Federal employees have adult dependent care needs. Two percent of employees have both child and adult dependent care needs.

2. Most employees with dependent care needs are satisfied with the balance they have achieved between work and family.

About 69 percent of employees with dependent care needs are satisfied with the balance between their work and family lives, according to the employee survey. About 62 percent of single parents are satisfied with their work and family balance; this level holds for those with children under 13 and annual family income under $26,000.

3. About half (53 percent) of Federal employees with dependent care needs believe their organizations understand and support employees' family responsibilities. Only 46 percent of single parents agree that their organizations show this understanding and support.

These sentiments reflect on agency or installation-level policies and practices, and not on those of first-line supervisors. When asked if their supervisors support their family responsibilities, 83 percent of employees with dependent care needs believe they do. About 79 percent of single parents agree that their supervisors support their family role.

4. There is a limited availability of agency-sponsored dependent care services; the extent of such services varies greatly among agencies.

In recent years, many agencies have made serious efforts to increase the number

and effectiveness of agency-sponsored dependent care services for employees. Most agencies now provide counseling for family concerns through the Employee Assistance Program (EAP), and some offer a broad range of programs. However, employee survey data indicate that about 38 percent of employees report that their agencies do not provide any specific dependent care services other than those available from the EAP. There are significant differences between and within agencies concerning services offered, utilization of services, and extent of administrative and program problems. Agencies and installations also vary in the effectiveness with which they publicize the services they offer.

5. A significant number of employees with dependent care needs express an interest in using certain agency-sponsored dependent care services.

Approximately one-third of employees with child care needs express an interest in having their agencies provide on-site child care centers, on-site sick care, summer care, and after-school care, according to the employee survey. Eighteen percent of employees with child care needs express interest in resource libraries and resource and referral services. About 30 percent of employees with adult dependent care needs express an interest in resource and referral services.

6. There are significant differences between the extent of expressed interest in specific programs and services and the extent to which they are actually used.

On the one hand, a significant number of employees with dependent care needs express an interest in using various agency-provided dependent care services. On the other hand, of such employees who indicate that their agencies provide dependent care services, a minority actually use these services. This suggests that employees often express interest in seeing a program or service offered as an option, but their choice to actually use it if available will depend on a variety of factors such as satisfaction with the arrangements they already have, cost, and convenience. Employee interest data, therefore, should be assessed in the context of these other factors when using the data to help make specific determinations of the need for services.

7. Employees use a range of different personnel system flexibilities to meet their dependent care needs.

The employee survey data show the following percentages of employees with child care needs that used personnel system flexibilities to meet those needs during the past year:

- 74 percent used annual leave;
- 40 percent worked flexible or compressed schedules;

- 24 percent used sick leave;
- 13 percent worked different shifts from their spouses;
- 8 percent used leave without pay;
- 5 percent worked part-time;
- 2 percent worked at home "on the clock"; and
- 14 percent used none of the above flexibilities.

The employee survey data show the following percentages of employees with adult dependent care needs that used personnel system flexibilities to meet those needs during the past year:

- 68 percent used annual leave;
- 28 percent worked flexible or compressed schedules;
- 8 percent used sick leave;
- 4 percent worked different shifts from their spouses;
- 3 percent used leave without pay;
- 3 percent worked part-time;
- 2 percent worked at home "on the clock"; and
- 25 percent used none of the above flexibilities.

8. A significant proportion of labor agreements in the Federal service include dependent care provisions.

OPM's review of 2,240 labor agreements in the Federal service found that 646 contained at least 1 provision related to dependent care.[1] Findings include:

a. Maternity Leave Provisions. 606 agreements, or 27 percent, contain maternity leave provisions covering 714,067 employees (or 54 percent) of the 1,322,224 Federal employees currently covered by an agreement.

b. Paternity Leave Provisions. 170 agreements, or 8 percent, contain paternity leave provisions covering 330,298 employees (or 25 percent) of the Federal employees currently covered.

c. Child Care Provisions. 109 agreements, or 5 percent, contain child care provisions covering 239,685 (or 18 percent) of the Federal employees currently covered.

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[1]**OPM will publish separately a detailed description of labor agreement provisions related to work and family.**

B. CHILD CARE

1. CHILD CARE PROGRAMS AND SERVICES IN THE FEDERAL GOVERNMENT

Prior to 1985, most of the Federal child care programs were in the Department of Defense, which established its programs primarily for military personnel. Broader interest in child care services for Federal employees grew significantly with the 1985 enactment of temporary legislation, commonly known as the "Trible Amendment," which authorized Federal agencies to establish on-site child care centers using appropriated funds. In 1988, this legislation was made permanent and codified in 40 U.S.C. 490(b). In the years that followed, the General Services Administration (GSA) began to promote the development of new Federal child care centers. In fiscal years 1988 and 1989, GSA opened 47 child care centers nationwide. There are now 80 child care centers operating in GSA-controlled space; they enroll approximately 4,817[1] children, 3,377[1] of whom are children of Federal employees.

In 1988, OPM also undertook several initiatives to encourage Federal agencies to address the dependent care needs of their employees. These initiatives included a memorandum to Agency Heads, FPM guidance, an informational brochure, and a report to the President. Each of these issuances suggested a broad range of approaches agencies could take in helping employees with their child care needs.

Child care programs have been evolving in the Federal Government since that time and are at various stages of development in many Federal agencies. Although many smaller agencies have not yet established programs, most larger agencies have done so to varying degrees. Programs range from offering simple, inexpensive services such as resource libraries to providing an array of services including on-site child care centers.

The full range of agency efforts in child care are discussed in Appendix A, "Agency Implementation of Child Care Programs." Separate attention is given to the two agencies, the Department of Defense and the General Services Administration, who have played a major role in the development of Federal child care programs.

2. STUDY FINDINGS

The following findings are from the employee survey, the Survey of Agency Personnel Directors, the OPM Review of Selected Installations, and union comments.

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[1]These numbers have been updated since the first printing of this report.

a. About 24 percent of Federal employees have child care needs.

For the purposes of this discussion, "employees with child care needs" are defined as employees who are single parents or dual-income parents, with children under 13. Excluded from this group is an additional 5 percent of Federal employees who have children under 13, but have a spouse or partner at home to provide care.

b. Federal employees with child care needs currently use a variety of child care arrangements; almost three-quarters of these employees are satisfied with their current arrangements.

The following table shows employees' responses to the employee survey regarding their current child care arrangements.

TABLE B-1

CURRENT CHILD CARE ARRANGEMENTS OF FEDERAL EMPLOYEES

CURRENT ARRANGEMENT	EMPLOYEES WITH CHILDREN UNDER 6 ONLY[1]	EMPLOYEES WITH CHILDREN 6-12 ONLY[2]	EMPLOYEES WITH BOTH[3]
FAMILY HOME PROVIDER	34%	12%	32%
CHILD CARE CENTER (not agency-sponsored)	26%	12%	33%
ADULT RELATIVE	25%	17%	23%
SPOUSE/PARTNER	21%	28%	27%
SCHOOL	15%	46%	35%
BABY SITTER IN THE EMPLOYEES OWN HOME	6%	4%	8%
AGENCY-SPONSORED CHILD CARE CENTER	5%	2%	6%
FRIEND	4%	7%	6%
OLDER CHILDREN	2%	20%	5%
CHILDREN ARE RESPONSIBLE FOR THEMSELVES	2%	30%	7%

[1]7% of the Federal workforce.
[2]13% of the Federal workforce.
[3]4% of the Federal workforce.

As shown in Table B-1, the most frequently used arrangements for children under 6 are family home providers, child care centers, and adult relatives. The most frequently used child care arrangement for children ages 6 to 12 is "school," which probably means before and after school programs in some cases, and in other

cases, simply means that the child attends school while the parents are at work. Thirty percent of the children in this age range are reported to be taking care of themselves.

The employee survey data show that approximately 74 percent of these employees are satisfied with their current child care arrangements. Satisfaction is highest with employees who bring their children to an on-site agency-sponsored child care center. Satisfaction is lowest when children are taken care of by friends, older children, or babysitters in the employees' own homes, or when children care for themselves.

c. Almost three-quarters of employees with children under 6 and more than half of employees with children ages 6 to 12 express interest in using a variety of agency-sponsored child care services.

The following table shows employees' responses to the employee survey regarding their interest in obtaining agency-sponsored child care services.

TABLE B-2

EMPLOYEE INTEREST IN AGENCY SPONSORED SERVICES

SERVICE	EMPLOYEES WITH CHILDREN UNDER 6 ONLY[1]	EMPLOYEES WITH CHILDREN 6-12 ONLY[2]	EMPLOYEES WITH BOTH[3]
ON-SITE CHILD CARE CENTERS	53%	18%	49%
ON-SITE SICK CARE	45%	28%	45%
ON-SITE BEFORE AND AFTER SCHOOL CARE	39%	26%	42%
ON-SITE SUMMER CARE	37%	31%	44%
WORKSHOPS/SEMINARS	27%	18%	24%
RESOURCE AND REFERRAL SERVICES	26%	13%	21%
RESOURCE LIBRARY	24%	14%	20%
COUNSELOR	22%	11%	18%
SUPPORT GROUPS	20%	10%	18%

[1]7% of the Federal workforce.
[2]13% of the Federal workforce.
[3]4% of the Federal workforce.

Approximately half of the employees with children under 6, and 18 percent of those with children ages 6 to 12, express interest in using agency-sponsored child

care centers. Employees also express a strong interest in on-site sick care, summer care, and before and after school care. This is particularly understandable in light of the large number of children for whom "school" is the child care provider, and the large number of school age children who take care of themselves when they are not at school. However, as suggested by the discussion in section "e" below, an expression of "interest" should not necessarily be interpreted as meaning a firm intention to use such services if they are offered.

d. One-fifth of employees with child care needs report that their agencies sponsor on-site child care centers; few employees report that their agencies offer other child care services.

The employee survey data show that 20 percent of employees with child care needs report that their agency sponsors an on-site child care center. However, few employees report that their agency offers other child care services: 2 percent report on-site sick care services; 5 percent report on-site summer care; 7 percent report on-site before and after-school care; 4 percent report workshops or seminars; 7 percent report resource and referral services; 5 percent report resource libraries; 4 percent report counselors other than those in the Employee Assistance Program (EAP); and 4 percent report support groups. Thirty-eight percent of the employees report that none of these services is available.

The OPM Review of Selected Installations is consistent with this data. It found a wide variance in the child care services provided at the installation level, from almost no services at all to well-developed programs that include an on-site child care center. Most installations, however, fall somewhere in between. About 30 percent of the installations in the sample of 29 have access to on-site or nearby child care centers.

e. Where services are available, fewer than 28 percent of employees with child care needs report using them.

Sixteen percent of the employees with child care needs who have access to agency-sponsored child care centers report in the employee survey that they use the center. When other child care services are offered, employee use ranges from 3 to 28 percent, according to the employee survey.

The OPM Review of Selected Installations found that when child care services such as referral services and dependent care counseling are available at installations, they are generally underutilized. Installation managers were asked why their employees are not using the child care services available or are using them very little. They suggest that some employees do not need to use installation services as there are ample services available in the private sector or they are able to meet their dependent care needs through the use of leave and flexible work

schedules. A general lack of information and publicity about dependent care services available at installations could be another reason for low use. Some managers also suggest that dependent care counseling and referral services provided by the EAP are not well utilized because EAP's are sometimes stereotyped as counseling centers for "problem" employees.

f. Lack of affordability is one of the primary reasons given by employees for not using agency-sponsored child care centers.

The following discussion focuses on employees with children under 6 since they are the most likely to use an on-site child care center. Twenty-three percent of employees with children under 6 report in the employee survey that their agency provides an on-site child care center, and of these, 25 percent are using the center. Reasons given by those employees who are not using the agency-sponsored centers are:

- They have other child care arrangements - 68 percent;
- The center is too expensive - 26 percent;
- They prefer to have the child cared for at home - 18 percent;
- The center is too far from home - 14 percent;
- There is a waiting list - 10 percent;
- The center has inflexible hours - 6 percent; and
- The center is of poor quality - 4 percent.

One-quarter of these employees say their agency-sponsored center is too expensive. It is also interesting to note significant differences between the parent populations on this issue. More single parents with children under 6 say that the agency-sponsored center is too expensive (33 percent)[1], than do dual-income parents with children under 6 (22 percent).[2]

g. A number of agencies suggest some type of financial assistance to help lower-income employees pay for agency-sponsored child care centers; others express a desire for greater latitude in using appropriated funds to support their on-site child care centers.

Agencies report that despite subsidies in the form of providing space and utilities free of charge, the cost of providing child care services usually requires tuition

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[1]**The margin of error for this percentage is greater than ± 3 percent because of the small sample size.**

[2]**Approximately 2 percent of the Federal workforce is comprised of single parents with children under 6 years of age; approximately 10 percent of the Federal workforce is comprised of dual-income parents with children under 6.**

rates higher than the amount lower income Federal employees can pay. Several agencies, one Federal union, and the MSPB in its recent work and family report suggest that OPM consider offering Federal employees a flexible benefits program, including flexible spending accounts for dependent care purposes, which could enable lower-income employees to send their children to on-site child care facilities. Other agencies suggest the use of vouchers and other forms of tuition assistance.

A number of agencies also suggest that OPM propose legislation to allow agencies greater latitude in using appropriated funds to support their child care centers, for example, allowing them to subsidize start-up costs for the first 24 months of operation and to place child care center directors and staff on the Federal payroll. Federal child care centers, like many others in both the private and public sectors, are hampered by such problems as high staff turnover, low pay for teachers, and a lack of health benefits for staff. The solution to these problems is not immediately obvious, however, because even with low operating costs, it is difficult for most centers to remain solvent. According to *A Profile of Child Care Settings Study*, sponsored by the U.S. Department of Education, private and public sector child care centers around the country were asked if they made money last year. Half of all centers reported breaking even, one-quarter reported losing money, and one-quarter reported making money. Even among for-profit programs, only 50 to 60 percent reported making a profit last year.[1]

The OPM Review of Selected Installations found that agency officials believe that child care center costs are kept as low as possible and are generally comparable to the rates charged at local child care centers in the private sector. The provision of space and some services at these centers in Federal installations is generally responsible for helping to keep costs down but some employees feel the reduction in costs for such services is not sufficient. Some installations indicate that state subsidies and money from the Combined Federal Campaign are available to help employees who cannot pay for child care services.

h. Several agencies suggest lower cost alternatives to on-site child care centers to help employees meet child care needs.

Several agencies note in their responses to the Survey of Agency Personnel Directors that many Government employees with child care needs work in areas with an insufficient Federal population to support a full-size child care center. They also point out that budgetary constraints limit the number of centers that

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[1]***The Demand and Supply of Child Care in 1990;*** **joint findings from** ***The National Child Care Survey 1990*** **and** ***A Profile of Child Care Settings,*** **issued by the National Association for the Education of Young Children, Washington, DC 20009-5786, pp. 34-35.**

can be established. Therefore, they suggest that agencies be given the authority to expend appropriated funds on lower cost alternatives to on-site centers, e.g., providing start-up funds to community-based centers, participating in child care center consortia with private companies, and contracting directly with private child care centers for spaces for agency employees.

C. ADULT DEPENDENT CARE

1. ADULT DEPENDENT CARE PROGRAMS AND SERVICES IN THE FEDERAL GOVERNMENT

Elder care...senior care...adult dependent care - these are the terms generally used to describe the newly emerging program area that helps employees care for their elderly parents/relatives and dependents with mental or physical disabilities. Awareness is growing rapidly about the problems employees encounter when caring for an elderly parent/relative or a person with disabilities, and agencies are responding by giving increasing attention to employees' adult dependent care concerns.

The first major Federal initiative specifically in the area of adult dependent care began in June 1988 with the issuance of FPM guidance and a memorandum from the Director of OPM to the Heads of all Federal Departments and Agencies. The memorandum pointed out that increasing numbers of Federal workers have responsibility for caring for older family members and encouraged Agency Heads to support programs to address these needs. Most of the adult dependent care programs that agencies have developed since 1988 not only help employees deal with crisis situations, but also prepare employees before a crisis situation develops. They generally address the task of educating employees regarding the full range of aging problems and the continuum of services that are available to address those problems. Adult dependent care programs prepare employees by providing them with information that can save hours and sometimes days of searching for answers to questions such as: what community services are available, how to file for medical insurance, how to obtain power of attorney, how to recognize symptoms of serious illnesses such as Alzheimer's disease, what to expect during the course of the illnesses, the latest treatment methods, and how best to respond in caring for the afflicted person. Appendix A contains examples of agency adult dependent care programs.

The growing interest in adult dependent care among Federal agencies is demonstrated by the increasing participation of agencies in an Interagency Adult Dependent Care Working Group. The group began to meet in December 1990 as an outgrowth of GSA's Interagency Task Force on Federal Child Care. Meetings were chaired by GSA staff and held bimonthly at OPM. Membership grew from 6 agencies to 18 agencies in less than a year. In February 1992 OPM began chairing the group and sent an invitation to all Federal agencies to attend. Twenty-five agencies attended the March 1992 meeting. The working group gives members an opportunity to exchange ideas, information, and resources. It also serves an advisory function for OPM and has been working on several projects to

increase awareness of adult dependent care issues.

2. STUDY FINDINGS

The following findings are from the employee survey, the OPM Review of Selected Installations, and the Survey of Agency Personnel Directors.

a. Twelve percent of Federal employees have significant adult dependent care responsibilities; an additional 13 percent anticipate having such responsibilities within the next 5 years.

Twelve percent of respondents to the employee survey report that they have "responsibility for spending a great deal of money and/or time caring for adult dependents who are elderly or physically or mentally disabled." Approximately 11 percent report that they care for elderly parents or relatives and approximately 3 percent report that they care for persons with disabilities. (These percentages include some overlap because some employees care for both elderly parents/relatives and persons with disabilities.) An additional 13 percent of Federal employees report that they anticipate adult dependent care responsibilities within the next 5 years.

b. Approximately half of the Federal employees with current adult dependent care responsibilities spend 4 or more hours a week providing care.

Employee survey data indicate that Federal employees with current adult dependent care responsibilities spend the following amounts of time on these responsibilities: 14 percent spend 20 or more hours per week; 13 percent spend 10 to 19 hours per week; 22 percent spend 4 to 9 hours per week; 24 percent spend 1 to 3 hours per week; and 18 percent provide occasional assistance (under emergency circumstances). Nine percent of employees with current adult dependent care responsibilities do not spend any time providing care for their elderly and/or other adult dependent. Presumably these employees are providing financial support in caring for the person rather than providing personal care.

c. A significant number of Federal employees with current adult dependent care responsibilities are interested in obtaining some type of agency-sponsored services.

According to the employee survey, Federal employees with current adult dependent care responsibilities are interested in using the following services if offered by their agency:

- Resource and referral service - 30 percent;
- Dependent care counselor to provide referrals - 25 percent;
- Educational workshops or seminars - 25 percent;
- On-site day care center - 23 percent;
- Resource library - 21 percent; and
- Support group - 23 percent.

Almost half (49 percent) of the employees with current adult dependent care needs report they are not interested in any of these services.

d. While some agencies have developed adult dependent care services for their employees, most agencies do not currently offer such services.

The employee survey data show that only 2.6 percent of employees with current adult dependent care responsibilities report that their agencies offer a resource and referral service; 2.3 percent report that their agencies offer educational workshops; 1.8 percent report support groups; 1.8 percent report resource libraries; and 1.5 percent report dependent care counselors.

The findings of the OPM Review of Selected Installations are consistent with this data. It found that while most installations provide counseling for family concerns through their EAP's, few programs have been designed specifically for meeting adult dependent care needs.

Similarly, the Survey of Agency Personnel Directors indicates that most agency EAP's provide counseling and referrals for family concerns, while only seven agencies have established programs specifically for adult dependent care needs.

e. Where services are available, employees report that they are using them to some extent.

Of employees who are offered resource libraries, support groups, and educational workshops, at least 24 percent[1] report using one or more of these services.

f. Perceived budget limitations and lack of need are the primary barriers to developing adult dependent care programs.

The OPM Review of Selected Installations looked at the reasons why there were few adult dependent care programs at the installation level. It found that the general lack of services for adult dependent care appears to be due to a perceived lack of need. Also, a lack of funds and available staff to develop adequate

[1]**The margin of error for this percentage is greater than ± 3 percent because of the small sample size.**

dependent care programs was identified as a problem by some installations. The Survey of Agency Personnel Directors indicates that the primary reason for a lack of adult dependent care programs is lack of resources.

D. FLEXIBLE AND COMPRESSED WORK SCHEDULES

1. FLEXIBLE AND COMPRESSED WORK SCHEDULES IN THE FEDERAL GOVERNMENT

The use of flexible and compressed work schedules has grown steadily since the first experimental program was implemented by the Bureau of Indian Affairs in Albuquerque, New Mexico, in 1972. Public Law 95-390, the "Federal Employee's Flexible and Compressed Work Schedules Act," established a Governmentwide 3-year experimental program in 1978. The program was extended for another 3 years under Public Law 97-221 in 1982 and was made permanent in 1985 (Public Law 99-190).

A flexible work schedule divides the workday into bands of flexible and core time. Within certain parameters, an employee may select his or her arrival and departure time during the flexible time bands. The arrival and departure times may vary from day to day. During the core time band, an employee must be present at work or in an approved leave status. The law permits a variety of flexible work schedule approaches. In some agency programs, employees may earn credit hours for work performed beyond their basic work requirement. The employee decides when to work credit hours, but no more than 24 credit hours may be carried over into the following pay period. Depending on the degree of flexibility in a particular work schedule, an employee may be able to complete a biweekly work requirement in less than 10 workdays.

A compressed work schedule is designed to permit an employee to complete a biweekly work requirement in less than 10 workdays by increasing the number of hours in the workday. Unlike flexible work schedules, however, compressed work schedules are work schedules that are fixed in advance as determined either by management or through negotiations with the exclusive employee representatives, as appropriate.

In 1982, agencies reported to OPM that about 175,000 employees were covered by flexible or compressed work schedules. Just 2 years later, in 1984, an OPM survey of Federal agencies revealed that about 308,000 Federal employees were covered by flexible or compressed work schedules. In a July 1985 report, the U.S. General Accounting Office (GAO) estimated that 489,000 Federal employees worked under flexible or compressed schedules in the continental United States.

According to the employee survey, 38 percent of white-collar employees report that they work under a flexible work schedule, and an additional 14 percent report that they work under a compressed work schedule. Together, this represents a total of

about 52 percent of the white-collar Federal workforce of 1,653,836 employees. In addition, a recent review of collective bargaining agreements reveals that of all bargaining unit employees covered by such agreements, 38 percent (503,384 employees) are covered by agreements containing flexible or compressed work schedule provisions.

The MSPB report, *Balancing Work Responsibilities and Family Needs: The Federal Civil Service Response*, noted that a higher percentage of Federal workers are on flexible work schedules than is the case for workers in any other sector of the economy. MSPB characterized the Federal Government as a "trend-setter."

2. STUDY FINDINGS

The following findings are from the employee survey, the OPM Review of Selected Installations, and the Survey of Agency Personnel Directors.

a. About 54 percent of employees with dependent care needs work under flexible or compressed work schedules.

According to employee survey data, 40 percent of employees with dependent care needs work under a flexible schedule, and 13 percent work under a compressed schedule. This is almost identical to the proportion of the total white-collar employee population working under these schedules. Forty percent of employees who have child care needs used flexible or compressed work schedules during the past year to help manage child care needs. Of employees with adult dependent care needs, 28 percent used flexible or compressed work schedules during the past year to help manage these responsibilities. Findings from OPM's Review of Selected Installations are consistent with these data.

b. Availability of flexible and compressed work schedules is very important to employees with dependent care needs in their decision to remain with an agency.

According to the employee survey, 53 percent of employees with dependent care needs believe that the availability of flexible and compressed schedules is "very important" in their decision to remain with their employing agency. An additional 31 percent consider it "somewhat important."

c. About 77 percent of employees with dependent care needs who do not work flexible or compressed work schedules are interested in doing so.

The employee survey indicates that about 77 percent of those employees who are working under fixed schedules and who have dependent care needs would be

interested in working under a flexible or compressed work schedule. Of this group, 47 percent say flexible and compressed work schedules are not available to them because their agencies do not have a flexible work hours program, and another 26 percent report that their organizations are ineligible to participate in the program. Thirteen percent state that their supervisors have denied their requests to work under a flexible or compressed work schedule, and 20 percent cite other reasons for not being able to participate.

d. While some managers express concern that flexible or compressed work schedules may not be appropriate for their agencies, most supervisors do not believe flexible or compressed work schedules, when properly managed, adversely affect employee productivity.

According to the Survey of Agency Personnel Directors, several agencies are concerned that flexible or compressed work schedules may interfere with the efficient operation of their agencies. One specifically referred to the difficulty in managing an employee's "day off" under a compressed work schedule.

The employee survey reflects managers' and supervisors' opinions regarding how the productivity (i.e., amount, quality, and timeliness of work) of employees who work under flexible or compressed schedules compares to the productivity of employees who work under fixed schedules. Only 6 percent of the managers and supervisors say that the former group of employees is less productive; 38 percent indicate productivity is about the same between the two groups of employees; and 14 percent say employees who work under flexible or compressed schedules are more productive. (The remaining 43 percent say they can not make a judgment on this question.)

E . PART-TIME EMPLOYMENT AND JOB SHARING

1. PART-TIME EMPLOYMENT AND JOB SHARING IN THE FEDERAL GOVERNMENT

The Federal Employees Part-time Career Employment Act of 1978, 5 U.S.C. 3401, *et seq.*, requires Federal agencies to establish programs "to promote part-time opportunities in all grade levels." (Only a few agencies are excepted from the provisions of the law, most notably the Postal Service and the intelligence agencies.) One objective of the legislation - the first to deal specifically with part-time employment in the Federal service - was to "provide parents opportunities to balance family responsibilities with the need for additional income." The law made major changes in Federal part-time employment by:

- Defining part-time employment as 16 to 32 hours per week;
- Directing the Government to pro-rate its contribution to health insurance premiums for part-time employees;
- Requiring agencies to pro-rate part-time employees for purposes of ceiling control; and
- Mandating individual agencies to issue formal program guidelines on part-time employment.

Overall, part-time employees with permanent appointments make up 2.2 percent of the Federal white collar workforce (non-Postal Service). The percentage in major agencies ranges from 0.8 to 9.1, with Defense agencies tending to be among the less frequent users of part-time employment. OPM has the highest percentage, 9.1 percent; Commerce has 7.3 percent; HHS has 4.2 percent; EPA has 3.7 percent, and VA has 3.5 percent. (VA also has many other part-time employees who are covered by the title 38 employment system.)

The Governmentwide percentage of part-time employees at higher grades has increased since 1978 as shown in Table E-1. The gains made by higher graded women are particularly notable.

TABLE E-1

PART-TIME PERMANENT WORKFORCE

GRADE LEVELS	1978	1991
GS 1-6	78%	61%
GS 7-9	12%	16%
GS 10 - 15	10%	23%
WOMEN AT GS 13-15	48%	78%

The distribution of part-time employees by grade level varies by agency; in some agencies, part-time employees are more concentrated at the lower GS grades.

Part-time employees work in diverse occupations. The white collar jobs (all pay plans) with the highest number of permanent part-time employees as of December 1991 include: medical officer, nurse, secretary, clerk typist, contact representative, sales store clerical, social insurance administration, tax examining, claims examining clerical, attorney, computer specialist, personnel clerk, and medical technologist.

Recently, OPM initiated a pilot program to promote job sharing as a way of increasing part-time employment opportunities. Because of workload demands, supervisors are often unable to approve employee requests for part-time work schedules. Under job sharing, two part-time employees can coordinate to cover a full-time position. OPM provided agencies extensive instructions on how to set up job sharing arrangements in FPM Letter 340-3, dated September 10, 1990, and in its publication, *Job Sharing for Federal Employees*.

OPM is also testing an automated system, "The OPM Connection," to match up employees who are looking for job sharing partners. The partners can then apply for full-time vacancies advertised by agencies, which are required to accept their applications for full-time positions. The system, which operates in Boston, Chicago, Los Angeles, and Washington, DC, also allows agencies to telephone OPM with their requests for candidates interested in part-time or job shared positions. OPM faxes names to agencies within minutes.

Since "The OPM Connection" began in November 1990, over 700 employees have registered. OPM supplied an average of five names for each of the employees who asked for matching. OPM is currently conducting a survey to learn how many job-sharing teams were formed and whether they found jobs.

2. STUDY FINDINGS

The following findings are from the employee survey, the OPM Review of Selected Installations, and the Survey of Agency Personnel Directors.

a. In the past year, 5 percent of employees with dependent care needs worked a part-time schedule to meet those needs.

The employee survey data show that part-time employment was used by 5 percent of employees with child care needs and by 3 percent with adult dependent care needs during the past year to meet those needs. (Some part-time employees have both child and adult dependent care needs.) Other personnel flexibilities were used more frequently, as described earlier.

b. Part-time employment is of great importance to those employees who use it to handle family responsibilities.

Seventy-eight percent[1] of part-time employees with dependent care needs are satisfied with the balance they have achieved between their work and family life as compared to 69 percent of full-time employees, according to the employee survey. Seventy-six percent[1] of part-time employees with dependent care needs say a part-time schedule is important to their decision to stay with their organization or agency; 8 percent say it is somewhat important.

c. Nine percent of Federal employees with dependent care needs would like to work part-time instead of full-time (these data do not include those who said they cannot afford to work part-time), and most of these employees say they cannot work part-time because their jobs require full-time coverage.

The 9 percent of employees with dependent care needs who would like to work part-time report the following reasons why they cannot do so:

- 63 percent say their position requires full-time coverage;
- 22 percent say their workload is too great;
- 20 percent say it would limit their career advancement;
- 7 percent say they would like to work part-time but cannot because their supervisor has denied their request; and
- 7 percent say they are afraid to ask for a schedule change to part-time.

The relatively low percent of employees interested in changing to a part-time schedule is also reflected in the survey finding that 72 percent of supervisors have never been asked by employees to approve a change in work schedule from full-time to part-time.

d. The great majority of supervisors who were asked to approve a change in work schedule from full-time to part-time did so in at least some cases.

Forty percent say they approved most requests; 43 percent say they approved some and denied some based on the situation; and 17 percent say they denied most.

Supervisors who refused requests gave the following reasons:

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[1]**The margin of error for this percentage is greater than ± 3 because of the small sample size.**

- 73 percent say the position required full-time coverage;
- 40 percent[1] say the position had too great a workload;
- 40 percent[1] say the employee's absence would be disruptive;
- 19 percent say the agency's internal system made it difficult to approve requests;
- 17 percent say the agency encourages full-time employment; and
- 12 percent say the employees had a record of performance or conduct problems.

e. The use of part-time employment varies significantly from agency to agency; the employee survey data suggest that certain agencies may have internal barriers that make supervisors reluctant to approve agency requests to work part-time.

TABLE E-2

PERCENTAGE OF AGENCY'S PERMANENT WHITE COLLAR WORKFORCE ON PART-TIME SCHEDULE*

AGENCY	PERCENTAGE
OPM	9.1
COMMERCE	7.3
HHS	4.2
EPA	3.7
VA	3.5
LABOR	3.4
TREASURY	3.3
STATE	3.0
INTERIOR	2.7
USDA	2.3
ENERGY	2.1
NASA	1.5
DOT	1.4
JUSTICE	1.3
DOD	1.2
HUD	1.2
ARMY	1.2
GSA	1.2

(CONTINUED ON NEXT PAGE)

[1]The margin of error for this percentage is greater than ± 3 because of the small sample size.

AGENCY	PERCENTAGE
NAVY	1.0
EDUCATION	0.9
AIR FORCE	0.8
SBA	0.8
GOVERNMENTWIDE	2.2

*Central Personnel Data File for GS and similar, September 1991

Although the variation among agencies may reflect differences in factors such as mission, occupational mix, and level of employee interest, the employee survey data suggest that certain agencies may have internal barriers that make supervisors reluctant to approve employee requests to work part-time. Of the supervisors who have denied employee requests to work part-time, at least 19 percent did so because of internal barriers, i.e., the agency's internal systems made it difficult and/or that their agency stressed full-time employment. The percent of supervisors citing internal barriers as a reason for denying part-time schedules varies considerably from agency to agency. Further, in some cases, the agencies with the highest percentage of supervisors who said there were internal barriers were also the agencies with the lowest percentage of part-time employment.

f. Agencies view part-time employment as a useful retention tool.

OPM's Review of Selected Installations found that most supervisors believe the use of part-time employment (and job sharing) boosts the morale of those who use it and helps retain some valuable employees.

F. FLEXIPLACE

1. FLEXIPLACE IN THE FEDERAL GOVERNMENT

Work-at-home arrangements, flexiplace, have existed in the Federal Government for many years, but for the most part on an informal basis. Since there is no law or regulation prohibiting Federal agencies from allowing employees to work at home, many agencies have a long history of permitting informal work-at-home arrangements. These informal arrangements were established for a variety of reasons including assisting employees with personal life issues such as injuries, illness, and long term disabilities. Some agencies, such as the National Credit Union Administration, have utilized formal work-at-home arrangements for many years with regard to positions where the employee travels extensively and has little need to be at a conventional office.

In 1990, the President's Council on Management Improvement (PCMI), initiated a Governmentwide, Federal Flexible Workplace Pilot Project. The pilot project recognized existing work-at-home arrangements, but sought to expand these to:

- Enhance Federal recruitment and retention;
- Help employees achieve a balance in their work and personal lives; and
- Reduce Federal facility operating costs.

Under the flexiplace pilot project, Federal employees are allowed to work at home or at geographically convenient satellite offices for designated portions of the workweek. The primary purpose of the project is to gain the experience and information necessary to recommend formal policies and procedures for successful implementation and operation of flexible workplace arrangements.

The flexiplace pilot project is conducted and coordinated by an interagency management team led by representatives from the Office of Personnel Management and the General Services Administration. Other agencies represented on the management team are the Department of Agriculture, the Equal Employment Opportunity Commission, the Department of Justice, and the Internal Revenue Service. Flexiplace has both White House and congressional support.

The flexiplace pilot project has three primary components:

a. **Work-at-home.** The work-at-home component, the first one that is operational, consists of arrangements in which Federal employees work at their residences for designated portions of the workweek. Currently, there are approximately 700 participants from 13 Federal departments/agencies. Participation in this component is still growing and new agencies are expected to begin participating in the months ahead.

b. **Satellite offices.** This component consists of arrangements in which employees from different agencies work in satellite work centers which are more geographically convenient to their residences than are their conventional worksites. Because of the implications for shared expenses, facilities, and services for agencies participating in this component, the flexiplace management team is working with the PCMI's Cooperative Administrative Support Unit (CASU) program to develop the satellite office component. The CASU program has established mechanisms and procedures for such cooperative arrangements. Hagerstown, Maryland, and Winchester, Virginia, are two sites currently under examination as potential satellite work centers.

c. **Disabled employees/applicants.** This component consists of home-based or satellite office arrangements which accommodate disabled individuals. An additional goal of this component is to achieve reductions in the numbers of disabled persons who must be out of the workforce on Workers' Compensation, Disability Retirement, or unemployment compensation rolls. This component is still in the proposal stage; the Department of Labor and the Department of Defense are among agencies considering establishing pilots in this area.

2. STUDY FINDINGS

The following findings are from the employee survey and the Survey of Agency Personnel Directors.

a. Few employees with dependent care needs currently work under flexiplace arrangements.

The employee survey data indicate that about 6 percent of employees with dependent care needs work at home on an occasional basis, and 3 percent work at home often. The great majority of these employees work at home under an informal arrangement with their agencies rather than as part of the formal flexiplace pilot project. About 17 percent of these employees indicate that the flexibility of working at home is an important consideration in their decision to stay with the agency.

b. Many employees with dependent care needs would like to work at home on an occasional basis.

The employee survey data indicate that approximately 63 percent of employees with dependent care needs would like to work at home on an occasional basis.

c. Most employees with dependent care needs who are not participating in flexiplace say that it is because they did not know about it. Many managers are also unaware of flexiplace authority.

Of the employees with dependent care needs who would like to participate in flexiplace but are not, 68 percent say not knowing about flexiplace is their reason for not participating, or at least not requesting to participate. In addition to this lack of knowledge about the general flexiplace authority, 69 percent of non-supervisory employees and 59 percent of the GM 13 - 15 managers do not know about the formal flexiplace pilot project.

In addition, results of the Survey of Agency Personnel Directors further indicate a lack of knowledge and understanding of flexiplace as a personnel management tool. A number of agencies report that there is management resistance or a lack of management support for the use of flexiplace. Also, the employee survey data indicate that 17 percent of supervisors who know about the flexiplace pilot project but are not using flexiplace authority, believe their "top management had ruled out flexiplace for their agency (policy decision)." The recent introduction of flexiplace and the lack of knowledge about it suggest that some "policy decisions" may not have been completely considered from a cost-benefit standpoint. Finally, the MSPB report indicates that a significant number of agencies do not fully understand the extent to which flexiplace could enhance the agency's ability to recruit and retain quality employees.

d. About 58 percent of supervisors who know about the pilot project say they are not participating in flexiplace because "the nature of jobs in their work unit requires employees to be at the office/work station (e.g. public contact, production, maintenance)." Fifty-six percent of the employees who report they would like to work at home occasionally also believe their work requires them to be in the office.

This finding indicates that a significant number of supervisors see a basic incompatibility between flexiplace and the requirement of their organizations, thus limiting the use of flexiplace by their employees. This perception is shared by employees; 56 percent of those who would like to work at home occasionally believe their work requires that they be in the office. This finding needs to be assessed in conjunction with the previous finding related to a lack of knowledge about and understanding of flexiplace.

G. FEDERAL LEAVE SYSTEM

1. THE CURRENT FEDERAL LEAVE SYSTEM

The major components of the Federal leave system are annual leave, sick leave, and leave without pay. Annual leave provides an employee time off with full pay for purposes such as vacation time, family responsibilities, or any other personal business. Annual leave accrual rates are related to years of service as follows:

Federal Service	Annual Leave Accrual Rate
0 to 3 years	4 hours per biweekly pay period (13 days per year)
3 to 15 years	6 hours per biweekly pay period (20 days per year)
15 or more years	8 hours per biweekly pay period (26 days per year)

Most employees are entitled to carry over a maximum of 240 hours (30 days) of annual leave from 1 leave year to the next as a reserve for planned events or emergency uses. For most employees, annual leave in excess of 240 hours is forfeited at the end of each year. (Senior Executive Service members are not subject to the 240-hour carryover limitation.) At separation or retirement, employees are entitled to receive a lump-sum payment for their accrued annual leave.

Sick leave provides an employee time off with full pay when the employee is incapacitated for duty; is receiving medical, dental, or optical examination or treatment; is required to give care and attendance to a family member afflicted with a contagious disease; or would jeopardize the health of others because of exposure to a contagious disease. Sick leave accrues at the rate of 4 hours per biweekly pay period (13 days per year) for all employees regardless of length of service. There is no limit on the accumulation of sick leave. However, there is no entitlement to a lump-sum payment for unused sick leave upon separation or retirement. (For employees covered by the Civil Service Retirement System, unused sick leave is used to compute length of service for annuity calculation purposes.)

Leave without pay permits an employee to be absent from work in an approved, non-pay leave status for short or extended periods. Supervisors have discretion to approve requests for unpaid leave in order to balance the needs of the employee with those of the organization. While on leave without pay, employees remain

employed by their agency and, within certain limits, continue to receive benefits such as retirement coverage, health insurance, and life insurance.

In addition to annual leave, sick leave, and leave without pay, Federal employees may be eligible for other types of leave in specific circumstances, such as home leave, court leave, and military leave. Finally, agencies may grant excused absences from duty with full pay for short periods of time on an individual basis or on a group basis under certain circumstances.

The annual leave, sick leave, and leave without pay provisions have been in effect for decades. The statutory leave program is supported by Governmentwide regulations and corresponding Federal Personnel Manual (FPM) guidance and is generally well understood by employees, supervisors, and managers.

FPM guidance issued by OPM in 1986 encourages agencies to be compassionate and flexible in granting annual leave, sick leave, and leave without pay, as appropriate, for parental and family responsibilities. At the same time, this guidance cautions agencies against establishing policies that would adversely affect mission accomplishment.

2. STUDY FINDINGS

The following findings are from the employee survey, the OPM Review of Selected Installations, the Survey of Agency Personnel Directors, and union comments.

a. Nineteen Federal agencies have formal dependent care leave policies.

In the Survey of Agency Personnel Directors, OPM found that 19 agencies have formal leave policies and programs authorized under current laws to help employees balance their work and family responsibilities. For example, the Tennessee Valley Authority's family policy entitles full-time employees who have completed 1 year of continuous service to take up to 10 weeks of unpaid leave for a child's birth or adoption or to care for a seriously ill family member. The Department of Commerce has established a policy that treats medically recommended rest periods for pregnant employees as excused absences for up to 1 hour per day.

Further evidence of leave policies related to dependent care are the number of Federal employees covered by family care-related leave benefits in negotiated labor agreements:

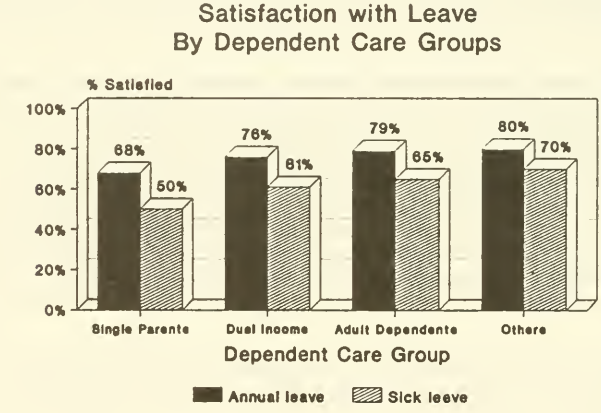
- 54 percent (714,067 employees) are covered by leave provisions related to maternity; and

- 25 percent (330,298 employees) are covered by leave provisions related to paternity.

The Department of Labor collective bargaining agreement provides employees leave without pay and/or annual leave for up to 2 years for pregnancy and subsequent childcare. The National Labor Relations Board's labor agreement has provisions to grant leave requests for up to 6 months for reasons relating to maternity and paternity responsibilities. The agreement permits the use of annual leave, compensatory time off, and reasonable amounts of leave without pay for up to 3 months to care for elderly or infirm parents and other dependents of employees.

b. The majority of employees with dependent care needs are greatly satisfied with the annual leave and sick leave systems; a somewhat larger proportion of employees without dependent care needs are greatly satisfied.

The following chart shows the percentage of employees who responded to the employee survey that they are satisfied to a "great extent" or a "very great extent" with the Federal leave system.



Others have no dependant care needs.
Respondents were satisfied to a great or very great extent with leave.

Sixty-eight percent of single parents are greatly satisfied with the annual leave system, and 50 percent are greatly satisfied with the sick leave system. Seventy-six percent of dual income parents express great satisfaction with the annual leave system, and 61 percent express great satisfaction with the sick leave system. Seventy-nine percent of employees with adult dependent care needs are greatly satisfied with the annual leave system, and 65 percent are greatly satisfied with the sick leave system. By comparison, 80 percent of employees without dependent care needs are greatly satisfied with the annual leave system, and 70 percent express great satisfaction with the sick leave system.

c. Several survey respondents and reports suggest a wide variety of reforms of the leave system, including the following:

(1) Merge annual and sick leave into a single leave system.

Five agency field installations reviewed during the OPM Review of Selected Installations and at least two agencies responding to the Survey of Agency Personnel Directors believe sick leave and annual leave should be combined into an all purpose "personal leave" category. A combined leave system would give employees flexibility and discretion that are not available under the current leave system to use leave for family care responsibilities.

(2) Establish a permanent program to provide for the use of sick leave for adoption purposes.

During fiscal year 1991, the Federal Government permitted employees to use sick leave for adoption purposes as part of a 1-year experimental program. The program terminated on September 30, 1991. The continued use of sick leave for adoption purposes was strongly recommended by the MSPB in its recent work and family report. Also, at least one agency responding to the Survey of Agency Personnel Directors recommended the establishment of a permanent program.

(3) Permit the use of sick leave to care for sick family members.

Eight agencies responding to the Survey of Agency Personnel Directors suggest that employees be permitted to use sick leave to provide care for a sick family member. MSPB also made this recommendation in its work and family report.

(4) Permit the recredit of unused sick leave for all employees returning to Federal employment.

Another agency suggestion in response to the Survey of Agency Personnel Directors is that the 3-year limitation on the recredit of sick leave after a break in Federal service be removed. Currently, OPM regulations provide that sick leave

may be recredited to an employee only if he or she is separated and reemployed without a break in service of more than 3 years.

(5) Establish a short-term disability program to provide income protection for employees prevented from working because of non-occupational accident or illness.

The MSPB report strongly recommends that OPM "initiate action to develop and provide short-term disability insurance at group rates to Federal employees who might want this insurance and are willing to pay the full cost of coverage." At least two agencies responding to the Survey of Agency Personnel Directors also recommend that some form of short-term disability coverage be provided by the Federal Government to its workforce.

(6) Establish a Governmentwide family and medical leave policy.

At least one agency responding to the Survey of Agency Personnel Directors and two unions suggest that the Federal Government establish, through legislation, a Governmentwide family and medical leave policy that provides a minimum amount of paid and/or unpaid leave for employees with certain family and medical needs.

H. FEDERAL LEAVE SHARING PROGRAMS

1. THE VOLUNTARY LEAVE TRANSFER AND LEAVE BANK PROGRAMS

On October 31, 1988, the President signed Public Law 100-566, which established a 5-year experimental program for both annual leave transfer and leave banks in the Federal Government. The 5-year experimental program is scheduled to terminate on October 30, 1993. OPM will prepare a comprehensive report on the overall operation of the program by April 30, 1993, and make recommendations to Congress on the continuation of leave sharing in the Federal Government.

Under the Governmentwide voluntary leave transfer program, employees experiencing a medical emergency can apply to their agency to become leave recipients and, if approved, can receive donated annual leave (not sick leave) from fellow employees to help offset the hardship caused by the medical emergency. In addition, the law provides for at least three single-agency experiments with leave banks, under which employees can contribute annual leave to a common leave fund within each agency and then can apply to withdraw leave from the fund if they encounter a medical emergency. There are six Federal agencies currently participating in the voluntary leave bank program: the Internal Revenue Service (IRS), the Environmental Protection Agency, the Defense Nuclear Agency, the National Gallery of Art, the Farm Credit Administration, and the Occupational Health and Safety Review Commission. The largest agency with a leave bank, the IRS, implemented its program in April 1990.

All Federal agencies are required to participate in either the voluntary leave transfer or leave bank program. Employees have enthusiastically supported these programs, and, to date, agencies have not reported any instances in which the voluntary leave transfer or leave bank programs interfered with the operational needs of the agency.

2. STUDY FINDINGS

The following findings are from the employee survey.

a. More than 96 percent of Federal employees with dependent care needs are satisfied with the Federal leave sharing program.

According to the employee survey, fewer than 4 percent of employees believe that the voluntary leave transfer and leave bank programs are "not at all" an effective way of helping employees meet medical emergencies.

b. About 14 percent of leave recipients have used donated annual leave to care for a sick family member.

The employee survey data show that about 14 percent of leave recipients have used donated annual leave to care for a sick family member. This is consistent with the data in OPM's report to Congress on first-year operations of the Federal leave sharing programs, which show that agencies reported that 12 percent of approved leave recipients used donated annual leave to care for a sick family member under the voluntary leave transfer program.

CHAPTER III: KEY MEASURES TO INCREASE THE EFFECTIVENESS OF WORK AND FAMILY PROGRAMS

The Federal Government has a range of personnel system flexibilities and work and family programs that help employees meet their family responsibilities, and most employees report satisfaction with the balance they have achieved between work and family. There are still unmet needs, however.

The study findings suggest a number of key measures to increase the availability and effectiveness of work and family programs. Some can begin immediately. Others require further analysis and consideration.

The measures address enhancing work and family programs in the following major ways:

- Increasing agency efforts to strengthen their work and family programs;
- Strengthening OPM's capacity to coordinate policy and provide assistance to agencies;
- Enhancing interagency cooperation and coordination in developing work and family programs and in resolving related issues;
- Exploring changes in current programs such as flexiplace, job sharing, and leave sharing that will increase their usefulness in meeting the dependent care needs of employees; and
- Considering new work and family related initiatives such as flexible benefits and revisions to the leave system which may require legislative change.

1. OPM Will Urge Enhanced Agency Attention to and Emphasis on Work and Family Matters.

There currently exists considerable authority for agencies to develop and implement comprehensive and effective work and family programs. Further, some agencies have demonstrated the ability to do this and thus serve as examples of what can be done to help employees balance their work and family responsibilities. At the same time, the study results show that there are significant differences among agencies with regard to the extent to which they have initiated and implemented work and family programs, and that there are clear indications of

employee interest in and need for additional work and family services. Finally, the employee survey data indicate that a substantial portion of the workforce does not believe their agencies understand and support employees' family responsibilities.

It is also clear that there are significant differences among agencies and within agencies regarding the nature and extent of work and family program needs. These differences relate to the demographics of their workforce, the extent to which work and family programs are already in place, the availability of community resources, and the extent to which agencies need work and family programs to become or remain a competitive employer.

Therefore, it is essential that each agency (and as appropriate sub-agency components) take steps to assess its specific needs for work and family programs for its employees, and based on this assessment, initiate specific programs to help meet those needs within available authorities and resources. To that end, OPM will urge enhanced agency attention to and emphasis on work and family matters. Further, as discussed in the next two measures, OPM will enhance its capacity and services to help agencies undertake such program assessment and development work.

2. OPM Will Establish a Work and Family Program Center within OPM.

The study provides several indications that OPM should strengthen its leadership, policy development, and agency assistance role with respect to work and family matters. Among these indicators are: a) the wide variety of agency experiences that need to be assessed and shared; b) the continuing evolution of issues and developments that need to be monitored and related to the Federal workforce; c) the differences among agencies with respect to the extent to which they have thoroughly considered and addressed work and family needs of their employees; d) the significant unmet needs of many Federal employees related to balancing work and family responsibilities; and e) the variety of substantive issues and suggestions that have been made to strengthen work and family programs but which need further assessment.

To help address the above areas, OPM will build on its current resources and activities related to work and family programs and establish a **Work and Family Program Center** within OPM. The Center will strengthen OPM's policy development and agency assistance capacity related to work and family matters. It will have leadership responsibility along with appropriate authority and resources to work with OPM program offices and key Federal agencies (GSA, HHS, DOL, DOD, and DVA) in assessing work and family issues and proposals,

developing needed work and family initiatives, and providing a comprehensive program of agency assistance (see "3" below).

The Center will provide the capacity within OPM to take a more comprehensive and integrated approach to both work and family related policy development and agency assistance. It will enable OPM to play a stronger role in program coordination, assessment, and information sharing. This in turn should facilitate the timely and efficient development of both Governmentwide proposals and specific agency programs for meeting the work and family challenge.

3. Through the Work and Family Program Center, OPM Will Provide a Comprehensive Assistance Program Consisting of Policy Guidance, Training, Program Development, Information Services, and Technical Assistance.

The primary purpose of this comprehensive assistance program will be to facilitate agency efforts to develop cost-effective programs in a timely and efficient manner. The program will be based on current, ongoing efforts and will include activities such as the following:

a. Coordinated Governmentwide programs and services that address specific needs and opportunities relevant to all agencies. For example, OPM and the Administration on Aging, HHS, are currently planning to utilize Area Agencies on Aging to provide assistance to Federal agencies in developing adult dependent care programs.

b. A clearinghouse of model and innovative work and family programs in Federal agencies.

c. Models and guidance for agencies on conducting cost/benefit assessments of their work and family programs.

d. Training, especially for executives, managers, supervisors, and personnel/EAP staffs, that addresses work and family needs, issues, policies, and programs.

e. Informational materials such as a Directory of Federal Agency Work and Family Programs, an Employee Benefits Handbook, and a Resources and Referral Handbook. (These three publications are already being developed, and two are nearly completed.)

f. An annual Director's Award for Outstanding Agency Work and Family Programs.

4. OPM Will Form an Interagency Partnership on Work and Family.

To capitalize on the experiences and responsibilities of certain key agencies in the dependent care area, OPM proposes a Partnership on Work and Family between OPM and these agencies to address the tasks of solving current problems and planning for the future. The Partnership will include key agencies in the child and adult dependent care arena: GSA, DOD, DVA, DOT, HHS, and DOL. It will serve two basic purposes: (1) to provide a forum and experience base for helping agencies address ongoing needs and problems related to work and family matters, and (2) to provide a means by which further assessment can be made of potential changes to increase the effectiveness of work and family programs. Examples of such changes include the following:

a. Expanded agency funding authority with respect to on-site child care centers.

b. Measures to ensure quality and accountability of on-site child care centers.

c. Alternatives to on-site child care centers, including authority to expend funds on such things as start-up costs for community based centers, participating in child care center consortia with private companies, and contracting directly with private centers for spaces for children of agency employees.

d. Authority to establish agency sponsored on-site adult dependent care centers.

In addition, the Partnership will be consulted by OPM with respect to other potential changes OPM might be considering, such as revisions in the leave system.

5. OPM Will Study and Consider Proposing Flexible Benefit Programs that have Dependent Care as a Key Component.

Many private sector companies have adopted flexible benefit plans which allow employees to choose those benefits most valuable to them within a fixed dollar amount. Several agencies, a Federal employee union, and the MSPB suggested that OPM study the feasibility of applying this concept to the Federal Government. The most popular aspect of "flexible plans" in the private sector, pre-tax spending accounts, is highly problematic for an employer who is also the tax collector. Employee survey data indicate, moreover, that Federal employees are not much interested in trading one benefit for another. Nonetheless, OPM will consider allowing greater employee choices between and among benefit programs as such programs are revised.

6. OPM will Take Steps to Strengthen the Programs for Part-Time Employment, Flexiplace, and Flexible and Compressed Work Schedules.

The study clearly shows that these three programs can be very useful to certain employees in meeting their work and family needs, as well as serving other purposes. The extent to which they are useful to employees with dependent care needs varies considerably. Part-time employment, although very beneficial to those who use it, is of limited application because of its impact on an employee's income, as well as because of limitations stemming from an agency's ability to use part-time positions. Similarly, the application of flexiplace is limited because it is not suitable for all positions and work settings. Flexible and compressed work schedules are more broadly applicable, although there are some restrictions due to agency missions and other requirements.

At the same time, there is evidence that more employees with dependent care needs are interested in using these flexibilities than are currently doing so. Also, it cannot be assumed that all agencies have thoroughly assessed the extent to which they can be made available to and used by employees to help meet dependent care needs.

Therefore, OPM will continue to encourage agencies to fully consider and apply these flexibilities as part of their overall work and family program. The appropriate and creative use of these programs will be emphasized in OPM's program of agency assistance administered by its Work and Family Program Center. In addition, OPM will take a variety of steps to enhance these program areas in ways that will strengthen their work and family connection. For example:

Part-Time Employment

a. OPM will evaluate and consider expanding the 4-city job sharing pilot project.

b. OPM will determine whether changes in the law on part-time employment would make it easier for agencies to establish part-time positions and use part-time employees.

c. OPM will examine policies on RIF to determine whether they include unnecessary barriers to part-time employment; especially the policy of restricting the assignment rights of part-time employees to other part-time jobs.

Flexiplace

a. Based on the completed study of the Flexiplace pilot project, OPM will determine whether to establish Flexiplace as a permanent program.

b. To encourage and facilitate the appropriate use of Flexiplace, OPM will provide agencies assistance and training related to the special features and requirements of Flexiplace, such as remote supervision.

c. OPM will further assess the effectiveness and use of satellite offices.

d. OPM will assess the desirability of recommending legislation that would authorize agencies to purchase telephone equipment for employees' residences.

Flexible and Compressed Work Schedules

a. OPM will further evaluate the use of flexible and compressed work schedules and the reasons for their non-availability and non-utilization.

b. OPM will urge agencies to assess the extent to which expanded availability of flexible and compressed work schedules would help employees meet work and family needs, as well as other objectives, and the extent to which flexible and compressed work schedule availability could be expanded consistent with productivity and service considerations.

7. OPM Will Consider Proposals to Make the Federal Leave System More Responsive to Work and Family Needs.

The generous Federal leave system is clearly a major benefit to Federal employees with dependent care needs. At the same time, it appears that certain aspects of it detract from its usefulness. For example, it provides the least benefit to employees with the least amount of service, thus limiting its usefulness to many employees with child care needs; it allows for, but does not guarantee, the use of unpaid leave for parental and family responsibilities, including childbirth and adoption; it does not permit agencies to recredit the sick leave earned by former Federal employees who return to Federal service after an absence of more than 3 years; and it does not allow employees to use sick leave to care for sick dependents unless a contagious disease is involved.

OPM is currently reviewing the Federal leave system to determine whether, and to what degree, changes are needed. The findings from this study will be carefully

considered in the context of that comprehensive review. In the interim, OPM supports temporary re-authorization of provisions to allow use of sick leave for adoption.

In addition, OPM will conduct an in-depth review of the leave sharing and leave bank programs to determine whether they should be continued and made permanent and what modifications if any are needed in them. As part of that review an analysis will be done to determine the extent to which these programs have assisted employees in balancing their work and family responsibilities. This in-depth review will be the basis for OPM's final report on these pilot programs, which is due to Congress in April 1993.

APPENDIX A

AGENCY IMPLEMENTATION OF DEPENDENT CARE PROGRAMS

The report provides an overview of Federal dependent care efforts. This appendix relays specific information about agency implementation of child care and adult dependent care programs.

I. AGENCY IMPLEMENTATION OF CHILD CARE PROGRAMS

Two agencies are singled out for individual discussion in Part A of this section. Any complete review of Federal child care programs must include some description of the programs administered by the Department of Defense, which operates the largest child care system in the nation, and the General Services Administration, which supports the establishment and administration of child care centers in space it controls. Part B describes 10 specific types of child care programs and services, and reflects the current status of implementation Governmentwide for those programs and services.

A. Specific Discussions of Programs in the Department of Defense and the General Services Administration

1. The Department of Defense Child Care Program

As noted, the Department of Defense (DoD) operates the largest child care system in the nation. Each of the Military Services (Air Force, Army, Navy, and Marine Corps) and the Defense Agencies have committed significant resources to providing high quality, affordable child care for their workforces.

Recognizing that there are many ways to meet the child care needs of its workforce, DoD provides a comprehensive system of child care at 420 military installations around the world and 19 Defense Agency sites. Services include 704 child care centers, 11,900 family day care homes, programs for school-age children, and resource and referral programs. There are 68,718 center spaces, 63,769 family day care spaces and 25,459 spaces for before and after school care for a total program capacity of 157,946 spaces. Approximately 5 to 8 percent of the spaces are currently taken by children of DoD civilian employees. Although military families have priority enrollment at the centers, there are some children of civilians at almost all of the centers. In family day care homes, civilians have equal access.

The Department of Defense is actively pursuing improvements to the child care system. This includes improving the availability, affordability, and quality of child care services. To help insure that child care is affordable to all personnel, DoD

uses a graduated fee scale (that also applies to civilians) based on family income. Employees pay approximately one-half of the cost of child care in military centers, while the Government, through appropriated funds, pays the other 50 percent. The average fee paid in a military center is $50-$55 per week.

In 1990, the Department of Defense initiated a task force to study the staff turnover rate in military centers. As a result of that study, and the Military Child Care Act, caregiver wages were upgraded on a DoD-wide basis. Caregiver wages and promotions are now tied to job performance and completion of a stringent training program. Prior to the implementation of this plan, the turnover rate in military centers ranged from 60 percent in stateside locations, to over 300 percent in some overseas programs. The average turnover rate is now approximately 25 percent. All child care providers in the DoD child care centers are Government employees, working in either a general schedule (GS) position or a non-appropriated fund position.

The Department of Defense programs are inspected and certified on a quarterly basis. Inspections are unannounced and consist of fire, safety, health, and program reviews. In addition, DoD encourages accreditation by the National Association for the Education of Young Children. As of January 1992, over 60 centers were accredited.

The Department of Defense has taken the lead in the prevention of child abuse in out-of-home settings by preparing training materials for both center-based and family day care programs. DoD has implemented a Worldwide Child Safety Hotline that parents can call to report child abuse and safety violations in any DoD-sponsored child care program. DoD also established the first multi-disciplinary team to assist commanders in the investigation of child sexual abuse allegations.

2. The Special Role of the General Services Administration in Establishing and Providing Support to Federal Child Care Centers

In 1987, the General Services Administration (GSA) began to promote the development of new Federal child care centers. This effort added 68 child care centers to the 12 established before 1987, for a current total of 80 centers in GSA-controlled space. These 80 centers operate in 28 States and the District of Columbia with enrollment of approximately 4,817[1] children, 3,377[1] of whom are children of Federal employees. In addition to its promotional activities, GSA's role has included the assignment, development, and modification of space, as well as maintenance and security of the centers.

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[1]**These numbers have been updated since the first printing of this report.**

Beginning in 1990, GSA expanded its role to address the quality of programs offered. With expertise gained through site visits and discussions with agencies, GSA has been able to serve as a resource for Federal child care centers and has taken a number of significant actions to improve the quality of centers. It has:

a. Established the Office of Child Care and Development Programs (OCCDP) to respond to the needs of established and prospective Federal child care centers. The mission of the Office of Child Care and Development Programs is to ensure that Federal families receive quality care for their young children in child care centers in GSA-controlled space. The Office promotes information sharing through networking, on-site meetings, and an annual conference, and works with center and agency management to identify problems and develop solutions.

b. Established a network of 10 Regional Child Care Coordinators who assist Federal agencies with the development and ongoing operation of their child care centers. Working in GSA's regional offices, the coordinators provide advice and guidance on facility design and policy implementation and provide the OCCDP with an update on child care activity in their respective regions. The coordinators receive training through an annual retreat with the staff of the OCCDP. The Regional Coordinators are a vital component of the OCCDP services offered to client agencies and their child care centers.

c. Developed training and other resource materials and disseminated them to child care centers operating in GSA space. These currently include a Fire Safety Curriculum, a resource book that provides information on the roles and responsibilities of center Boards of Directors, and guidelines on fundraising.

d. Sponsored two annual child care conferences (a third is planned) for individuals involved in the Federal child care program. Conference sessions provide training to directors and staff, board members, and Federal agency organizing committees.

e. Developed an initiative, entitled SHAPE, which was announced at the first annual Federal child care conference in July 1990. SHAPE focuses on affordability, accessibility, and quality of child care centers, including salaries and benefits, health and safety issues, accreditation, partnerships, and equity. Each area is addressed in resources and materials developed by the OCCDP. The key component is accreditation, and GSA has developed a GSA Administrator's Award, recognizing those centers that have achieved accreditation.

f. Developed new licensing agreements, which will provide a system of accountability to GSA. The licensing agreements may be signed by GSA and: (a) the Department or Agency, (b) a Child Care Vendor, or (c) a Board of Directors as Child Care Provider. These licensing agreements are intended to provide consistent policy guidance and fiscal accountability over child care services provided in GSA-controlled space.

g. Established an Interagency Task Force on Federal Child Care, composed of representatives of the agencies that sponsor child care centers in GSA-controlled space. The Task Force is a forum for GSA to provide policy clarification on a variety of issues, including fundraising, security, and ethics.

h. Created *The SHAPE Newsletter*, published quarterly, which serves as an important networking tool among agencies, boards, vendors, child care coordinators, and others involved in on-site child care. The newsletter contains information about new policies, conferences, training, and special programs and initiatives conducted by GSA and the child care centers.

i. Developed a preliminary mini-center model that could be used by agencies that do not have enough employees with child care needs to warrant establishing a full-size child care center. The mini-center would provide child care for a maximum of 12 children and would be similar to family day care.

B. Types of Federal Agency Child Care Programs and Services, and Current Status of Implementation.

The following material is based on the 75 responses to the Survey of Agency Personnel Directors and follow-up interviews with selected agencies. Some of these programs/services are also used to support adult dependent care, and are not described again in Section II, Agency Implementation of Adult Dependent Care Programs.

1. On-site or Nearby Child Care Centers

Agencies are authorized by 40 U.S.C. 490(b) to provide, free of charge for rent or services, space for child care centers on the conditions that: (1) space is available; (2) child care services will be provided to a group of individuals of whom at least 50 percent are Federal employees; and (3) priority for available child care services will be given to Federal employees.

There are approximately 858 child care centers sponsored by Federal agencies. Eighty of these child care centers are in GSA-controlled space, sponsored by and serving a variety of agencies. Many of the centers in GSA space are sponsored by more than one agency, especially in field locations. Agencies often join together to sign a multi-agency contract, referred to as a consortium, to establish a center.

In addition to those in GSA-controlled space, several agencies also sponsor child care centers in non-GSA-controlled space. They include:

- 704 child care centers sponsored by Department of Defense, most of which enroll at least some children of civilian employees;
- 32 child care centers sponsored by Department of Veterans Affairs;
- 11 child care centers sponsored by Department of Transportation;
- 18 child care centers sponsored by U.S. Forest Service;
- 9 child care centers sponsored by the National Aeronautics and Space Administration (NASA);
- 3 child care centers sponsored by Department of Health and Human Services; and
- 1 child care center sponsored by the Smithsonian Institution.

2. On-site or Nearby Before and After School Child Care

Twelve agencies reported that they sponsor programs that provide care for school age children (usually age 5 to 12 years) before and after school. Program services often include making arrangements to transport the children to and from school.

The DoD agencies provide the greatest number of on-site or nearby before and after school child care programs. Available to both military and civilian employees, these programs frequently use family day care certified homes for school-age children. The Department of Veterans Affairs, the Department of Transportation, and the Smithsonian Institution also provide before and/or after school child care for their employees.

In addition, approximately 10 percent of the child care centers in GSA-controlled space have provisions for on-site before and after school care, including centers sponsored by the Departments of Housing and Urban Development, Labor, Health and Human Services, Treasury, and Justice.

The need for before and after school child care is recognized and more agencies are beginning to address this area. For example, the Library of Congress anticipates opening an on-site before/after school program in fiscal year 1993, as does the Social Security Administration in Baltimore.

3. On-site or Nearby Sick Child Care

Seven agencies reported that they provide sick child care services, i.e., temporary care while the child is recovering from an injury or illness. Most of the on-site sick child care is provided by the Air Force and the Army, primarily using family day care certified homes. Other agencies providing on-site or nearby sick child care are the Departments of Transportation, Veterans Affairs, Housing and Urban Development, and Health and Human Services.

4. On-site or Nearby Summer Care

Child care arrangements for school-age children during the summer months are a growing concern of working parents and some Federal agencies have implemented summer care programs. On-site or nearby summer care provides all-day programs and activities for school-age children, usually for children age 5 through 12 years, who require some kind of adult supervision. These structured programs/activities frequently include field trips and instruction in outdoor activities, such as swimming and tennis.

The Departments of the Navy, Air Force, and Army provide most of the on-site or nearby summer care programs available to Federal employees. Fifteen additional agencies have summer care programs in place. For example, the Defense Logistics Agency has 9 summer programs, the Department of the Treasury has 8, and the Department of Housing and Urban Development has 10. The Department of Justice, the Federal Reserve Board, the Department of Labor, the Department of Health and Human Services, the Smithsonian Institution, and the National Endowment for the Humanities also reported the establishment of such programs. Several others, such as the Library of Congress and the Federal Deposit Insurance Corporation, anticipate starting summer programs in 1993.

5. Resource and Referral Services

Resource and referral services can also assist working families. Such services range from a one page listing of licensed child care providers to a professionally staffed telephone service, which can be staffed by either agency employees or contract staff. The professionally staffed telephone service provides employees with information on finding and evaluating the quality of child care providers and makes actual referrals to community based service providers.

Eighteen agencies reported offering resource and referral services. The services range from the U.S. Information Agency's providing employees with a comprehensive list of nearby child care centers to the Department of Transportation's comprehensive *Child Care Resource and Referral Directory* that assists employees in locating quality child care services throughout the country. The Federal Deposit Insurance Corporation (FDIC) Employee Assistance Referral Program offers a 24-hour counseling and referral service, either over the toll-free

telephone number or face-to-face at a location convenient to the inquirer. FDIC employees are provided with dependent care counseling and locality-specific resource and referral services for child and elder care.

6. Resource Libraries/Centers

Resource centers or libraries can help employees address their child care concerns by providing access to child care literature. These centers contain articles, pamphlets, books, manuals, and videotapes concerning child care, parenting skills, and other family and work life issues. Twelve Federal agencies reported having at least one resource library/center available for employees at their agencies, including the Department of Housing and Urban Development, the Agency for International Development, the Equal Employment Opportunity Commission, and the General Accounting Office. The Department of Transportation has established a Headquarters Work and Family Resource Center with the latest and most up-to-date pamphlets, publications, and periodicals specifically for dependent care and work and family issues.

7. Support Groups

Five Federal agencies reported holding regular support groups that deal with child care and other family related issues for their employees. These groups allow employees to share common concerns and experiences. For example, the National Security Agency has a support group for nursing mothers that was initiated to establish and improve facilities for mothers who wished to continue breast feeding their babies after returning from maternity leave. Other Federal agencies have expressed interest in establishing similar groups.

In early 1990, a Department of Health and Human Services regional office established a "parenting" support group which met during lunch time once or twice a month throughout 1991. Speakers such as child psychologists, school counselors, and experts in related fields led discussions on topics requested by the participants. The Smithsonian Institution, the Departments of Interior and Justice, and the Agency for International Development also sponsor support groups which address dependent care concerns.

8. Educational Workshops, Seminars, Fairs

Federal departments and agencies conduct, or otherwise provide, periodic educational workshops and/or seminars which are designed to acquaint employees with the types of services that are offered by their agencies and the types of resources that are available within their communities. The following are a few examples of the kinds of activities that agencies are providing to educate and help their employees.

- The General Accounting Office's Office of Counseling and Career Development conducts monthly noontime seminars at headquarters which often address family related issues.

- The Department of Transportation sponsored and videotaped a Work and Family Seminar series for distribution to its employees nationwide, to help employees achieve balance in their work and family life.

- The Social Security Administration uses its satellite TV broadcast to provide a series of presentations on parenting topics to SSA employees at approximately 35 downlinks across the country.

- One Department of Health and Human Services regional office held two Dependent Care Fairs that were attended by more than 2,700 Federal employees.

- The Department of Justice (DoJ) held two Dependent Care Fairs at its headquarters building in Washington, DC, which attracted over 200 DoJ employees seeking information about dependent care resources. Approximately 22 organizations concerned with dependent care issues staffed the exhibit booths at the fair.

- The Nuclear Regulatory Commission sponsored a series of lunch-time workshops on various family related issues to deal with the stresses of single parenting, blended families, and the "sandwiched generation" - caring for both children and aging parents. Topics included: "Parents and Teenagers: Survival Techniques," "Single Parenting: Balancing the Demands of Children, Home and the Workplace,"and "Yours, Mine and Ours: Working it Out as a Blended Family."

9. Work/Family Counselors (Non-EAP)

A number of agencies utilize Work/Family Counselors who are not assigned to the EAP to provide child care assistance to employees. The full range of their duties often includes providing resource and referral services, presenting seminars on family and dependent care issues, advising management and employees on work and family issues, and reviewing agency policies for their impact on work and family programs.

Among the agencies reporting Work and Family Counselors, a few have substantial numbers of employees assigned such duties. The Department of Transportation has 12 regional child care coordinators within the Federal Aviation Administration. The Coast Guard has 20 Family Program Coordinators and also has Family Advocacy representatives at over 2,000 locations. The National Guard

Bureau has 53 Family Program Coordinators assigned throughout the country. The Department of the Navy, employs 89 Work and Family Counselors.

Other agencies that have Work and Family Counselors include the National Security Agency with three (two are stationed overseas), Department of the Treasury with two, and the National Science Foundation, the Federal Reserve Board, and the Agency for International Development with one each. The Internal Revenue Service's Work and Family Program is particularly broad, and includes on its staff an Early Childhood Development Specialist, a Dependent Care Specialist for adult dependent care, part-time, and job sharing programs, a Telecommuting Specialist for the flexiplace and clean air programs, an EAP Manager, a Clinical Psychologist for the traumatic incidence counseling program, a Career Counselor for the career relocation and financial management counseling programs, and a Drug-Free Workplace Program Manager.

10. Employee Assistance Programs (EAP's)

Federal EAP's, established in the early 1970's to help employees with substance dependency, have, over time, expanded their services to assist employees experiencing other personal and health related problems that may affect job performance, attendance, or conduct at the worksite. EAP's, available to all Federal employees, provide free, confidential counseling and referral services to employees and, where feasible, family members.

These programs are becoming a major source of support for employees with dependent care problems because they frequently offer counseling, information, or referral for help with job stress, family crises and illness, financial strain, and other problems that may be caused by dependent care pressures. Of the 75 agencies responding to the OPM work and family survey, 70 percent indicated that their EAP's provide counseling and referral service for family or other relationship concerns. In addition to providing individual counseling, many of the EAP's sponsor lunch-time seminars and special educational events. For example, OPM's EAP regularly offers employee lunch-time seminars on dependent care concerns, such as selecting quality child care, single parenting, and stress management.

In FY '90, more than 62,000 employees voluntarily sought assistance from their EAP for help with their personal problems (an increase of 4 percent over the previous year). The high rate of voluntary employee use of the EAP indicates that many employees are seeking and finding help coping with a wide range of personal and family problems.

II. AGENCY IMPLEMENTATION OF ADULT DEPENDENT CARE PROGRAMS

A. Existing Programs

The following material is based on the 75 responses to the Survey of Agency Personnel Directors and follow-up with selected agencies. As noted in section I, agencies sometimes tailor a program or service to address both child care and adult dependent care needs. The examples described in this section are those developed specifically for adult dependent care.

1. Resource Centers

These centers are a cost-effective way to help employees enhance their knowledge of aging-related issues. One example of such a center is the Health Resources and Services Administration's Older Adult Resource Center, established in 1988 to give employees easy access to information about aging-related issues and to stimulate a greater appreciation of the rapidly growing older population. The center contains over 100 publications from both the public and private sectors and its collection is continually being updated.

2. Support Groups

Several Federal agencies sponsor adult dependent care support groups for employees facing the physical, financial, emotional, and/or legal responsibilities of caring for an adult dependent. These groups offer counseling, sharing of experiences, and information about resources. For example, the Department of Housing and Urban Development sponsors an adult dependent care support group which meets monthly. It alternates between information-sharing forums and meetings on specific topics, such as housing, legal, social services, medical and custodial care concerns.

3. Educational Workshops/Seminars

Several agencies sponsor educational workshops on adult dependent care topics. The Department of Health and Human Services headquarters office and its Administration on Aging have jointly sponsored lunch-time seminars on adult dependent care topics. The Internal Revenue Service (IRS) purchased an elder care video training package, including workbooks, which was distributed to all IRS offices to raise the awareness of employees and managers regarding the growing issue of the aging population and its impact on individuals and the workplace.

B. Programs Under Development

In addition to the programs and services currently offered, several agencies are in the process of developing adult dependent care programs. For example, the Social Security Administration (SSA) is working with the Maryland Office on Aging and the local Area Agencies on Aging to establish an adult dependent care information program that would include workshops, resource centers, support groups, and other similar activities. SSA is planning to use a satellite TV broadcast to provide educational information on adult dependent care issues to its employees in field locations.

Also, the Internal Revenue Service (IRS) and the Environmental Protection Agency are currently exploring the feasibility of establishing agency-sponsored on-site adult day care centers. IRS has established an Advisory Board of elder care experts to study the various programs. There are several types of centers being explored, each of which could potentially be adapted to the workplace. One is a facility that would care for the frail elderly or persons suffering from Alzheimer's disease who need supervision during the time that the employee is at work. Another is a center that would provide an opportunity for employees' elderly parents/relatives to socialize with other seniors and attend educational workshops. A third type is an intergenerational center where seniors would have an opportunity to share space with a child care center. A fourth type would combine any of the above with care for adult dependents with disabilities.

APPENDIX B

SURVEY OF FEDERAL EMPLOYEES METHODOLOGY

I. DEVELOPMENT

A. Created by program office subject matter experts.

Subject matter experts from OPM's program offices worked together to create an instrument that would provide information useful to policy-making. About half of the questions were selected from existing, previously administered public and private sector surveys, which permits comparisons with other data sources. The other half were developed especially for the employee survey, because no other surveys had previously asked for such information.

B. Pre-tested with Federal employees.

The employee survey was carefully pretested with several agency groups of employees, including professionals, clerical employees, managers, personnel specialists, wage grade employees, and physicians and nurses; their suggestions and comments for revising questions were incorporated. The major, national employee organizations and management associations were also provided an opportunity to review the instrument.

C. Final product.

After all revisions, the final product was a 184-item survey categorized into eight sections: (1) employee characteristics, (2) work experiences in the Federal Government, (3) work schedules and arrangements, (4) child care, (5) adult dependent care, (6) leave, (7) pay, and (8) supervisory and personnel specialist issues.

II. SAMPLING METHODOLOGY AND WEIGHTING

A. Sampling plan.

The sampling plan for the employee survey included four samples: a primary sample and three specialized sub-samples (one for assessing employee values and

two for evaluating pay reform). Results for the primary sample, which consists only of Federal white-collar employees, are presented in this report. Stratified by department (the 22 largest executive branch departments and a 23rd group of all others) and pay category (GS 1-6, GS 7-15, GS 1-15 supervisors, GM 13-15, and Senior Executive Service). The total number of employees included in the primary sample was 56,767.

B. Weighting.

Samples were not proportional to department nor pay category population size; therefore, survey responses were weighted to represent accurate group proportions within the overall Federal white-collar population.

C. Generalizing to the Federal white-collar workforce from the survey statistics.

The sampling plan and weighting scheme permit us to generalize from the survey data to the Federal white-collar workforce with extremely high confidence and little margin of error. This is true whether one generalizes to the overall group of Federal employees or to specific sub-groups (e.g., employees at a department, employees within a pay category, or even employees within a certain pay category at a department). When the entire Federal population is used, the margin of error is approximately ± 0.5 percent, at the 95 percent confidence level. In cases where questions pertain to a subset of the workforce, such as employees with child care needs, the margin of error may be somewhat greater, but rarely more than ± 3 percent, at the 95 percent confidence level.

III. ADMINISTRATION AND RESPONSE RATE

A. SOFE distribution.

Employees were randomly selected from OPM's Central Personnel Data File (CPDF), based on the described sampling plan. The CPDF is a database that includes demographic data on *all* Federal civilian employees. Surveys and the sampling lists were distributed to personnel offices by a contractor. In turn, personnel offices were requested to deliver the surveys to the assigned employees. Each survey package contained a questionnaire and a pre-addressed return envelope. Employees returned the surveys to the contractor, who scanned them onto magnetic tape. Aggregated responses were then given to OPM on this tape medium.

The total number of sampled employees in this plan was 56,767. The first surveys were mailed in mid-November 1991 and the last received arrived in early

February 1992. The response rate for the white-collar sample was 31,645, or 56 percent. The number of usable responses was 30,854, or 54 percent.

B. Comparison to CPDF.

Where possible, weighted percentages for each response choice to questions in the employee characteristics (demographic) section were compared to the corresponding population percentages determined from OPM's CPDF. Based on examination of these items, comparisons indicated that the weighted sample is representative of Federal white-collar employees.

Personnel Research *Highlights*

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United States Office of Personnel Management

Special Report

May 1992

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PERSONNEL RESEARCH HIGHLIGHTS

SPECIAL REPORT

on

THE SURVEY OF FEDERAL EMPLOYEES (SOFE)

The Office of Systems Innovation and Simplification
Personnel Systems and Oversight Group
U.S. Office of Personnel Management

This publication was printed on Recycled Paper

Introduction

Purpose

The Survey of Federal Employees (SOFE) is the Office of Personnel Management's (OPM) first major survey of the workforce since 1983. The questionnaire was designed to provide policy-makers with information about Federal employees that was not available from existing sources. Questions covered various personnel areas: employees' satisfaction with their jobs, supervisors, and organizations; performance management; training; work schedule arrangements; leave benefits; and dependent care responsibilities and the ways employees accommodate these responsibilities.

Methodology

The SOFE questionnaire was created by subject matter experts, with the assistance of psychologists and survey researchers. Items were carefully pretested with a variety of employee groups, and major employee organizations and management associations were consulted during the development. The final questionnaire contained 184 items.

The sampling plan consisted of a primary sample and three specialized sub-samples. This report describes information only for the primary sample, covering white-collar Federal employees. The sampling plan and weighting procedures permit us to generalize from the sample to the entire population of white-collar Federal employees in the extensive group of Federal agencies participating in the survey. Percentages provided in the report are accurate within +/- 1.1 percent, at the 95 percent level of confidence, unless otherwise noted.

SOFE was distributed to randomly selected Federal employees between mid-November 1991 and early February 1992. Surveys for the primary sample were mailed to approximately 57,000 employees, and nearly 32,000 were returned, for a response rate of 56 percent.

More detailed information on the survey methodology is provided in Appendix A.

Highlights Report

This report features general results from the 1992 Survey of Federal Employees. Information is presented first on Federal employees' attitudes towards their jobs, their supervisors, and their organizations. Then, responses to questions on performance management, training, work schedule arrangements, leave benefits, and dependent care are provided. The data presented here focus solely on Governmentwide, white-collar

employment. Future reports will concentrate on specific program areas and will analyze the data in more detail. For example, responses of supervisors and nonsupervisors will be compared and analyzed.

As you read tnis report, keep the following points in mind:

1. Most items on the questionnaire offered employees up to five response choices. Percentages in this report typically are given for consolidated response choices, unless otherwise stated. For example, "33 percent agree" combines the number of employees who marked "strongly agree" and "agree." Likewise, "66 percent marked to a great extent" refers to the combined number of employees responding to a "great extent" and a "very great extent."

2. Percentages have been rounded according to accepted rules of practice. Therefore, on a few occasions, rounding error will result in a total of 99 or 101 percent. On multiple response items, those that asked respondents to choose as many options as applied, the total percentages will not equal 100 percent.

3. The percentages provided for each item are based only on those who responded to the item. "Missing cases" are excluded from analysis.

The full SOFE response frequencies are provided in Appendix B.

Who Responded to SOFE?: Respondent Demographics

The first section of the Survey of Federal Employees asked respondents about demographic characteristics such as gender, age, and educational level. Responses to this section were then compared with other OPM data sources on white-collar employees to determine how closely the SOFE respondent group resembled the Governmentwide population.

Respondents to SOFE generally mirror the composition of the Federal population. The SOFE respondent group is predominately white (78 percent), middle-aged (62 percent are between ages 35 and 54), and married (68 percent). Most work full-time (95 percent). The group is well educated (43 percent have at least a four-year college degree). The majority have worked for only one agency (79 percent) and have more than 10 years until retirement eligibility (61 percent). The average grade is 8.8.

Most employees have working spouses, and a relatively large group are married to other Federal employees. Of married employees, 77 percent have a working spouse. Interestingly, 29 percent of married employees have a spouse who works for the Federal Government.

The largest group of employees have household salaries of $26,000 to $50,999. Forty-one percent of respondents reported their household, pre-tax, combined income to be between $26,000 and $50,999. Another 26 percent reported $51,000 to $75,999, and 18 percent reported $10,000 to $25,999. Only 1 percent reported an income of less than $10,000, and 14 percent reported $76,000 or more.

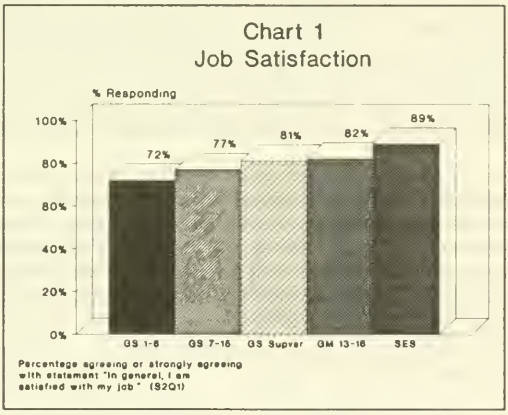
Many Federal employees have worked in the private sector. Employees were asked where they had come from when they last entered the Federal service. Forty-three percent came from the private sector, while 16 percent entered as a student from a college or university setting. Nine percent had been in the military, and 7 percent worked in local or State Government. Another 7 percent were homemakers. Less than 1 percent had been retired. Four percent were in an unemployed status immediately prior to entering Federal service. See Appendix B for a more detailed breakdown of where respondents last worked.

General Employee Attitudes

Many items on SOFE were designed to measure employees' perceptions of their jobs, supervisors, and organizations; responses to these items are presented in this section.

Employees' Attitudes About Their Jobs

Federal white-collar employees are generally satisfied with their jobs. Over three-quarters (76 percent) of employees agree with the statement that they are satisfied with their jobs. Not surprisingly, employees with greater responsibility more often report that they are satisfied (see Chart 1).



Employees most frequently value a sense of accomplishment, use of their skills and abilities, and time spent with their families. When asked to choose the things they most value, most employees (59 percent) choose a "sense of accomplishment." "Use of my skills and abilities" is selected by 44 percent and "spending time with family" by 42 percent. Other popular values are "challenging work" (39 percent), "service to others" (35 percent), and "advancement" (35 percent).

Employees' expectations appear to be met. A majority believe that their jobs are challenging (71 percent), that their jobs make good use of their skills and abilities (66 percent), that employees' personal development is encouraged (53 percent), and that they are able to accomplish something worthwhile in their jobs (51 percent). Most employees (72 percent) also believe they have achieved a satisfactory balance between their work and family lives.

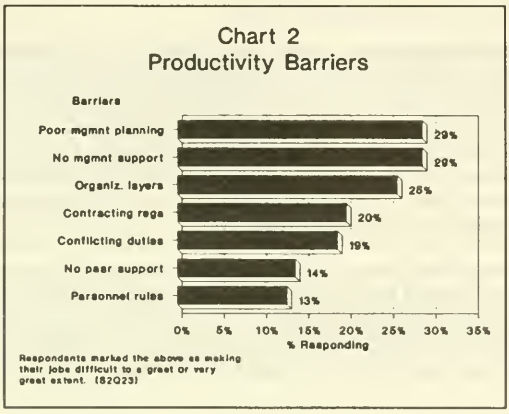
Federal employees believe they work hard. Most Federal employees (85 percent) disagree with the statement that they do not have enough work to do to keep them busy, and most (80 percent) believe they are expected to work hard. Nearly as many (77 percent) disagree that the work in their unit could be accomplished with fewer people. One-third report that, on the average, they work some overtime every week.

Federal employees say they know what is expected of them and most rarely need to re-do work. A large majority (87 percent) have a clear understanding of how their work contributes to the agency's mission. Three-quarters (75 percent) of respondents report that they know what is expected of them. Accordingly, 59 percent say they rarely or never re-do their work; only 8 percent report re-doing work often or always. Of the reasons for re-doing work, the most common are a change in procedures, policies, or practices (52 percent) or decisions by higher-ups (47 percent). Thirty-eight percent report that rework occurs because of their own errors.

Problems with management planning and support are identified as the most common productivity barriers. Of seven productivity barriers, the ones cited most frequently as making one's job difficult to a great extent are poor planning by management (29 percent) and lack of support from management (29 percent). The least frequently cited are lack of support from co-workers (14 percent) and personnel rules and regulations (13 percent). See Chart 2, on the next page, for the full range of responses.

Employees' Attitudes About Their Co-Workers

Employees are satisfied with their co-workers, but perceive that the Government has difficulty attracting quality employees. Seventy-eight percent of respondents agree that people in their work unit cooperate to get the work done. Confident in their co-workers, almost three-quarters (72 percent) report that their colleagues have the necessary skills and abilities to perform their jobs. Nonetheless, only 46 percent believe their agency can attract high quality employees, and only 40 percent agree that high performers tend to stay.



Employees' Attitudes About Their Supervisors

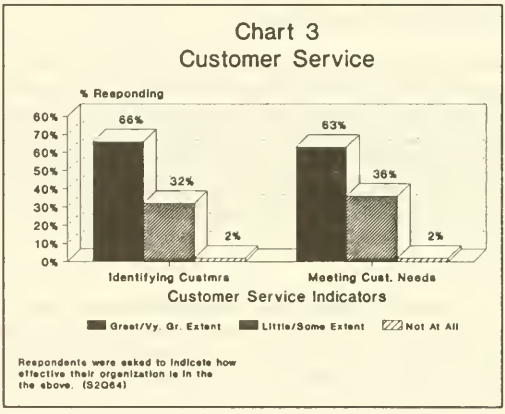
Federal employees are satisfied with their supervisors. The majority (60 percent) agree that their supervisors work well with people, and 72 percent agree that their supervisors have good technical skills. Eighty-four percent assert that their supervisors are understanding when family responsibilities cause changes in work schedules. Almost two-thirds (63 percent) have confidence and trust in their immediate supervisor, while slightly less than half (49 percent) can say the same about their second-level supervisor. Perceptions of how supervisors deal with poor performers are more mixed: one-third believe their supervisors deal effectively with poor performers; another third (34 percent) disagree with that statement; the remaining third are undecided.

Federal employees report that they participate in decisions affecting their work. A majority (59 percent) feel that their supervisors encourage them to help in developing work methods and job procedures within their work unit. Less than one-third (32 percent) state that they have to get approval from higher-ups to make decisions that they could make on their own.

Employees' Attitudes About Their Organizations

Employees think their organization is concerned about them, but express some misgivings regarding trust and fairness. Two-thirds (66 percent) regard their organization as being concerned for the safety and health of employees, and 52 percent think their organization provides a good physical work environment. Additionally, 55 percent view their organization as being understanding and supportive of employees' family responsibilities. However, less than half (44 percent) have confidence and trust in their organization, and less than one-third (30 percent) perceive their organization as treating all employees equally, regardless of position or rank.

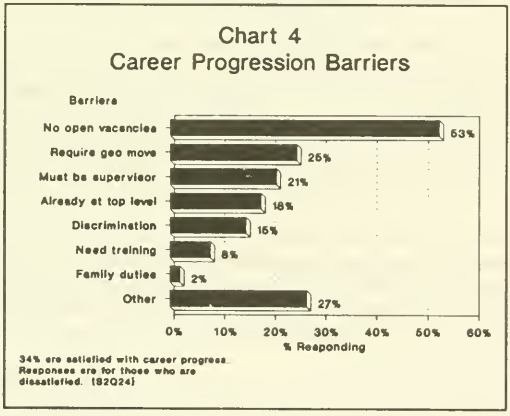
Federal employees believe that their organizations are customer service-oriented. Two-thirds of employees (66 percent) think their organization effectively identifies its customers, and 63 percent believe those customers' needs are met to a great extent (see Chart 3). Additionally, two-thirds of those employees familiar with front-line employees think they provide good service to the public, and 68 percent agree that customer service is a priority in their organization.



Career Prospects With the Federal Government

Employees are committed to the Federal Government. Nearly 9 out of 10 employees (87 percent) disagree with the statement that they "don't care what happens to [their] organization, as long as [they] get a paycheck." Similarly, almost three-quarters (73 percent) indicate that they try to come to work when they do not feel well, because they know their contribution will be missed. In addition, 54 percent agree with the assertion that "the Federal Government is a great place to work."

About one-third of employees are satisfied with their career prospects. Thirty-four percent of respondents are satisfied with their career prospects in the Federal Government. For those who are not satisfied, the most common barrier cited is the lack of vacant, higher-graded positions (53 percent). One-quarter also indicate a lack of mobility (i.e., they do not want to move). Only 2 percent thought their family responsibilities were perceived as a problem by others. However, 15 percent did cite discrimination as a perceived limitation to career progression. See Chart 4 for the full range of responses.



Most employees are planning to remain with the Federal Government. During the next year, one-third of respondents plan to look for a new job, while 49 percent will not look and 19 percent are not sure. Of those planning to change jobs, most are likely to look for a new

job within the Federal Government, either inside the same agency (57 percent) or in another Federal agency (50 percent). Less than one-third of those looking (30 percent) would look outside the Federal Government.

Supervisory Authority

Supervisors do not believe that they have much authority in personnel matters. Nearly three-fourths of supervisors (73 percent) disagree that they have enough authority to determine their employees' pay. Slightly more than half (52 percent) do not believe they have enough authority to hire competent employees, and 49 percent do not agree that they have enough authority to promote their employees. However, only 25 percent assert that they do not have enough authority to discipline poor performers.

Performance Management

The results presented in this section reflect employees' experiences with and perceptions of the performance appraisal system and their opinions about potential changes to it.

Nearly all Federal white-collar employees (93 percent) received a performance appraisal within the past year. Only 6 percent have received their most recent rating more than a year ago, and only 2 percent have never received one.

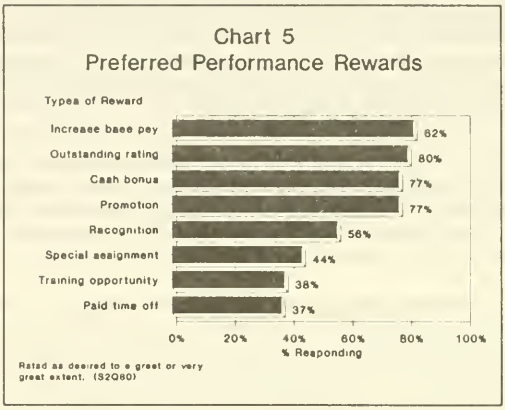
Virtually all employees received at least a fully successful performance rating. When asked to report their last appraisal rating, one-third said they had been rated "outstanding," 41 percent reported a rating of "exceeds fully successful," and one-quarter reported a rating of "fully successful." Only three-tenths of 1 percent said they were rated as "minimally successful," and one-tenth of 1 percent reported a rating of "unacceptable."

Employees seem to understand and approve of the current system as it relates to their personal ratings. Nearly three-quarters of employees (71 percent) state that they understand the system being used in their agency. Employees agree that the ratings they receive are a "fair and accurate reflection" of their performance (63 percent) and disagree with the statement that management gives everyone the same rating (65 percent). Employees agree with their supervisors on what good performance is (65 percent) and state that they discuss the specific reasons for their ratings with their supervisors (65 percent).

However, employees are less sure that the system is operating appropriately with respect to their co-workers, and that the system motivates employees to do their best. Sixty-one percent believe that some people receive a higher performance rating than they deserve. In addition, less than one-fifth (19 percent) agree that the appraisal system motivates employees to perform well; 48 percent disagree and 33 percent neither agree nor disagree.

Employees would like to be paid based on the quality of their job performance. Nearly all employees (97 percent) believe that the quality of their work should be important in determining their rating. Other factors deemed important are timeliness of work (82 percent), customer service (80 percent), and teamwork (72 percent). Quantity of work was seen as important by 47 percent.

Employees' most-favored options for performance rewards are related to compensation. An increase in basic pay (82 percent) and an outstanding performance rating (80 percent) are the most favored rewards for good performance. An outstanding rating is often associated with a quality-step increase, merit increase, or cash bonus. Least popular are paid time off and training opportunities. See Chart 5 for the full range of responses on this question.



However, many do not believe that there is a link between pay and performance. Only about half (48 percent) perceive that they will receive a pay raise or cash award if they perform exceptionally well.

Employees appear comfortable with the current appraisal system. Although there is interest in and support for changes to the Federal appraisal system, most employees appear comfortable with the current system.

* **Employees prefer five rating levels.** Sixty-five percent of respondents would like to keep five rating levels. One-quarter support a reduction to three levels, while 11 percent prefer a two-level system. It is reasonable to assume that respondents, most of whom received ratings of "outstanding" or "exceeds fully successful," see the potential for their ratings to be lowered under a system with fewer rating levels.

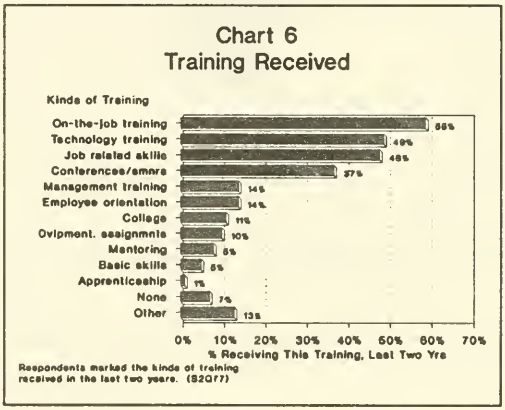
* **Employees want to be rated on individual performance.** Most workers prefer that their ratings be based on individual performance (69 percent). However, nearly one-third (30 percent) would support a rating based on a combination of individual and group performance. Only 1 percent want their rating to be based solely on the overall performance of their work group.

* **Employees think that input into their ratings should come from their supervisors and themselves.** Most employees (89 percent) think their rating should be based to a great extent on their first-level supervisors' input. Slightly less than half (48 percent) favor input coming from themselves. Other sources of input are supported by smaller percentages of employees: second-level supervisor (38 percent), internal customers (24 percent), external customers (21 percent), and co-workers (18 percent).

Training

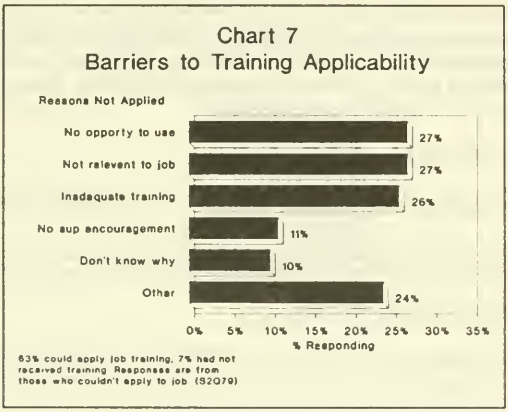
This section examines how frequently employees receive training, along with their perceptions of training opportunities and barriers to training.

The most common type of training was informal on-the-job training. Employees were asked to note the types of training they had received in the past 2 years. Over half (59 percent) listed informal on-the-job training. Other common types of training were for technology-specific skills (49 percent) and job-specific skills (48 percent). The least common types of training were mentoring (8 percent), basic skills courses (5 percent), and apprenticeships (1 percent). Seven percent had not received any training in the 2-year period. See Chart 6 for a complete listing of training received.



Most employees who received training have been able to apply the skills learned to their jobs. Almost two-thirds (63 percent) of trained employees are able to use the skills they have learned. For those unable to apply the skills to their jobs, the most common reasons are: not being given an opportunity to use them (27 percent), irrelevance to their jobs (27

percent), and inadequate training (26 percent). See Chart 7 for a complete listing of responses.



Federal employees' training needs are identified in diverse ways. Most commonly, employees request training from their supervisors (62 percent), based on their own perceptions of their needs. Alternately, supervisors identify employee needs (44 percent), or supervisors and employees jointly identify the employees' training needs (44 percent). One-third (32 percent) also note that the personnel office identifies training opportunities. Fifteen percent of respondents report that training needs are not identified.

A variety of factors interfere with employees' receiving training. Nearly 4 out of 10 employees (38 percent) report that lack of funds interferes to a great extent with getting training. Thirty-two percent also note that they are too busy on the job to take training. Other factors are lack of management support (22 percent), priority given to other employees (21 percent), and lack of available, appropriate training (17 percent).

Work Schedule Arrangements

The Federal Government provides a variety of work scheduling flexibilities to help employees accommodate their other life activities (e.g., education, volunteer work, another job, dependent care). This section examines employees' interest in and use of these flexibilities. The areas discussed include:

Flexible and Compressed Work Schedules

Part-Time Employment (i.e., 16-32 hours per week, regularly scheduled)

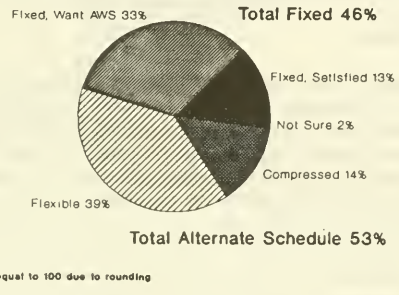
Flexiplace (working at home, either officially or unofficially, "on-the-clock")

Flexible and Compressed Work Schedules

About half of Federal employees work either a flexible or compressed work schedule. Nearly 4 of every 10 employees (39 percent) work a flexible schedule, which permits them to choose their starting time, vary the hours worked, and/or earn credit hours. Another 14 percent work a compressed schedule, which, although it has a fixed starting time, allows employees to work longer than 8 hours a day in order to work fewer days during the work week or biweekly pay period. The remainder (46 percent) of employees work a fixed schedule. Of the fixed schedule employees, about one-third (29 percent, or 13 percent of all employees) are satisfied with that schedule and do not want to work under a flexible or compressed work schedule. The remainder of the fixed schedule employees (estimated at 33 percent of all employees) appear to be interested in working under either a flexible or compressed work schedule. See Chart 8, on the following page, for a graphic display of the work schedule breakdown.

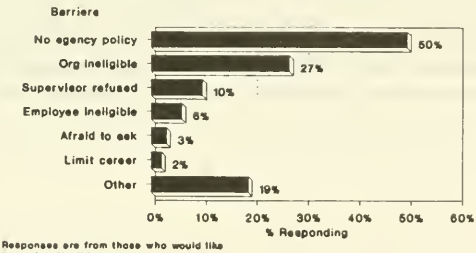
Fixed schedule employees who want to work a more flexible schedule, but cannot, cite lack of agency policy as the most common reason. Of those employees who want to work under a flexible or compressed schedule, but cannot, the most common reason is that such schedules are not offered (50 percent). Over one-fourth (27 percent) also indicate that their work unit or organization is not eligible to participate. See Chart 9, on the next page, for the complete list of reasons cited for not being able to work under a flexible or compressed schedule.

Chart 8
Work Schedule Arrangements



Numbers not equal to 100 due to rounding (83Q1)

Chart 9
Barriers To Working A Flexible or Compressed Work Schedule



Responses are from those who would like to work a flexible or compressed schedule but can't. (83Q2)

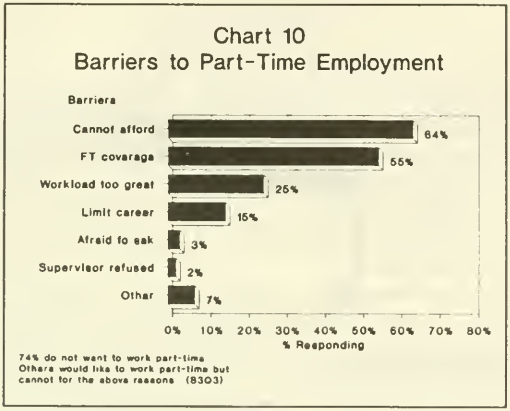
Supervisors approved most requests to work flexible or compressed schedules. Nearly one-fourth of responding supervisors (24 percent) have never been asked by employees to work under a flexible or compressed schedule. Of those asked, 66 percent approved most requests, while 3 percent denied most requests. Thirteen percent stated that their response depended on the situation. The most common reason for refusing a request was that it would be disruptive to the work unit (48 percent).

Part-Time Employment

A substantial majority of full-time workers are not interested in working part-time. Ninety-five percent of respondents to SOFE work a full-time schedule, while 4 percent work part-time. One percent work some other type of schedule. Seventy-four percent of part-time employees are women. Nearly three-quarters (74 percent) of employees who work full-time maintain that they are not interested in working part-time. This indicates that 26 percent of the respondents who work full-time might be interested in working part-time. Full-time employees who desire a part-time schedule are primarily women in grades GS-7 and below.

Employees who would like to work part-time, but cannot, most often cite not being able to afford it as the reason. The most common reason full-time workers interested in part-time do not switch is that they cannot afford it (64 percent). The next most common reason is that their jobs require full-time coverage (55 percent). One-quarter also state that their workload demands that they remain in a full-time status. See Chart 10, on the next page, for a complete list of the reasons cited for not being able to work part-time.

Many supervisors have never received a request to work part-time. Nearly three-fourths of responding supervisors (72 percent) have never been asked by an employee to work a part-time schedule. Of those who have received such requests, 40 percent approved most of them, while 43 percent approved or denied them depending on the situation. Nearly one-fifth (17 percent) denied most requests to work part-time. The most common reason for denying a part-time schedule was that the job required full-time coverage (73 percent), followed by too great a workload (40 percent), and likely disruption to the work unit (40 percent).

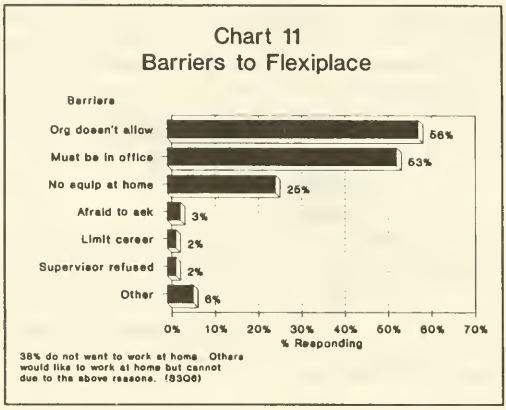


Flexiplace

Most employees have not worked at home in a pay status. Asked to use the "past year" as a reference, 9 out of 10 employees (91 percent) had not worked at home "on-the-clock." One percent had done so at least once and 6 percent did so a few days in the whole year. Only 2 percent worked at home on-the-clock from 1 to a few days a week, as needed. Although this question was intended to identify instances of informal flexiplace, some respondents may be enrolled in OPM's formal flexiplace pilot project.

The most common reason for not working at home is that agencies will not allow it. Over one-third of employees (38 percent) do not want to work at home. For those who would like to work at home occasionally, most report that their agency or organization does not permit working at home during regular business hours (58 percent) or that their work requires that they be in the office or at their work station (53 percent). One-quarter also indicate that they did not have the proper equipment to do their jobs at home. See Chart 11, on the next page, for a complete list of reasons cited for not being able to work at home.

A great majority of supervisors have never received a request to work at home. Eight out of 10 supervisors (82 percent) have never had an employee ask them to work at home during regular business hours. Of those asked, 20 percent approved most requests, while the



rest either denied most requests (42 percent), or approved or denied depending on the situation (38 percent).

Many employees have not heard of OPM's formal flexiplace pilot project. Only four percent of SOFE respondents were participants in OPM's formal pilot project. Among non-participants, 68 percent had never heard of the pilot. Other reasons for not participating were that respondents were required to be in the office or at their work station (37 percent) and that their agency does not permit flexiplace (24 percent).

Leave Benefits

This section examines employees' satisfaction with leave benefits, how they use their leave, and their desire for changes to the system.

Generally, employees are very pleased with the Federal leave system. Nearly 8 out of 10 employees (79 percent) are satisfied to a great extent with their annual leave. Nearly 7 out of 10 employees (67 percent) are satisfied to a great extent with their sick leave.

Most annual leave was used for vacation purposes. When asked about annual leave use in the past year, nearly 9 out of 10 employees (87 percent) estimate using at least some of their annual leave for vacation. Eighty percent also took at least some for "other personal business." About half (51 percent) used annual leave to tend to family members' illnesses or medical care. Relatively few used at least some annual leave for other, specific purposes: school or community activities (25 percent), child care (15 percent), and maternity/paternity or adoption leave (5 percent).

Some employees would take sick leave for family illnesses. Employees were asked what they would do if they had to care for a sick family member and had no annual leave available. The most popular option is to use sick leave, chosen by 40 percent. Over one-fourth (26 percent) would use leave without pay, and another 20 percent select advanced leave.

Employees show little interest in trading leave for child/adult dependent care benefits. When asked if they would like to trade some leave benefits for more of other leave or child/adult dependent care benefits, relatively few employees indicate interest. Only 3 percent are interested to a great extent in giving up some annual leave to get more sick leave; 81 percent are not at all interested. Similarly, only 4 percent show great interest in giving up leave (in general) to help pay for child care (83 percent have no interest at all), and only 3 percent would do the same to help pay for adult dependent care (76 percent have no interest at all). However, nearly one-quarter (24 percent) would be interested to a great extent in giving up some sick leave to get more annual leave (47 percent still have no interest at all).

Dependent Care

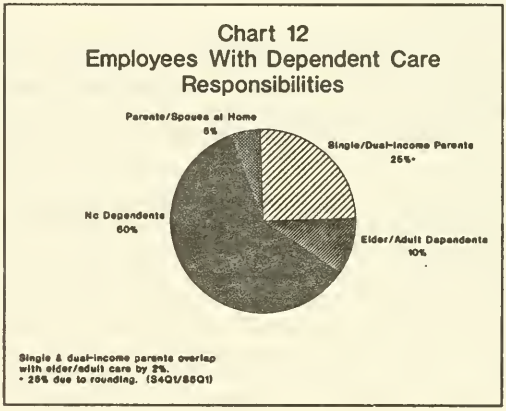
The Federal Government is interested in knowing how many of its employees have dependent care responsibilities and needs. This section focuses on child care and adult dependent care issues.[1]

Dependent Care Issues

Chart 12 identifies the dependent care groups. Those with dependent care needs are defined as belonging to two general groups:

1.) parents *with pressing child care needs*; and

2.) those caring for elderly or handicapped adult individuals.



[1] The percentages reported in this section may vary by as much as +/- 3 percent. See Appendix A, page 28 for further explanation.

Thirty-five percent of Federal employees are included in these two groups.[2] Information about parents refers only to *dual-income and single parents* with children under 13 years old, because they are expected to have the most pressing need for child care. Parents with a spouse at home (5 percent of all employees) are identified in Chart 12, but not addressed in the discussion. Also, another 60 percent of the workforce, namely those *without* adult dependents or children under 13, have been excluded from this discussion.

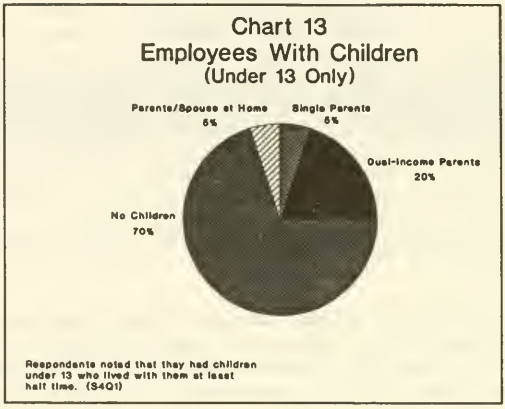
Most Federal employees with dependent care needs are satisfied with their current balance between work and family responsibilities. Sixty-nine percent of employees with some type of dependent care responsibility report that they are satisfied with their balance of work and family duties, as compared to 74 percent of employees without dependent care responsibilities (and 72 percent of all employees).

About half of Federal employees with dependent care responsibilities believe their organizations' policies and practices support their family responsibilities. Fifty-three percent of respondents with dependent care responsibilities agree that their organizations understand and support employees' family responsibilities. In comparison, an even greater majority (83 percent) believe that their *supervisors* support and understand family responsibilities.

Child Care

Single parents and dual-income parents make up about one-quarter of the Federal workforce. The single parent and dual-income parent groups represent those parents assumed to have the most pressing child care needs. Dual-income parents account for 20 percent of the Federal workforce, while single parents represent 5 percent. As a group, 47 percent of these parents (or 12 percent of the Federal workforce) have children under 6 years old, and 71 percent (or 17 percent of the Federal workforce) have children 6 to 12 years old. It should be noted that 18 percent of these parents have children in both age categories. Another group, representing 5 percent of employees, consists of two parent, single-income families; that is, one spouse remains at home with the children. The remainder have no children under 13. Chart 13, on the next page, presents a graphic display of these groups.

[2] Information on dependent care responsibilities is also available in OPM's recent report to Congress, "A Study of the Work and Family Needs of the Federal Workforce" (OPM, 1992). The information in that report is more detailed than that provided here; for example, findings are reported by children's age and marital status of the parents. In this SOFE report, only Governmentwide information is presented.



Parents most frequently cite their school systems as a main source of child care. More than one-third of parents rely upon schools and just over one-quarter (26 percent) depend on their spouses to help supervise their children. Approximately one in five parents depends on a family home provider, some other adult relative, or a child care center (not sponsored by the Government) to care for his or her children. Chart 14, on the next page, displays a complete listing of the types of childcare providers relied upon by Federal employees.

Federal employees with child care needs express the greatest interest in on-site sick care, summer care, child care centers, and before- and/or after-school care. When asked to identify what kinds of child care services they would be most interested in using, employees with child care needs most commonly showed an interest in on-site sick care (36 percent), on-site summer care (35 percent), on-site child care (34 percent), and before- and/or after-school care (33 percent). See Chart 15, on the following page, for a complete listing of employee interests in child care services.

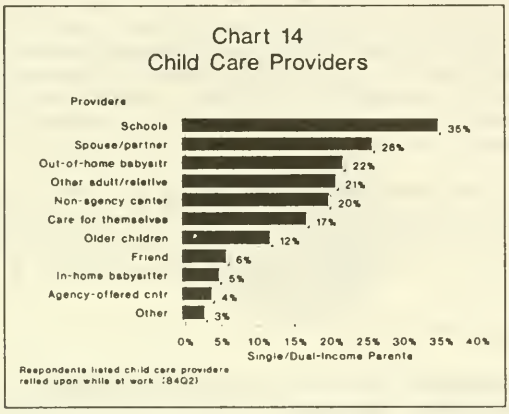


Chart 14
Child Care Providers
Providers
Schools
Spouse/partner
Out-of-home babysitr
Other adult/relative
Non-agency center
Care for themselves
Older children
Friend
In-home babysitter
Agency-offered cntr
Other
35%
26%
22%
21%
20%
17%
12%
6%
5%
4%
3%
0% 5% 10% 15% 20% 25% 30% 35% 40%
Single/Dual-Income Parents
Respondents listed child care providers relied upon while at work (84Q2)

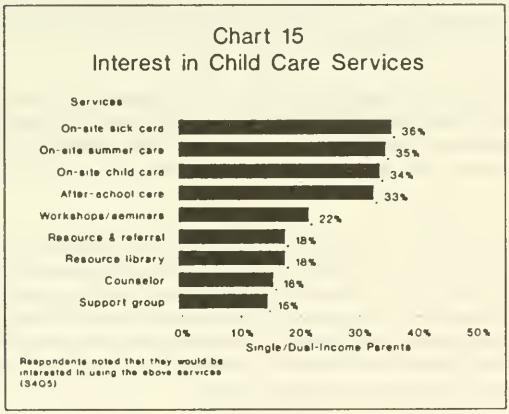


Chart 15
Interest in Child Care Services
Services
On-site sick care
On-site summer care
On-site child care
After-school care
Workshops/seminars
Resource & referral
Resource library
Counselor
Support group
36%
35%
34%
33%
22%
18%
18%
16%
15%
0% 10% 20% 30% 40% 50%
Single/Dual-Income Parents
Respondents noted that they would be interested in using the above services (84Q5)

A relatively small percentage of employees report that their agencies offer child care or related services. The most commonly reported service offered by agencies is an on-site child care center, cited by 21 percent of employees with children. Other less commonly offered services are a resource and referral service (7 percent), on-site before- and after-school care (7 percent), on-site summer care (5 percent), a resource library (5 percent), educational workshops or seminars (4 percent), dependent care counselors (4 percent), a support group (4 percent), and on-site sick care (2 percent).

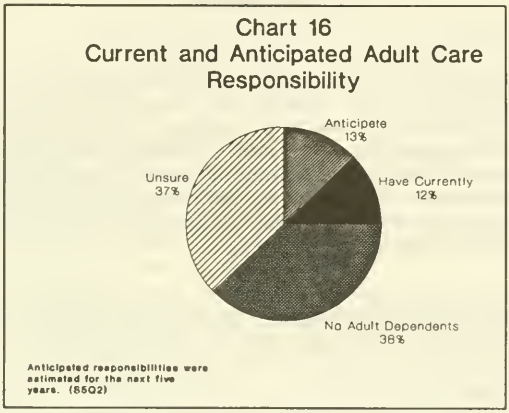
It appears that the cost of on-site child care may prevent parents from using it. When respondents reporting availability of an on-site or nearby child care center are asked to indicate why they do not use the center, 62 percent report that they have arranged for "other care." The second most common reason for not using the center is that it is "too expensive" (20 percent).

Adult Dependent Care

One-quarter of all employees either have or anticipate having a significant adult dependent care responsibility. Approximately 12 percent of Federal employees have significant adult dependent care responsibilities; an additional 13 percent anticipate having such responsibilities within the next 5 years. See Chart 16, on the next page, for a breakdown of the adult dependent care group. The greatest proportion (9 percent of all employees) care for an elderly parent, while 2 percent care for another elderly relative and 3 percent care for an adult with a physical or mental disability.

Many employees with current adult dependent care responsibilities spend significant time providing care. Almost half (49 percent) of the employees with current adult dependent care responsibilities spend 4 or more hours per week providing care. Roughly 24 percent spend 1 to 3 hours per week caring for an adult dependent, while 9 percent report spending no time on a weekly basis.

Approximately half of Federal employees with current adult dependent care responsibilities are interested in obtaining some type of agency-sponsored service. Nearly one-third (31 percent) are interested in a resource and referral service, one-quarter are interested in assistance from a dependent care counselor, and another quarter of employees with adult dependents are interested in attending educational workshops and seminars. Twenty-three percent are interested in an on-site adult day care center, 21 percent in a resource library, and 24 percent in support groups.



Survey responses indicate that while some agencies have developed adult dependent care services for their employees, most agencies either do not currently offer such services or employees are not aware of them. Nearly 3 percent of employees with adult dependents report that a resource and referral service is available, 2 percent indicate that educational workshops are offered, and 2 percent report that support groups are offered by the agency. Another 2 percent report the availability of resource libraries, and roughly 2 percent indicate the availability of dependent care counselors through their agencies.

Conclusion

Data from the Survey of Federal Employees will continue to be analyzed for evaluating and developing Federal personnel policies. SOFE data are integral to an OPM report on Federal employee work and family needs provided to the Congress in April 1992. These data are also integral to another significant report on Federal productivity and quality due to the Congress in November 1992. SOFE data will also be found in upcoming reports documenting the effects of the Federal Employees Pay Comparability Act (FEPCA). Additionally, separate analyses are underway for each of the 22 major Federal departments and agencies sampled in the survey.

The Office of Systems Innovation and Simplification in the Personnel Systems and Oversight Group maintains overall responsibility for SOFE, with each program office in OPM exercising control over its area. Questions about SOFE should be sent to:

SOFE
Office of Systems Innovation and Simplification
U.S. Office of Personnel Management
1900 E St., NW., Room 7433
Washington, DC 20415-0001.

Appendix A

SOFE Methodology

Development

Created by program office subject matter experts. Subject matter experts from OPM's program offices worked together to create an instrument that would provide information useful to policy-making. About half of the questions were selected from existing, previously administered public and private sector surveys, thus permitting potential comparisons with other data sources. The remaining questions were developed especially for SOFE, because no previous survey had ever asked for such information.

Pre-tested with Federal employees. SOFE was carefully pretested with 10 groups of employees, including professionals, clerical employees, managers, personnel specialists, prevailing rate (wage) employees, and physicians and nurses (total = 86 employees), in at least 7 agencies (including one regional location). Their suggestions and comments for revising questions were incorporated. The major, national employee organizations and management associations also were provided an opportunity to review the instrument.

Final product. After all revisions, the final product was a 184-item survey categorized into eight sections: (1) employee characteristics, (2) work experiences in the Federal Government, (3) work schedules and arrangements, (4) child care, (5) adult dependent care, (6) leave, (7) pay, and (8) supervisory and personnel specialist issues.

Sampling Methodology and Weighting

Sampling plan. The sampling plan for SOFE included four samples -- a primary sample and three specialized sub-samples (one for assessing employee values and two for evaluating pay reform). Results for the primary sample, consisting of Federal white-collar employees, are presented in this report. This sample was stratified by department (the 22 largest executive branch departments and a 23rd group of all other agencies) and by pay category (GS-1-6, GS-7-15, GS-1-15 supervisors, GM-13-15, and Senior Executive Service). The total number of employees included in the primary sample was 56,767. See Table 1, on the next page, for the number of surveys sent to each department/pay category cell.

Weighting. Samples were not proportional to department nor to pay category population size; therefore, survey responses were weighted to represent accurate group proportions within the overall Federal white-collar population.

TABLE 1

PRIMARY SAMPLE RESPONSE RATES

Grade Level	GS 1-6		GS 7-15		GS 1-15 Sup		GM 13-15		SES	
Sent/Replied	Sent	Reply	Sent	Reply	Sent	Reply	Sent	Reply	Sent	Reply
					Department					
Air Force	635	283	637	396	621	395	616	394	187	95
Agriculture	636	245	636	337	609	576	618	389	305	127
Army	638	287	638	424	628	406	627	395	304	156
Commerce	621	237	625	362	503	295	591	351	339	162
DOD	630	285	635	500	592	396	614	435	369	175
Justice	621	205	634	355	584	357	600	382	276	92
Labor	580	201	618	333	272	114	562	282	169	63
Energy	570	251	616	425	221	131	582	396	366	180
Education	445	152	564	322	42	39	469	264	87	30
EPA	571	151	620	327	59	28	567	288	267	68
GSA	591	245	610	315	466	287	541	336	116	42
HHS	633	245	637	406	605	357	616	348	401	166
HUD	581	253	612	349	300	161	527	279	118	48
Interior	631	277	633	402	590	493	597	423	267	112
NASA	580	203	626	381	218	100	580	346	381	191
Navy	636	258	638	438	623	354	631	398	342	171
OPM	564	296	566	400	249	126	383	257	62	26
Small Business	488	220	562	328	110	100	433	245	51	23
State	496	101	578	263	241	108	480	245	133	49
Transportation	609	216	635	342	501	264	619	348	327	141
Treasury	637	289	637	440	607	361	621	412	376	101
VA	637	236	635	364	619	447	596	372	294	196
Other	625	358	634	404	586	343	601	337	468	160
Totals	13,655	5,494	14,226	8,613	9,846	6,238	13,071	7,922	6,005	2,574

Generalizing to the Federal white-collar workforce from the survey statistics. The sampling plan and weighting scheme permit us to generalize from the survey data to the Federal white-collar workforce with extremely high confidence and little margin of error. This is true whether one generalizes to the overall group of Federal employees or to specific sub-groups (e.g., employees at a department or employees within a pay category). When the entire set of Governmentwide responses is used, the margin of error is approximately +/- 1.1 percent, at the 95 percent confidence level. In cases where questions pertain to a subset of the workforce, such as employees with child care needs, the margin of error may be somewhat greater. All results reported in this summary do not vary more than +/- 3 percent at the 95 percent confidence level.

Administration and Response Rate

SOFE distribution. Employees were randomly selected from OPM's Central Personnel Data File (CPDF) based on the described sampling plan. The CPDF is a database that includes demographic data on most Federal civilian employees. The following agencies, however, are excluded from the File: U.S. Postal Service, FBI, CIA, DIA, TVA, Federal Reserve Board, the White House, and the Judicial Branch. The file includes GAO and GPO in the Legislative Branch, however, these agencies were excluded from the SOFE sample. Surveys and the sampling lists of selected employees were distributed to personnel offices by a contractor. In turn, personnel offices were requested to deliver the surveys to the assigned employees. Each survey package contained a questionnaire and a pre-addressed return envelope. Employees returned the surveys to a contractor for scanning onto magnetic tape. Aggregated responses were then provided to OPM on this tape medium.

The total number of sampled employees in this plan was 56,767. The first surveys were mailed in mid-November 1991 and the last were received in early February 1992. The response rate for the white-collar sample was 31,645, or 56 percent. The number of usable responses was 30,854, or 54 percent. See Table 1 again for the number of surveys received for each department/pay category cell.

Comparison to CPDF. Where possible, weighted percentages for each response choice to questions in the employee characteristics (demographic) section of SOFE were compared to the corresponding population percentages determined from OPM's CPDF. Based on examination of these items, comparisons indicated that the weighted sample is representative of Federal white-collar employees.

Appendix B

SOFE Results

As you review the data, keep the following points in mind:

1. Many items on this questionnaire offered employees up to five response choices. In this appendix, the percentages for these items are consolidated. For example, the percentage under "agree" combines the number of employees who marked "strongly agree" and "agree." Likewise, the percentage under "great extent" combines "great extent" and a "very great extent."

2. Percentages have been rounded according to accepted rules of practice. Therefore, on a few occasions, rounding error will result in a total of 99 or 101 percent. On multiple response items, those that asked respondents to choose as many options as applied, the total percentages will not equal 100 percent.

3. The percentages provided for each item are based only on those who responded to the item. "Missing cases" are excluded from analysis.

4. Due to space limitations, abbreviations are used in the appendix when indicating the type of scale or categories used for each item. Refer to the list below for the abbreviations and their meanings.

   M=Married, **S**=Single
   NS=Not Sure, **N**=Neither, **DK**=Don't Know
   D=Disagree, **U**=Undecided, **A**=Agree
   NE=No Extent, **SE**=Some Extent, **GE**=Great Extent
   NA=Not Applicable
   NI=Not Important, **SI**=Somewhat Important, **VI**=Very Important
   NL=Not Likely, **SL**=Somewhat Likely, **VL**=Very Likely
   Dis=Dissatisfied, **U**=Undecided, **Sat**=Satisfied
   IU=Interested in Using, **CO**=Currently Offered, **CU**=Currently Using
   *****=percentage computed independently of other responses

SOFE			
Category/Items	Percentages		
Section 1 - Employee Characteristics			
1. Are you:	Female 52	Male 48	
2. Are you:			
Black, not of Hispanic Origin	13		
American Indian	1		
Asian or Pacific Islander	3		
Hispanic	4		
White, not of Hispanic Origin	78		
Other	1		
3. How old are you?			
Under 20	< 1		
20 thru 24	3		
25 thru 29	8		
30 thru 34	12		
35 thru 39	15		
40 thru 44	19		
45 thru 49	16		
50 thru 54	12		
55 thru 59	9		
60 thru 64	4		
65 thru 69	1		
70 and over	< 1		
4. What is your marital status?	M 68	S 32	
5. If you are married, is your spouse:	Yes	No	
Employed?	77	23	
A Federal employee?	29	71	
A retired Federal employee?	5	95	
6. What is your household's approximate pre-tax combined income?			
Less than $10,000 per year	1		

SOFE			
Category/Items	Percentages		
$10,000-25,999 per year	18		
$26,000-50,999 per year	41		
$51,000-75,999 per year	26		
$76,000-100,000 per year	10		
More than $100,000 per year	4		
7. What is your current work schedule and appointment?			
Full-time work schedule, permanent appointment	92		
Part-time work schedule, permanent appointment	3		
Full-time work schedule, temporary appointment	3		
Part-time work schedule, temporary appointment	1		
Other	1		
7a. Do you have a work shift schedule?	No 75	NS 3	Yes 22
8. How many total years have you been a Federal Government employee?			
Less than one year	2		
1 thru 3 years	14		
4 thru 5 years	10		
6 thru 10 years	20		
11 thru 15 years	17		
16 thru 20 years	15		
21 thru 25 years	12		
26 thru 30 years	6		
More than 30 years	4		
9. What is your educational level?			
Elementary school (grades 1-8)	<1		
Some high school or some technical training	1		
Graduated from high school or GED	15		
Technical training or apprenticeship after high school	5		
Some college	26		
2-year associate degree	10		
Graduated from college	22		

SOFE			
Category/Items	**Percentages**		
Some graduate school	8		
Master's degree	10		
Law degree	1		
Doctorate degree	2		
10. Where did you come from when you last entered the Federal service? (mark the one you most identified with)			
Private sector	43		
Local/State Government	7		
High school	5		
Technical/computer school	1		
College/university (as a student)	16		
Academia (as faculty or administrator)	1		
Military	9		
Public service (e.g., school, hospital)	3		
Self-employed	2		
Homemaker	7		
Retirement	<1		
Not employed	4		
Other	2		
11. Which retirement system are you under?	CSRS 56	FERS 39	N/DK 6
12. Are you covered by the special retirement provisions for law enforcement officers?	No 91	DK 7	Yes 3
13. When will you be eligible to retire voluntarily?			
I am eligible now	6		
1 thru 2 years	4		
3 thru 5 years	8		
6 thru 10 years	14		
More than 10 years	61		
Unsure	6		
14. Where do you work?			
Air Force Military Airlift Command	1		
Air Force Strategic Air Command	1		

SOFE	
Category/Items	Percentages
Air Force Systems Command	2
Other Air Force	6
Food and Drug Administratioo	1
National Institutes of Health	1
Social Security Administratioo	4
Other Health and Human Servicea	2
Geological Survey	1
National Park Service	1
Other Interior	3
Customs Service	1
Internal Revenue Service	8
Other Treasury	1
Army	16
Navy	12
Other Department of Defense	5
Agriculture	8
Commerce	2
Education	<1
Energy	1
Environmental Protectioo Agency	1
Geoeral Services Administratioo	1
Housing and Urban Development	1
Justice	4
Labor	1
National Aeronautics and Space Administratioo	2
Office of Personnel Management	<1
Small Business Administration	<1
State	<1
Transportation	4
Veterans Affairs	9
Other Agencies	4

SOFE			
Category/Items	Percentages		
15. How many different Federal agencies have you worked for in the last 10 years?	1 79	2 17	3 4
16. What is your pay category?			
General Schedule and Similar (GS-GG-GW-GN)	90		
General Schedule and Similar, but covered by Merit Pay (GM-GH)	9		
Senior Executive Service (ES)	1		
Wage Grade (WG)			
Wage Grade Leader (WL)			
Wage Grade Supervisor (WS)			
Senior Level (SL-ST)			
Administrative Law Judge			
Title 38 (VA, Veterans Health Administration)			
Other			
17. What is your grade level? (if applicable)			
1	<1		
2	<1		
3	2		
4	9		
5	15		
6	9		
7	9		
8	2		
9	9		
10	2		
11	13		
12	14		
13	9		
14	5		
15	3		
16			
17			
18			

SOFE			
Category/Items	Percentages		
18. What is your supervisory status?			
Nonsupervisor	86		
First-line supervisor (you give performance appraisals)	9		
Manager (above first-line, you are a supervisor of at least one supervisor)	6		
19. How long has it been since you last received a written performance appraisal?			
Less than 6 months	65		
At least 6 months but less than 1 year	28		
1 year to less than 2 years	5		
2 years or more	1		
Never received one	2		
20. Which of following most closely describes the performance rating you received at your last appraisal?			
Outstanding	33		
Exceeds fully successful	41		
Fully successful	25		
Minimally successful	<1		
Unacceptable	<1		
Have never received a performance rating	2		
21. Within the last year, has there been a RIF (reduction in force, when employees are laid off) within your agency?	No 75	NS 8	Yes 17
22. Do you expect a RIF within your agency in the near future?	No 57	NS 22	Yes 21
23. Do you receive a special salary rate?	No 90	NS 1	Yes 9
24. Are you covered by the overtime pay rules of the Fair Labor Standards Act (FLSA)?	No 25	NS 29	Yes 47
25. On average, how much overtime do you work?			
I rarely work overtime	67		
1-5 hours/week	22		
6-10 hours/week	8		
More than 10 hours/week	4		
26. When you work overtime, which do you usually receive? (mark one)			

SOFE			
Category/Items	Percentages		
Doesn't apply - I don't work overtime	22 *		
Overtime pay	49		
Compensatory time off	33		
No pay at all	18		
Section 2 - Your Work			
1. In general, I am satisfied with my job	D 14	U 10	A 76
2. I am satisfied with the balance I have achieved between my work and family life	D 14	U 14	A 72
3. Generally, I don't have enough work to do to keep me busy	D 85	U 7	A 8
4. I get enough information to do my job properly	D 19	U 16	A 65
5. My present job makes good use of my skills and abilities	D 22	U 12	A 66
6. It's hard for me to adapt to constant change	D 76	U 14	A 10
7. I can expect to receive a pay raise or cash award if I perform exceptionally well	D 35	U 17	A 48
8. I have a clear understanding of how my work contributes to the mission of my agency	D 5	U 8	A 87
9. My performance rating is a fair and accurate reflection of my performance	D 23	U 15	A 63
10. I spend too much time doing work below my official grade level	D 55	U 24	A 21
11. My performance has improved as a result of training	D 22	U 27	A 51
12. When I don't feel well in the morning, I still try to come to work because I know my contribution will be missed	D 9	U 18	A 73
13. If it were possible, I would like to be given pay increases based on the performance rating I receive from my supervisor	D 17	U 19	A 64
14. Policies and procedures affecting my work are communicated adequately	D 28	U 19	A 53
15. I am required to get approval for decisions that I can make myself	D 46	U 22	A 32
16. I need training because the required skill level of my job has increased in the past 2 years	D 46	U 25	A 29
17. I like making decisions that affect other people	D 9	U 35	A 56

SOFE			
Category/Items	Percentages		
18. My job is challenging	D 14	U 15	A 71
19. I have received paid time off for good performance	No 96	NS 2	Yes 2
20. When I do my work over or modify it, it is because of: (mark as many as apply)			
A change in procedures, policies, or practices	52		
Poor quality of work by others	21		
Deadlines that doo't permit enough time	21		
Decisions by higher-ups	47		
Incomplete instructions	25		
Too many editors/levels of review	24		
Lack of supervisory guidance	10		
Poor planning or coordination between work units	22		
Insufficient or faulty tools and materials	8		
Suggestions for improvement by my supervisor or others	35		
My own errors	38		
Other reasons	15		
Doo't know	1		
21. How often do others require you to re-do or modify your work?			
Never	6		
Rarely	54		
Sometimes	33		
Often	7		
Always	1		
22. To what extent have personal computers changed the way you do your work in the past 2 years?	NE 10	SE 27	GE 63
23. To what extent do each of the following make your job difficult?	NE	SE	GE
Lack of support from management	22	49	29
Lack of support from co-workers	33	54	14
Conflicting work assignments	28	53	19
Poor planning of management	20	51	29

SOFE			
Category/Items	Percentages		
Excessive organizational layers	26	49	26
Contracting and procurement rules and regulations	37	43	20
Personnel rules and regulations	37	50	13
24. If I am dissatisfied with my Federal career prospects, it is because: (mark as many as apply)			
Doesn't apply - I am satisfied with my career prospects	34		
I am at the top level in my field	18		
There are no vacancies in positions I could move up to	53		
It would require a geographic move	25		
I have to become a supervisor to get promoted	21		
I have no training	8		
I believe I am being discriminated against	15		
Others think my family duties are a problem	2		
Other	27		
25. People in my work unit cooperate to get the work done	D 11	U 11	A 78
26. In this work unit, training has improved employees' performance	D 18	U 28	A 55
27. People in my work unit are expected to work hard	D 6	U 14	A 80
28. The work in my work unit could be accomplished with fewer people	D 77	U 11	A 12
29. My co-workers have the necessary skills and abilities to perform their jobs	D 13	U 15	A 72
30. It's important for me to know where I rank among my co-workers	D 20	U 35	A 46
31. In my work unit, you know what is expected of you	D 12	U 13	A 75
32. In my work unit, quality of work is stressed over quantity of work	D 19	U 26	A 56
33. Employees in my work unit are encouraged to participate in decisions affecting their work	D 23	U 19	A 59
34. In my work unit, employees' personal development is encouraged	D 24	U 23	A 53
35. My supervisor has good technical skills	D 13	U 15	A 72
36. I have confidence and trust in my immediate supervisor	D 20	U 18	A 63

SOFE			
Category/Items	Percentages		
37. My supervisor deals effectively with poor performers	D 34	U 32	A 33
38. I feel free to discuss work problems with my supervisor	D 16	U 11	A 73
39. My supervisor discusses with me the specific reasons for my performance rating	D 17	U 18	A 65
40. My supervisor encourages me to help in developing work methods and job procedures	D 20	U 20	A 59
41. When I have to take time off or change my work schedule because of family responsibilities, my supervisor has been understanding	D 6	U 10	A 84
42. The guidance I receive from my supervisor helps me do a better job	D 21	U 25	A 55
43. My supervisor works well with people	D 19	U 20	A 60
44. My supervisor and I agree on what good performance on my job means	D 14	U 21	A 65
45. I have confidence and trust in my second-level supervisor (my supervisor's supervisor)	D 26	U 25	A 49
46. High performers tend to stay with this organization	D 30	U 30	A 40
47. I have confidence and trust in my organization	D 26	U 29	A 44
48. My organization demonstrates a concern for the safety and health of its employees	D 15	U 20	A 66
49. Pay raises and cash rewards around here depend on how well you perform	D 39	U 23	A 38
50. In my organization, management gives everyone the same performance rating	D 65	U 26	A 9
51. I am satisfied with the chances I have to accomplish something worthwhile	D 26	U 23	A 51
52. I don't care what happens to this organization as long as I get my paycheck	D 87	U 9	A 4
53. My organization provides a good physical work environment	D 27	U 22	A 52
54. Regardless of position or rank, my organization treats employees equally	D 47	U 23	A 30
55. My organization understands and supports employees' family responsibilities	D 15	U 31	A 54
56. Low performers tend to leave this organization	D 46	U 39	A 16

SOFE			
Category/Items	Percentages		
57. My organization encourages employees to use their skills and abilities	D 19	U 25	A 57
58. Customer service is a priority in my organization	D 11	U 22	A 68
59. My organization supports internal promotion	D 24	U 29	A 48
60. My organization makes attempts to keep employees challenged in their work	D 27	U 36	A 37
61. Regardless of position or rank, all employees should be treated equally	D 5	U 7	A 88
62. Grade level differences in my organization represent real differences in levels of job responsibility and job difficulty	D 34	U 21	A 46
63. In my organization, some people receive a higher performance rating than they deserve	D 10	U 29	A 61
64. To what extent do you think your organization is effective in:	NE	SE	GE
a. Responding to peak demands and emergencies?	1	34	64
b. Identifying its customers (those who use its products or services)?	2	32	66
c. Meeting the needs of the customers?	2	36	63
d. Avoiding costly mistakes?	6	53	41
e. Assigning the right people to the job?	6	61	33
f. Meeting the personal needs of employees?	7	63	31
g. Providing supplies, equipment, training, and other resources to get the job done?	5	55	40
h. Providing systems or support that make it easier to get the job done?	5	62	33
i. Fully using employees' skills and abilities?	7	63	31
65. My agency is able to attract high quality employees	D 22	U 32	A 46
66. The Federal Government is a great place to work	D 15	U 31	A 54
67. It does not make much difference what agency I work for as long as I can work in my chosen profession	D 31	U 26	A 43
68. I understand the performance appraisal system being used in this agency	D 14	U 15	A 71
69. My agency is able to attract high quality senior executives	D 30	U 46	A 24
70. The performance appraisal system in this agency motivates employees to perform well	D 48	U 33	A 19

SOFE				
Category/Items	Percentages			
71. This agency effectively manages its human resources	D 37		U 38	A 25
72. Management and the unioo work cooperatively on mutual problems	NA 39 *	D 26	U 39	A 35
73. Part-time employees are as committed to this agency as full-time employees	NA 29 *	D 21	U 33	A 46
74. Front-line employees (those who deal directly with the public) in this agency provide good service to the public	NA 17 *	D 8	U 25	A 67
75. Mark the 3 values that are most important to you				
Service to others	35			
Use of my skills and abilities	44			
Spending time with family	42			
Sense of accomplishment	59			
Work in general	6			
Personal development	16			
Freedom to do things my way	7			
Challenging work	39			
Participation in work decisions	19			
Advancement	35			
76. To what extent do each of the following interfere with your getting the training you need to do your job?	NE		SE	GE
Lack of funds	19		43	38
Lack of management support	30		48	22
Too busy on the job	20		49	32
Priority given to other employees	35		44	21
Appropriate training is not available	39		45	17
77. What kinds of training have you received in the last 2 years? (mark as many as apply)				
On-the-Job Training (OJT)	59			
Skills training related to my job	48			
Technology training (e.g., use of personal computers)	49			
Basic skills training in areas such as math or English	5			
Professional conferences and seminars	37			
College courses	11			

SOFE			
Category/Items	Percentages		
Developmental assignment or detail	10		
Apprenticeship	1		
Mentoring by a higher-level manager or supervisor	8		
Management training	14		
Employee orientation	14		
Other	13		
None	7		
78. How are training needs for employees in your organization identified? (mark as many as apply)			
Employee requests training from supervisor	62		
Supervisor identifies employee's needs	44		
Supervisor and employee identify needs together	44		
Personnel office identifies training opportunities	32		
Training needs are not identified	15		
79. The last time I had training, I had difficulty applying to my job the skills and abilities I gained because: (mark as many as apply)			
Doesn't apply - I have been able to use them	63 *		
Doesn't apply - I haven't had any training	7 *		
I was not given an opportunity to use them	27		
The knowledge and skills were not relevant to my job	27		
The training was inadequate	26		
My supervisor doesn't encourage me to use them	11		
Other	24		
Don't know	10		
80. To what extent would you like to receive each of the following as a reward for good performance?	NE	SE	GE
Recognition (e.g., verbal praise, certificate)	3	41	56
An outstanding performance rating	1	19	80
An increase in base pay	2	16	82
A cash bonus	2	21	77
A promotion	4	20	77
Paid time off	20	43	37

SOFE			
Category/Items	**Percentages**		
A training opportunity	15	47	38
A special assignment (e.g., increased responsibility)	13	44	44
81. How important do you think each of the following should be in your performance rating?	NI	SI	VI
Quantity of work produced	5	48	47
Quality of work produced	<1	3	97
Timeliness of work (i.e., meeting deadlines)	1	18	82
Teamwork	2	26	72
Customer service	3	17	80
82. To what extent do you think input to your performance rating should come from:	NE	SE	GE
Yourself?	5	47	48
Your co-workers?	25	57	18
Your first-level supervisor?	1	10	89
Your second-level supervisor?	11	51	38
Your internal customers (others in your organization and agency)?	24	52	24
Your external customers (people outside your agency)?	35	44	21
83. If my performance rating is not accurate, it's because: (mark as many as apply)			
Doesn't apply - my performance rating is accurate	54 *		
Doesn't apply - I have never received a performance rating on this job	4 *		
The number of high ratings (e.g., outstanding) is limited	57		
Information not related to my performance is considered	25		
My standards are not related to the work I do	15		
The quality of my work is not considered	26		
It does not take into account the performance of my work group or team	14		
My supervisor has not directly seen my performance	21		
My supervisor lacks the technical background to accurately rate my performance	21		
My supervisor and I have interpersonal differences	17		
The rating was changed by a higher-level supervisor	18		
Other	22		
84. How many rating levels would you prefer in your agency's performance appraisal? (mark one only)			

SOFE			
Category/Items	**Percentages**		
A 5-level rating system (e.g., outstanding, exceeds fully successful, fully successful, minimally successful, unacceptable)	65		
A 3-level rating system (e.g., outstanding, satisfactory, unacceptable)	25		
A 2-level rating system (e.g., satisfactory/unsatisfactory)	11		
85. I would prefer my performance rating to be based on: (mark one only)			
My individual performance	69		
The overall performance of my work group or team	1		
A combination of both	30		
86. Are you planning to look for a new job during the next year?	**No** 49	**NS** 19	**Yes** 33
87. If you are planning to look for another job, how likely is it that you will look:	**NL**	**SL**	**VL**
Inside your agency?	19	24	57
In another Federal agency?	16	34	50
Outside the Federal Government?	45	25	30
88. Would you be willing to move to another geographic location for: (mark as many as apply)			
A promotion?	52		
A transfer of your organization or work unit to another location?	27		
An overseas assignment?	22		
A job change at the same grade?	14		
Higher pay based on locality (due to an area's cost of labor)?	16		
A relocation allowance?	14		
Personal reasons?	32		
Other?	8		
I would not be willing to move for any reason	32		
Section 3 - Work Schedules and Arrangements			
1. Which work schedule arrangement do you have? (mark one only)			
Fixed	46		
Flexible	39		
Compressed	14		
Not sure	2		

SOFE			
Category/Items	Percentages		
2. I would like to have a flexible or compressed work schedule, but do not because: (mark as many as apply)			
Doesn't apply - I do not want to work a flexible or compressed schedule	29 *		
I am afraid to ask	3		
It would limit my career advancement	2		
My supervisor refused my request	10		
I am not eligible to participate (e.g., too high-level)	6		
My work unit or organization is not eligible to participate	27		
This agency does not have flexible or compressed work schedules (e.g., policy decision)	50		
Other	19		
3. I would like to work a part-time schedule (less than 40 hours a week), but cannot because: (mark as many as apply)			
Doesn't apply - I do not want to work part-time	74 *		
Doesn't apply - I already work part-time	4 *		
I am afraid to ask	3		
It would limit my career advancement	15		
I cannot afford it financially	64		
My supervisor refused my request	2		
My workload is too great	25		
My position requires full-time coverage	55		
Other	7		
4. Do you regularly take "leave without pay" (LWOP) in order to work a part-time schedule?	No 99	NS <1	Yes 1
5. In the past year, how often have you worked at home "on-the-clock" instead of working at the office?			
I have not worked at home "on-the-clock" in the past year	91		
Only once	1		
A few days in the whole year	6		
Often - at least 1 day a week as needed	1		
Very often - at least a few days a week	1		
6. I would like to occasionally work at home "on-the-clock", but I can't because: (mark as many as apply)			

SOFE			
Category/Items	Percentages		
Doesn't apply - I don't want to work at home "on-the-clock"	38 *		
I am afraid to ask	3		
It would limit my career advancement	2		
My supervisor refused my request	2		
My organization or agency does not allow working at home during regular business hours	58		
I don't have the proper equipment at home (e.g., word processor, telephone)	25		
My work requires that I be in the office/at my work station	53		
Other	6		
7. OPM is currently testing a pilot project of a formal "flexiplace" program that allows employees to work at home or in a satellite office "on-the-clock." This pilot project was made available to all Federal employees. If you are not participating in the flexiplace pilot, it is because: (Mark as many as apply)			
Doesn't apply - I am participating in the pilot project	4 *		
I did not know about the pilot project	68 *		
I was afraid to ask	1		
It would limit my career advancement	2		
My supervisor refused my request	1		
My agency does not allow flexiplace (policy decision)	36		
My work requires that I be in the office/at my work station	56		
I don't have a work area at home	10		
I already informally work at home from time to time	7		
I'd rather work at the office	23		
Other	7		
8. How <u>important</u> is availability of the following work arrangements to <u>your</u> decision to stay with your organization or agency?	NI	SI	VI
a. Part-time work schedule (less than 40 hours per week)	76	15	9
b. A flexible or compressed work schedule	30	33	37
c. Working at home "on-the-clock"	59	28	13

SOFE			
Category/Items	**Percentages**		
Section 4 - Work and Children			
1. How many children under the age of 13 live with you at least half the time?			
None	63		
Birth to 5 years	1 11	2 4	3 1
6 to 12 years	1 13	2 6	3 2
2. Who provides childcare while you are at work? (Mark as many as apply)			
Spouse/partner	37		
Other adult relative	18		
Older childreo	10		
Friend	5		
School	32		
Agency-sponsored childcare center at or near my workplace	3		
Other childcare ceoter	17		
Babysitter in my home	5		
Babysitter or childcare provider io their home	19		
My child or children are responsible for themselves	15		
Other	3		
3. Overall, how satisfied are you with your current childcare arrangements?	Dis 11	U 13	Sat 76
4. What is the total amount you spend on childcare arrangements for each child each week?	$0-$59	$60-$119	$120+
a. Child 1 (Youngest)	73	23	4
b. Child 2	82	15	3
c. Child 3	86	11	3
5. The following are childcare services that may be available in some Federal agencies. In the first column, mark those services which you would be interested in using if your agency offered them. In the second column, mark those services which your agency currently offers. In the third column, mark those services which you are currently using through your agency.	IU	CO	CU
On-site or nearby childcare center	33	20	3

SOFE			
Category/Items	**Percentages**		
On-site or nearby before- and/or after-school care	31	7	1
On-site or nearby sick care	33	2	1
On-site or nearby summer care	32	5	1
Resource and referral service	17	6	1
Resource library	17	5	1
Dependent care counselor to provide referrals	14	4	<1
Support group	13	4	<1
Educational workshop or seminar	20	4	1
None of the above	41	39	49
6. If I do not use my agency-sponsored childcare center, it is because: (mark as many as apply)			
Doesn't apply - I do not use my agency-sponsored center	22 *		
Doesn't apply - my agency does not have a center	53 *		
I have other childcare arrangements	60		
I don't know if we have a center	6		
I prefer that my child is cared for at home	23		
I don't want to mix work and family life	3		
My child/children are too old for childcare	17		
I would like to use the center, but there is a waiting list	5		
The center is too expensive	18		
The center is too far from home	15		
The center is too far from work	3		
The center provides poor quality services	3		
The center cannot accommodate special requirements of my child/children	2		
The center's business hours are not flexible enough for my schedule	5		
Other	10		
7. Parents frequently adjust their work schedules to meet their childcare needs. Which of the following have you used this past year to meet your childcare needs? (Mark as many as apply)			
Flexible or compressed work schedule	38		
Part-time work schedule (less than 40 hours per week)	5		
Work differeot shifts (i.e., you care for children while spouse works, and vice versa)	12		
Annual leave	71		

SOFE			
Category/Items	Percentages		
Sick leave	22		
Leave without pay	7		
Work at home "on-the-clock"	2		
None of the above	17		
Section 5 - Work and Eldercare			
1. For how many of the following elderly and other adult dependents are you presently responsible? (mark as many as apply and indicate how many)	1	2	
Elderly parents	7	2	
Other elderly relative or individual	2	1	
Physically and/or mentally disable relative or individual	3	<1	
None of the above dependents	82		
2. If you are not currently responsible for any elderly or other adult dependents as described above, do you expect to be responsible within the next 5 years?	No 50	NS 37	Yes 13
3. Approximately how many hours a week do you (not your spouse/partner) spend providing care for your elderly and/or other adult dependents?			
None	9		
1-3 hours	24		
4-9 hours	22		
10-19 hours	13		
20 hours or more	14		
Occasional (under emergency circumstances)	18		
4. The following are elder and other adult care services that may be available in some Federal agencies. In the first column, mark those services which you would be interested in using if your agency offered them. In the second column, mark those services which your agency currently offers. In the third column, mark those services which you are currently using through your agency.	IU	CO	CU
On-site or nearby day care center during work hours	23	2	<1
Dependent care counselor to provide referrals	25	2	1
Resource and referral service	31	3	<1
Resource library	21	2	1
Support group	24	2	1

SOFE			
Category/Items	Percentages		
Educational workshop or seminar	26	2	1
None of the above	49	37	38
5. If I do not use the elder and other adult dependent care resource, referral, or support group services provided by my agency, it's because: (mark as many as apply)			
Doesn't apply - my agency does not have any of these services	66 •		
Doesn't apply - I do use these services	4 •		
I don't need any services at this time	56		
I don't know if these services are available	32		
The services are not helpful	5		
I receive assistance from another organization (e.g., community center)	9		
Other	17		
6. Employees may meet their elder and other adult dependent care needs by rearranging their work schedules. Which of the following have you used this past year to meet your elder/other adult dependent care needs? (Mark as many as apply)			
Flexible or compressed work schedule	28		
Part-time work schedule (less than 40 hours per week)	3		
Work different shifts (i.e., you provide care while spouse/partner works, and vice versa)	4		
Annual leave	68		
Sick leave	8		
Leave without pay	3		
Work at home "on-the-clock"	2		
None of the above	25		
Section 6 - Leave			
1. To what extent are you satisfied with the following leave benefits provided by the Federal Government?	NE	SE	GE
a. Annual leave	2	20	79
b. Sick leave	4	29	67
2. How many hours of annual leave do you earn each pay period?			
4	12		
6	45		
8	41		

SOFE			
Category/Items	**Percentages**		
Doo't earn annual leave	1		
Doo't know	1		
3. Of the annual leave you used this past year, estimate how much was used for each of the following purposes	None	Some	Most
a. Vacation	13	49	38
b. Family members' illness or medical care	49	43	8
c. Childcare arrangements	85	13	1
d. School or community activities	75	24	2
e. Childbirth/adoptioo	95	3	2
f. Other personal business	20	67	13
4. If you could make a trade to get less of one type of benefit for more of another, to what extent would you be interested in:	NE	SE	GE
a. Giving up some annual leave to get more sick leave?	81	17	3
b. Giving up some sick leave to get more annual leave?	47	29	24
c. Giving up some leave to help pay for childcare?	83	13	4
d. Giving up some leave to help pay for elder and other adult dependent care?	76	20	3
5. If I ever have to take time off to care for a sick family member and my annual leave is used up, I would most likely use: (mark one only)			
Sick leave	40		
Compensatory time	9		
Advanced leave	20		
Leave without pay	26		
Leave bank	6		
6. I have wanted to take leave without pay for family care reasons, but cannot because: (mark as many as apply)			
Doesn't apply - I don't want to take leave without pay	79 •		
I could not afford it financially	73		
I was afraid to ask	7		
My supervisor refused my request	6		
Other	22		
7. What has been your experience with the Federal leave-transfer or leave bank program?			

SOFE				
Category/Items	**Percentages**			
I have donated leave to the program	23			
I have not donated leave	72			
I have never heard of it	5			
I have received leave for my own need or emergency	2			
I have received leave so that I could care for a dependent	<1			
I was denied leave from it	1			
8. To what extent do you think the Federal leave-transfer/leave bank program is an effective way of helping employees meet medical emergencies?	NE 3		SE 49	GE 47
9. Does your agency have a formal policy on maternity/paternity leave?	No 13		NS 60	Yes 27
10. To what extent has your agency's policy on maternity/paternity leave met your needs?	NA 69 •	NE 23	SE 38	GE 40
11. Does your agency have a formal policy on adoption leave?	No 12		NS 78	Yes 11
12. To what extent has your agency's policy on adoption leave met your needs?	NA 93 •	NE 50	SE 27	GE 23
Section 7 - Pay				
1. I am satisfied with my pay	D 49		U 18	A 32
2. My pay is fair considering what other people in this organization are paid	D 44		U 25	A 31
3. Considering the skills and effort I put into my work, I am satisfied with my pay	D 58		U 16	A 26
4. My pay is fair considering what other places in this area pay for the same kind of work	D 51		U 23	A 26
5. Pay *should* be based more on the knowledge and skills of the employee than on the duties and responsibilities of the position	D 35		U 32	A 33
6. My pay is fair considering what people in similar jobs in this agency are paid	D 36		U 29	A 35
7. People have different ideas about how they should be paid. How important do you think each of the following should be in determining your pay?	NI		SI	VI
a. Level of education required by the job	7		54	40
b. Job-related training	5		52	44
c. Job-related work experience	2		31	68
d. Level of responsibility	1		19	81
e. Difficulty of the work	1		23	76
f. Quality of job performance	1		13	87

SOFE			
Category/Items	Percentages		
g. Amount of work done	3	42	55
h. Timeliness of work	2	34	64
i. Amount of effort expended on the job	4	40	56
j. Quality of your work unit's performance	14	47	39
k. Productivity of your work unit	15	50	35
l. Overall performance of your organization or agency	28	51	21
m. The locality (regarding cost of labor) where the job is	14	45	40
n. Length of service in the Federal Government	18	48	35
8. I am aware that the Federal Employees Pay Comparability Act of 1990 has changed the Federal pay system.	No 28	NS 25	Yes 47
9. I understand that beginning in 1994, in addition to the Governmentwide annual increase, employees in areas with high labor costs will receive a locality pay increase.	No 23	NS 23	Yes 54
10. Are you now receiving a locality-based payment (other than a special salary rate)?	No 82	NS 9	Yes 10
11. Has your agency begun offering any of the following:	No	NS	Yes
a. Recruitment bonuses	47	48	6
b. Relocation bonuses	46	49	5
c. Retention allowances	49	49	3
12. Paying employees based on locality is fair	D 11	U 16	A 73
13. Paying a recruitment bonus to attract a high quality employee is fair	D 22	U 30	A 48
14. Paying a relocation bonus is fair	D 12	U 22	A 66
15. Paying a retention allowance is fair	D 18	U 24	A 58
16. Paying a high quality new hire more than other new hires is fair	D 43	U 27	A 30
17. Pay progression under my current pay plan is fair	D 31	U 28	A 41
Section 8 - Supervisors and Personnel Specialists			
1. I have an important role in classifying employees' jobs.	No 52	NS 5	Yes 43
2. It is easier to classify jobs in this agency than it was several years ago.	No 37	NS 30	Yes 34

SOFE			
Category/Items	Percentages		
3. To what extent are classification standards in this agency easy to apply?	NE 10	SE 70	GE 21
4. In your opinion, how does the personnel management evaluation (PME) program in your agency contribute to agency functioning? (Mark as many as apply)			
Helps agency performance	16		
Has little effect on agency performance	26		
Provides recommendations that are implemented by management	12		
Provides recommendations that are not implemented by management	7		
Feeds into human resource planning	9		
Assures that personnel support is provided in a manner consistent with law, rule, regulation, and OPM guidance	17		
Assists agencies in operating efficient and cost effective personnel programs	8		
Develops information for use in personnel program refinement and policy development	10		
Program does not exist in my agency	3		
I was not aware of such a program	53		
5. I have enough authority to determine my employees' pay	D 73	U 14	A 14
6. I have enough authority to promote people	D 49	U 14	A 37
7. I have enough authority to hire competent people when I need them	D 52	U 14	A 34
8. I have enough authority to discipline employees if they perform poorly	D 25	U 14	A 62
9. Do you have the authority to classify jobs?	No 81	NS 6	Yes 13
10. What is your response when employees request to work part-time? (mark one only)			
No one has ever asked to work part-time	72 *		
I approve most requests to work part-time	40		
I approve some requests and deny others, depending on the person and situation	43		
I deny most requests to work part-time	17		
11. If you have ever denied an employee's request to work part-time, it was because: (mark as many as apply)			
Doesn't apply - I have never refused a request to work part-time	44 *		
Their position required full-time coverage	73		

SOFE	
Category/Items	**Percentages**
Their workload was too great	40
Their absence would be disruptive for this work unit	40
They had a record of performance or conduct problems	12
My agency's internal system makes it difficult to approve employees' requests for part-time	19
My agency encourages full-time employment	17
Other	6
12. What is your response when employees request to have a flexible or compressed work schedule? (Mark one only)	
No one has ever asked to have a flexible or compressed work schedule	24 *
I approve most requests to work flexible or compressed work schedules	66
I approve some requests and deny others, depending on the person and situation	13
I deny most requests to work flexible or compressed work schedules	3
My agency does not have a program	18
13. If you have denied an employee's request to have a flexible or compressed work schedule, it was because: (mark as many as apply)	
Doesn't apply - I have never refused an employee's request to have a flexible or compressed work schedule	56 *
Their work unit is not eligible to participate	14
They were not eligible to participate	5
Their schedule would have been disruptive for this work unit	48
They had a record of performance or conduct problems	13
This agency does not offer a flexible or compressed work schedule	31
Other	8
14. What is response when employees request to work at home "on-the-clock" (this refers to informal "flexiplace, not the OPM flexiplace pilot project)? (mark one only)	
No one has ever asked to work at home "on-the-clock"	82 *
I approve most requests for flexiplace	20
I approve some requests and deny others, depending on the person and situation	38
I deny most requests for flexiplace	42

SOFE				
Category/Items	**Percentages**			
15. OPM is currently testing a pilot project of a formal "flexiplace" program that allows employees to work at home or in a satellite office "on-the-clock." This pilot project was made available to all Federal employees. If your staff not participating in the flexiplace pilot, it is because: (mark as many as apply)				
Doesn't apply - my staff is participating in the flexiplace pilot project	4 •			
I did not know about the pilot project	58			
Top management has ruled out flexiplace for this agency (policy decision)	17			
Flexiplace is too expensive	<1			
The nature of jobs in my work unit requires employees to be at the office/work station	38			
It would require extra supervisory effort	4			
Some of my staff already work occasionally at home	3			
None of my employees wanted to participate	2			
Other	6			
16. How is productivity (amount, quality, and timeliness of work) of permanent part-time workers compared to permanent full-time employees, taking into account the number of hours worked?	DK 58	Worse 5	Same 31	Better 6
17. How is the productivity (amount, quality, and timeliness of work) of employees working flexible or compressed work schedules compared to employees who work fixed schedules?	DK 43	Worse 6	Same 38	Better 14

ATTACHMENT #4

THE FEDERAL FLEXIBLE WORKPLACE

PILOT PROJECT

WORK-AT-HOME COMPONENT

January 1993

Final Report

United States
Office of
Personnel
Management

Career Entry Group

Office of Personnel Research and Development

Theodore Roosevelt Building
1900 E Street, NW.
Washington, DC 20415-0001

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Maxcine Sterling,
General Services Administration

Wendell Joice,
Office of Personnel Management

FLEXIPLACE Co-Directors

THE FEDERAL FLEXIBLE WORKPLACE PILOT PROJECT

WORK-AT-HOME COMPONENT

FINAL REPORT

EXECUTIVE SUMMARY

This evaluation of the work-at-home component of the *Federal Flexible Workplace Pilot Project (Flexiplace)* was developed for use by the President's Council on Management Improvement (PCMI).

Flexiplace is a Governmentwide, nationwide project which allows Federal employees to work at home or at geographically convenient satellite offices for part of the workweek. This project is sponsored by the PCMI and co-directed by the U.S. Office of Personnel Management (OPM) and the U.S. General Services Administration (GSA). Flexiplace, which was implemented in January 1990, was established to improve the Government's ability to recruit and retain capable employees, to improve employee quality of life, and to reduce Federal operating costs. The project consists of three basic components:

- *Work-at-home program.*

- *Satellite work center program.* This component involves the establishment of geographically convenient multi-agency satellite work centers which serve as alternate worksites for designated Federal employees. Operating guidelines for satellite work centers will be similar to those for work-at-home arrangements.

- *Flexiplace accommodations for disabled workers.* Participation in this component is available to disabled Federal employees and will be made available to Federal employees in Workers' Compensation or Disability Retirement programs.

The overall goal of the Flexiplace project is to gain the experience and information necessary to recommend policies and procedures for general implementation and operation of Federal flexible workplace arrangements.

This evaluation examines the pilot performance of the work-at-home component of Flexiplace and was developed by the *Flexiplace Management Team* (hereafter referred to as 'FMT' or 'we'). The FMT consists of representatives of the General Services Administration, the Department of Agriculture, the Department of Justice, and the Office of Personnel Management. We will use the evaluation findings to support our policy/procedure recommendations such as determining whether further Governmentwide implementation of Flexiplace should be encouraged and revising the Flexiplace work-at-home guidance (discussed later in this report).

This report covers project history, operation, methodology, participant group profile, and evaluation results.

METHODOLOGY

The FMT structured the evaluation of this project to obtain a broad assessment of the operation of alternative workplace arrangements. We based the evaluation on information from three basic sources: survey questionnaires, focus group reports, and observations by the FMT.

Survey Questionnaires. Operating through the agency coordinators, we administered separate evaluation survey questionnaires to all Flexiplace participants, their supervisors, non-participating control employees, customers/clients of the participants, and local union officials. Our survey research design focused on using the questionnaires to obtain baseline (job performance) and other background information at the beginning of a given pilot and then, after 6 and 12 months, obtaining evaluation/progress information. For example, supervisors submitted participant and control employee job performance ratings for three separate rating periods:

(1) **Baseline period** (the six months immediately preceding implementation of the pilot)

(2) The **first six months of the pilot**

(3) The **final six months of the pilot**

Supervisors submitted two types of job performance ratings: **performance change ratings** and **performance level ratings**. For the performance change ratings, we asked supervisors to indicate, for the given rating period of Flexiplace participation, whether there had been improvement/decline in the participant's job performance (relative to the participant's performance during the prior workyear). Performance level ratings indicate the supervisor's perception of the level of job performance for a given rating period.

In addition to the Flexiplace survey, we also used findings from the **Survey of Federal Employees (SOFE)** conducted by OPM's Office of Systems Innovation and Simplification (OSIS, 1992). This major survey of the Federal workforce was designed to provide policy-makers with information about Federal employees that was not available from existing sources. The SOFE covered a wide range of personnel areas (including Flexiplace) and obtained responses from approximately 32,000 employees.

Focus Groups. Participating agencies established discussion groups for participants and their supervisors to provide support and assistance as well as to serve as spontaneous sources of evaluation information. Typically, these groups met monthly for the first few months and, thereafter, on an as-needed basis. After each meeting, the focus group discussion leaders provided the FMT with written reports summarizing the group's discussion.

SURVEY DATA RESULTS

At the time this report was written, participation in Flexiplace included approximately 700 Federal employees from 13 Federal agencies. The findings discussed in this report, however, are based on the following numbers of survey respondents:

- 522 participant background/baseline questionnaires
- 224 participant six-month evaluations of Flexiplace experience
- 102 participant one-year evaluations of Flexiplace experience
- 388 supervisor baseline evaluations of participants
- 213 supervisor six-month evaluations of participants
- 100 supervisor one-year evaluations of participants
- 62 supervisor six-month evaluations of organizational performance
- 49 supervisor one-year evaluations of organizational performance
- 40 supervisor evaluations of control participants
- 40 control participant evaluations of work experience
- 30 customer/client six-month evaluations of participants

The difference in these totals is due to the fact that Flexiplace implementation dates varied widely across agencies; respondents from organizations with more recent implementation dates had not completed their questionnaires at the time this report was written.

Summary of Participant Group Profile. Most of the 522 Flexiplace participant survey respondents (72 percent) were married and/or living in families, nearly half (47 percent) had children under 18 living at home. Most were full-time professional employees (70 percent) with pre-Flexiplace job performance ratings at the 'Exceeds Fully Successful' or 'Outstanding' levels (84 percent) and most worked in urban downtown areas. The participants tended to be experienced in both life and work: their average age was 42 and 84 percent had 11 or more years of work experience.

With respect to racial composition, average age, and proportion of disabled employees, the Flexiplace participant group was very similar to the Federal non-postal civilian workforce. On the other hand, the participant group had proportionately more females, higher grades, more part time employees, and more employees with outstanding job performance ratings than does the Federal workforce.

A particularly important finding was that 43 percent of the participants reported that their most productive time periods for working were outside normal business hours. This finding has implications for efforts to improve workforce productivity: flexible work arrangements can be used to allow participants and their organizations to take fuller advantage of worker productivity peaks.

Summary of Participant Job Performance Ratings. More than 90 percent of the supervisors and 95 percent of the participants judged that Flexiplace job performance was either

unchanged or improved relative to pre-Flexiplace performance levels. When considering the implications of "unchanged" job performance ratings, it is important to note that 84 percent of the participants entered the Flexiplace pilot with job performance ratings of at least "exceeds fully successful" (44 percent with "exceeds fully successful" and 40 percent with "outstanding"). For the majority of the participants, therefore, Flexiplace job performance ratings of "unchanged" imply that a very high level of performance was maintained.

Customer/Client and Control Group Ratings. At the time this report was written, there were only 30 Customer/Client ratings, 40 supervisor ratings of control employees, and 40 control employee self-assessments in the data base; these numbers are too small to serve as representative samples of customers/clients or control employees. We are providing an analysis of these data, therefore, for information purposes only; caution should be applied to any interpretation based on these data. While little weight can be placed on the customer/client and control group findings (because of their small sample sizes), their general direction was consistent with the overall job performance findings.

Summary of Interpersonal Communications. The pattern of judgments regarding interpersonal communication is similar to that regarding job performance. More than 90 percent of the respondents, both participants and their supervisors, judged that there was no change in the effectiveness of work-related interpersonal communication; of those perceiving a change, significantly more saw an improvement as opposed to a decline in communication effectiveness.

Summary of Quality of Personal Life. Participants' responses indicate that Flexiplace has had a positive impact on their quality of personal life. For most of the examined factors, more than half of the participants responded that there had been at least some improvement attributable to the advent of Flexiplace (only 3 percent or fewer reported a decline). This finding is particularly timely in view of the recent national concern that American adults constantly feel pressed for time and feel that this time pressure has adverse implications for their families.

Summary of Quality of Work Life. In general, participant ratings of quality of work life were quite favorable, especially in view of the many personal and interpersonal adjustments involved. Regarding interpersonal relationship, job content, and most work environment factors, more than 90 percent of the ratings indicated no change or improved; a much greater proportion of the ratings indicated improvement as opposed to decline.

On the other hand, after the first six months in the project, 25 percent of the participants indicated that their job-related home office equipment was less adequate than that in their conventional offices; 37 percent of the participants indicated that their Flexiplace access to work materials was likewise less adequate than that in their conventional offices. Comparable data after one year in the project were 17 percent and 29 percent, respectively. These responses may be related to low funding allocations for the pilots and procedural difficulties typical in new programs.

Summary of Participant Responses on Costs. More than 70 percent of the respondents reported reductions in job-related transportation and miscellaneous costs and no change in dependent care costs. Approximately one-third of the participants, however, experienced increased home maintenance (probably for utilities) costs due to participating in Flexiplace. In terms of an overall cost assessment, more than half of the respondents indicated no change in job-related costs while nearly a third reported a reduction. That there was no change in dependent care costs appears to indicate that participants adhered to our guidance that Flexiplace is not a direct substitute for child care.

Other Participant Responses. Participants indicated reductions in both *sick leave and rush-hour vehicle usage.* After one year in the project, 45 percent of the participants indicated that their Flexiplace sick leave usage was generally lower than their sick leave usage prior to Flexiplace. For the same time period, 82 percent of the participants indicated that reduced rush hour usage of their private vehicles; 35 percent of the participants indicated reduced non-rush hour vehicle usage. Less than 6 percent of the participants indicated increases in sick leave or vehicle usage.

Summary of Organizational Performance. Supervisory judgments on Flexiplace and organizational performance are important because they present a view of the collective functioning of participants and non-participants. The data suggest that Flexiplace is a feasible and desirable option for most organizations. More than 70 percent of the supervisors indicated that Flexiplace was feasible in terms of meeting organizational objectives and supervising participants and more than 90 percent indicated that Flexiplace did not result in significant organizational expenses. This information is based on a relatively small sample of organizations and should be interpreted and applied cautiously. Finally, our focus group summaries and information from agency Flexiplace coordinators suggest that some of the modifications desired by supervisors include more supervisor control over selection and number of participants, more guidance on technological issues, more flexibility in agency-specified procedures, and increased agency funding for the program.

Summary of Overall Reactions. Considering all issues, the majority (79 percent after 6 months; 80 percent after 12 months) of the supervisors and nearly all (99 percent after 6 months; 100 percent after 12 months) of the participants judged Flexiplace to be a desirable option requiring, at most, minimal refinement.

FOCUS GROUP FINDINGS

The focus group reports provided an evaluation perspective different from that of survey questionnaires and, therefore, served to clarify and/or add to the material obtained from the survey. The focus group findings that were positive tended to mirror findings from the survey material. The negative findings were mostly issues surrounding organizational adjustment to Flexiplace, such as obtaining equipment, adjusting co-worker relationships, and establishing schedules. These findings provided us with additional information that should be included in our guidelines for participating organizations. Our general observations tended to

corroborate the finding that issues associated with organizational adjustment to Flexiplace represent the primary areas of difficulty for Flexiplace operation. There appears, however, to be about a two to three month period in which organizations resolve or begin to resolve these issues. Likewise, the usefulness of focus groups appears to begin to diminish after three months.

FLEXIPLACE MANAGEMENT TEAM (FMT) OBSERVATIONS

The FMT documented its observations on matters not covered elsewhere in this report. The primary observation is that overcoming management reluctance to participation in Flexiplace is the major challenge confronting the program. We base this assertion on information received from agency coordinators, Flexiplace focus groups, personnel directors, the Survey of Federal Employees, public and private sector research findings, and from our own experience implementing Flexiplace. Expressed reasons for this reluctance were varied, focusing on issues such as loss of control, implementation, budget, employee characteristics, job characteristics, various anxieties regarding changed procedures, and so on. No particular reason or set of reasons stood out in our information.

RECRUITING AND RETENTION

While the newness and limited size of the Flexiplace project prevented us from assessing its impact on recruiting and retention, anecdotal and indirectly-related information suggests that Flexiplace may have a positive impact in this area.

ADDITIONAL MANAGEMENT ISSUES

Some additional management issues are oversight of employees, costs, communications/ accessibility, and general pitfalls. These are difficult issues and, while available data are informative, they will not support definitive conclusions in these areas. When utilization of Flexiplace has been sufficiently expanded, these issues will provide excellent research topics.

CONCLUSION

Based on an assessment of all of the evaluation information, we concluded that Flexiplace is a successful program that works well with employees who are proven performers and that provides significant benefits to participating employees. We caution that our findings and conclusions may not apply to younger, lower graded employees; they were not adequately represented in our pilot participant group. Though the scope of our examination of organizational factors was somewhat limited, we further concluded that, from an organizational viewpoint, Flexiplace is both feasible and desirable. Finally, we found that Flexiplace shows promise as an effective mechanism for national efforts regarding work/family, transportation, and energy issues. With minor refinements in guidance materials and utilization with successfully performing employees, Flexiplace is ready for Governmentwide implementation through the use of the Federal Personnel Manual (FPM).

The primary difficulties for agency Flexiplace implementation are convincing management of the benefits of participating and facilitating individual and organizational adjustment to the program. The FPM guidance will be helpful in reducing problems in these areas.

Note on Interpretation of the Evaluation Information. Questions may arise as to whether these findings can be generalized to the Federal workforce. As noted earlier, the participants in this project were not selected on a random basis and, therefore, may not be completely representative of the Federal population. In fact, the number of lower graded, younger participants in our pilot group was noticeably small. This fact is reflected in our conclusions and recommendations. Also, one might conclude that the results are biased because the participants and their supervisors were volunteers who may have had positive expectations of the Flexiplace experience and who may have been motivated by a desire to ensure the success of the project.

As with the pilot project, participation in general (post-pilot) Flexiplace arrangements will be voluntary and will be limited to employees with proven performance records. Additionally, in both the pilot and general arrangements, the participant is (will be) aware that decreased job performance will lead to removal from the program. Thus, the resulting expectations of pilot and general Flexiplace participants should be reasonably similar.

RECOMMENDATIONS

Having reviewed the available information, our observations, and the immediate and long term requirements for successful implementation, the FMT recommends the following actions:

1. That the PCMI ▸

   - ▸ endorse the concept of Flexiplace, affirm that agencies have the authority to enter into Flexiplace arrangements, yet alert agencies that Flexiplace is not appropriate in all circumstances;
   - ▸ publicize the results of the Flexiplace Pilot (home-based component) and take steps to increase Federal employee awareness of Flexiplace;
   - ▸ formally acknowledge agencies that participated in the pilot, managers who volunteered their organizations, and participants themselves for a job well done;
   - ▸ examine the utility of providing incentives for managers who establish Flexiplace arrangements in their organizations;
   - ▸ request legislation that repeals the law prohibiting Federal agencies from purchasing telephone equipment for employee residences;

- urge organizations such as the National Capital Planning Commission, GSA, and agency procurement offices to include Flexible workplace arrangements in their Federal building planning and technology purchasing plans.

2. That OPM provide support and technical assistance to agencies establishing Flexiplace arrangements; this support should include providing guidance in the Federal Personnel Manual.

3. That GSA publish guidance in the Federal Information Resources Management Regulations on the use of computers and telephones for Federal employees working in alternative worksites.

THE FEDERAL FLEXIBLE WORKPLACE PILOT PROJECT

FINAL REPORT

THE WORK-AT-HOME COMPONENT

INTRODUCTION

This evaluation of the work-at-home component of the *Federal Flexible Workplace Pilot Project (Flexiplace)* was developed for use by the President's Council on Management Improvement (PCMI).

Flexiplace is a Governmentwide, nationwide project which allows Federal employees to work at home or at geographically convenient satellite offices for part of the workweek. The name "Flexiplace" is Federal terminology for the general term "telecommuting" and was adopted to highlight the broad scope of participation in the project. Flexiplace participation is not limited to employees who work with computers or other advanced technology equipment; nor is it limited to employees who commute long distances to their worksites. Some Flexiplace participants, for example, may be employees who simply want to work at home and whose work equipment consists solely of a standard telephone.

This project is sponsored by the PCMI and co-directed by the U.S. Office of Personnel Management (OPM) and the U.S. General Services Administration (GSA). Flexiplace, which was implemented in January 1990, was established to improve the Government's ability to recruit and retain capable employees, to improve employee quality of life, and to reduce Federal operating costs. The project consists of three basic components:

- *Work-at-home program.*

- *Satellite work center program.* This component involves the establishment of geographically convenient multi-agency satellite work centers which serve as alternate worksites for designated Federal employees. Operating guidelines for satellite work centers will be similar to those for work-at-home employees.

- *Flexiplace accommodations for disabled workers.* Participation in this component is available to disabled Federal employees and will be made available to Federal employees in Workers' Compensation or Disability Retirement programs.

The overall goal of the Flexiplace pilot is to gain the experience and information necessary to recommend policies and procedures for general implementation and operation of Federal flexible workplace arrangements. Pilot project operating procedures and requirements,

therefore, were designed to be sufficiently flexible to accommodate the specific needs and circumstances of individual agencies.

This evaluation examines the pilot performance of the work-at-home component of Flexiplace and was developed by the *Flexiplace Management Team* (hereafter referred to as 'FMT' or 'we'). The FMT consists of representatives of the General Services Administration, the Department of Agriculture, the Department of Justice, and the Office of Personnel Management. We will use the evaluation findings to support our policy/procedure recommendations such as determining whether further Governmentwide implementation of Flexiplace should be encouraged and revising the Flexiplace work-at-home guidance (discussed later in this report).

PROJECT HISTORY

In March 1989, the PCMI established an interagency task force to design and implement the Flexiplace project. The task force, with OPM and GSA serving as lead agencies, consisted of representatives from the following departments and agencies:

Department of the Air Force
Department of Agriculture
Department of Health and Human Services
Department of Labor
Department of Transportation
General Accounting Office
National Science Foundation
Office of Personnel Management
General Services Administration
Department of Defense
Department of Veterans' Affairs
Small Agency Council

- *Operating Guidelines.* After identifying and researching the relevant issues, the task force developed draft operating guidelines that were reviewed and approved by member agencies of the PCMI Human Resources Committee, by legal counsels from various agencies such as the Office of Personnel Management, General Services Administration, General Accounting Office, Department of Labor, and by the headquarters offices of major unions representing Federal employees. In January 1990, the PCMI task force published the "Guidelines for Pilot Flexible Workplace Arrangements," disseminating them to all Federal departments and agencies. The guidelines were accompanied by an invitation for Governmentwide participation in Flexiplace.

- *Union Involvement.* Prior to project implementation, the members of the task force met with representatives of the headquarters offices of major unions representing Federal employees. The goal of the task force was to secure union involvement and support,

clarify roles and expectations, and respond to union concerns. Additionally, all project evaluation materials as well as the Guidelines were reviewed by these unions. While taking a guarded approach, the unions were not resistant, and, in some cases, have been instrumental in establishing the project.

- *Project Management Team.* At the completion of the planning and development phase of the project, the project directors established a **Flexiplace Management Team (FMT)** to direct the Governmentwide implementation and operation of the pilot project, to provide technical assistance, to evaluate the project, and to prepare recommendations for continuing and improving Flexiplace. The team members are listed on the Acknowledgement page of this report.

- *Congressional Support.* During the planning phase of the project, aides from the office of Representative Frank Wolf (R-Virginia) met with the FMT to learn about the Flexiplace project and to offer assistance. In November 1990, Congress passed legislation (Public Law 101-509) introduced by Mr. Wolf which allowed participating agencies to use appropriated funds to provide telephone equipment and services in the homes of Flexiplace participants. Congress also passed legislation, introduced by Senator Burns (R-Montana), requiring the Department of Transportation in conjunction with the Department of Energy and the Environmental Protection Agency to conduct an impact study of telecommuting arrangements. Senator Burns also published several documents extolling the benefits of telecommuting. Finally, several other members of Congress have sponsored conferences and other activities with telecommuting as a primary topic.

- *White House Support.* Former President George Bush expressed support, repeatedly, for the telecommuting movement and its value to the fulfillment of national goals such as strengthening the American family and improving the environment. The President's Office of Policy Development was very active in supporting telecommuting programs in general and Flexiplace in particular.

  "Sometimes the best policy is not moving people, but moving their work."
  (Former President George Bush, Minnesota Telecommuting Conference, 1991)

- *Flexiplace Questions and Answers in the Federal Personnel Manual System.* In March 1991, the FMT published "Flexiplace: General Questions and Answers" in the Federal Personnel Manual System (FPM Letter 368-1). The document was accompanied by a cover letter to the heads of Federal agencies from the Director of OPM encouraging agency participation in the pilot project.

- *Technical Assistance.* The FMT has been very active in providing technical assistance to participating Federal agencies and exchanging information with State, local, and foreign governments as well as private sector organizations engaged in telecommuting initiatives.

In response to agency requests for more guidance on technology issues, the FMT completed a document entitled, "Flexiplace Questions and Answers on Computer and Telecommunications Issues." This document provides technical information for non-technical readers.

THE TELECOMMUTING MOVEMENT

Efforts to establish telecommuting as a normal work arrangement are occurring in both the public and private sectors, here and abroad. In addition to Flexiplace, there are numerous State and local government projects underway or in the planning stage (e.g., California, Washington, Arizona, Hawaii, Colorado, Kansas, Nebraska, Florida, Virginia, and Georgia). Private sector telecommuting programs have been implemented in corporations such as Pacific Bell, AT&T, Sears, J.C. Penny, Travelers Insurance, IBM, and Bell Atlantic. During the course of the Flexiplace pilot, we exchanged information with emissaries from Japan, Finland, the Netherlands, England, Australia, and Canada in their efforts to establish telecommuting arrangements in their countries. Workforce studies have presented solid evidence of a global movement toward telecommuting that will change prevailing work arrangement concepts for a substantial portion of the workforce (Telecommuting Advisory Council, 1992).

In order to keep abreast of emerging trends, technological advances, legislative and other initiatives, and opportunities to gain and provide assistance, the FMT began active participation in the Telecommuting Advisory Council (TAC). TAC is an international network of telecommuting program managers, experts, and consultants organized to conduct telecommuting promotion, research, education, technical assistance, and information sharing activities. The FMT was also instrumental in establishing the Potomac area chapter of the TAC.

PROJECT OPERATION

Flexiplace operation was designed with a focus on simplicity, ease, and flexibility. Participation, which is completely voluntary, requires both supervisor and organizational approval. Participation can be suspended by the participant, the supervisor, or the organization. The specific nature of participation is tailored to the needs and convenience of the organization. Flexiplace operates within the framework of existing laws and regulations. Other than the helpful legislation on telephone equipment, discussed earlier, no new legislation was required to implement this project.

Actual operating procedures of agency Flexiplace pilots are tailored to meet agency needs. The flexibility of the operating procedures is an asset to the project. Following is a generic profile of the operation of an agency Flexiplace pilot:

- *Decision to Participate*. The first and most challenging step is an agency's decision to participate.

- *Designation of Agency Flexiplace Coordinator.* The agency coordinator is the key individual who translates our guidance into action and otherwise runs the program at the agency or organizational level.

- *Consultation with Local Unions (if applicable).* If the agency plans to include union-represented employees in the project, agency management representatives consult with local unions and, generally, keep them informed as to the progress of the project.

- *Development of Agency Specifications.* Agencies have the option to tailor the Flexiplace operating guidelines into agency specific policies on Flexiplace arrangements.

- *Selection of Prospective Participants.* Basic criteria established for the selection of participants are the following:

  - A performance rating of Fully Successful or better (or equivalent);

  - Supervisor approval;

  - A reasonable level of experience in the current job (no trainees); and

  - The ability to perform successfully (as judged by the supervisor) in the Flexiplace arrangement.

Agencies are responsible for selecting participants and may amend or add to the preceding criteria. The FMT recommended that agencies select a diverse (grades, occupations, etc.) group of participants and, to provide, if possible, control groups of non-participating employees occupationally similar to the participants. Information provided by the control groups serves as a comparison for the participant evaluation information.

The FMT further specified that agencies should focus their participant selection on employees whose work arrangements fit the generic Flexiplace definition: formal employer/employee relationships where the location of the worksite is shifted away from the primary traditional worksite. During the Flexiplace planning stage, the FMT surveyed agencies and found that most were already utilizing informal work-at-home arrangements to accommodate injured or ill employees, employees who need periods of time to concentrate on complex work assignments, and employees who must be out of the office for personal reasons. The FMT also found that some agencies (such as the Federal Credit Union Administration) had established more formal work-at-home arrangements for employees (such as inspectors, auditors, etc.) whose work involves regular travel to worksites not controlled by their employers. Because Flexiplace was a pilot, it was important to get an accurate view of its performance with employees fitting the specified generic definition. The FMT, therefore, discouraged Flexiplace inclusion of the formal and informal work-at-home arrangements traditionally utilized by Federal agencies.

Now that evaluation data have been collected, this exclusion no longer applies.

- *Training of Participants.* We developed a one-day training package designed for the participating employee, the supervisor, and other individuals associated with the pilot. The training is conducted by OPM or by agency trainers. In those instances where agencies conduct their own training, we developed a *train-the-trainer* video which provides instructional narrative and excerpts of an actual training session.

- *Development of Work Agreement.* The work agreement is the basic contract between the supervisor and the employee which outlines the requirements for participation in Flexiplace. It also specifies that management has the right to remove an employee from the project if the employee's performance declines or if the project fails to meet organizational needs; the participating employee may terminate participation at any time. The operating guidelines provide a sample work agreement which agencies may use or modify as needed. The work agreement requires the signatures of the employee, the supervisor, and the agency coordinator.

- *Signing of Work Agreement.* After completing the Flexiplace training, employees and supervisors sign the work agreement indicating their acceptance of the specified expectations.

- *Implementation.* Participants begin their Flexiplace work arrangements according to the specifications in their work agreements.

- *Survey Evaluation.* Starting with baseline data provided at the beginning of the pilot and continuing with evaluation information provided at six-month intervals, participants and their supervisors, customers/clients, and local union officials complete and submit evaluation surveys to the FMT.

- *Focus Groups.* Participating agencies establish discussion groups for participants and their supervisors to provide support and assistance as well as to serve as spontaneous sources of evaluation information. Typically, these groups meet monthly for the first few months and, thereafter, on an as-needed basis. Where applicable, union representatives are invited to attend focus group sessions. After each meeting, the focus group discussion leaders provided the FMT with written reports summarizing the group's discussion.

- *Newsletter.* OPM published a newsletter covering a broad array of issues associated with telecommuting. We distributed this newsletter, "Flexiplace Focus," to participants and to other interested parties.

METHODOLOGY

The FMT structured the evaluation of this project to obtain a broad assessment of the operation of alternative workplace arrangements. We based the evaluation on information from three basic sources: survey questionnaires, focus group reports, and observations by the FMT.

Survey Questionnaires. Operating through the agency coordinators, we administered separate evaluation survey questionnaires (Appendices A through D) to all Flexiplace participants, their supervisors, non-participating control employees, customers/clients of the participants, and local union officials. Our survey research design focused on using the questionnaires to obtain baseline (job performance) and other background information at the beginning of a given pilot and then, after 6 and 12 months, obtaining evaluation/progress information. We utilized the following schedule:

- *Pilot Beginning*

  - Participants and control subjects completed background questionnaires on demographic and other personal information including work-related attitudes and perceptions.

  - Supervisors of participants and controls completed questionnaires on employee performance and leave usage (baseline).

- *At Six and Twelve Months*

  - Participants and control subjects completed questionnaires on their perceptions of their job experience during the previous six months.

  - Supervisors and customer/clients completed questionnaires on job performance of participants and control group employees.

  - Supervisors completed questionnaires on organizational job performance during the preceding six months.

  - Local union officials completed questionnaires on pilot performance during the preceding six months.

In addition to the Flexiplace survey, we also used findings from the **Survey of Federal Employees (SOFE)** conducted by OPM's Office of Systems Innovation and Simplification (OSIS, 1992). This major survey of the Federal workforce was designed to provide policy-makers with information about Federal employees that was not available from existing sources. The SOFE covered a wide range of personnel areas (including Flexiplace) and obtained responses from approximately 32,000 employees.

Focus Group Reports. We requested that focus group leaders, with group consent, submit a summary highlighting the group's discussion for each session. We established a structured reporting format which requested positive experiences, negative experiences, and group recommendations.

FMT Observations. Through its experience in conducting the Flexiplace project, the FMT made several observations regarding improved ways of handling the program. These observations were based on information received from agency Flexiplace coordinators, Flexiplace focus groups, personnel directors, a survey of Federal employees, public and private sector research findings, and from our own experience implementing Flexiplace. These observations are included in this report.

SURVEY DATA RESULTS

At the time this report was written, participation in Flexiplace included approximately 700 Federal employees from 13 Federal agencies. The findings discussed in this report, however, are based on the following numbers of survey respondents:

- 522 participant background/baseline questionnaires
- 224 participant six-month evaluations of Flexiplace experience
- 102 participant one-year evaluations of Flexiplace experience
- 388 supervisor baseline evaluations of participants
- 213 supervisor six-month evaluations of participants
- 100 supervisor one-year evaluations of participants
- 62 supervisor six-month evaluations of organizational performance
- 49 supervisor one-year evaluations of organizational performance
- 40 supervisor evaluations of control participants
- 40 control participant evaluations of work experience
- 30 customer/client six-month evaluations of participants

The difference in these totals is due to the fact that Flexiplace implementation dates varied widely across agencies; respondents from organizations with more recent implementation dates had not completed their questionnaires at the time this report was written.

Flexiplace participants included in the data base were from the following agencies:

Department of Agriculture
Department of the Army
Department of Health and Human Services
Department of the Interior
Department of Justice
Department of the Navy
Department of the Treasury
Environmental Protection Agency
Equal Employment Opportunity Commission
General Accounting Office
General Services Administration
Office of Personnel Management
National Guard Bureau

The Environmental Protection Agency (EPA) (116 participants), Department of Health and Human Services (84 participants), Equal Employment Opportunity Commission (80 participants), and Department of Agriculture (71 participants) had the highest numbers of participants in the data base. (The EPA has an on-going and separate alternative worksite program for certain employees such as those having allergic reactions to certain indoor environments. These employees were not participants in the Flexiplace project.)

Geographic locations of participating organizations and number of program participants:

Arizona (1)
California (102)
Colorado (17)
District of Columbia (186)
Georgia (18)
Illinois (11)
Kansas (3)
Kentucky (2)
Maryland (107)
Minnesota (1)
North Carolina (21)
Ohio (1)
Pennsylvania (33)
Utah (1)
Virginia (6)
Washington (8)
West Virginia (1)

PARTICIPANT GROUP PROFILE

We requested that agencies make efforts to select occupationally and demographically diverse participant groups. As one can see from the following participant group profile, the agencies were moderately successful in achieving that goal. Where available, comparable figures for the Federal non-postal civilian workforce, as of 1990, are included in parentheses.

DEMOGRAPHICS

- Sex = 62% (43%) female

- Race/National Origin
  - White (non-Hispanic) = 76% (73%)
  - Black (non-Hispanic) = 17% (17%)
  - Asian = 4% (3%)
  - Hispanic = 2% (5%)
  - American Indian = 1% (2%)

- Age
  - 60 and above = 6% (5%)
  - 50-59 = 14% (19%)
  - 40-49 = 36% (29%)
  - 31-39 = 35% (30%)
  - 30 and under = 9% (17%)

Average Age = 42 (42)

FAMILY STRUCTURE

Married and/or living in a family relationship with another adult = 72%

Participants with one or more children living at home = 47%

Age of children	
Pre-school	= 20%
Age 5-12	= 26%
Age 13-18	= 14%

Participants with no children, age 18 or under, living at home = 53%

DISABILITY PARTICIPATION

Participation in project because of a physical disability = 7%

Participants having a dependent disabled child or adult living at home = 5%

JOB INFORMATION

- Grade

GS 1-3	= 0% (4%)
GS 4-8	= 9% (40%)
GS 9-11	= 21% (26%)
GS 12	= 26% (13%)
GS 13	= 27% (9%)
GS 14-16	= 17% (8%)

Average Grade = 13 (9)

- Job Type

Clerical/secretarial	= 1%
Professional (non-supervisor)	= 70%
Technical/administrative	= 20%
Supervisor/manager	= 8%
Other	= 1%

- Sample of Occupations

Attorney, Writer/Editor, Physical Scientist, Librarian, Investigator, Veterinarian, Social Science Analyst, Psychologist, Environmental Engineer, Specialists (Personnel

Management, Employee Development, Employee Relations, Consumer Safety, Computer, Environmental Protection, Health Systems), Management/Program Analyst, Biologist, Pharmacologist, Medical Officer, Financial/Budget Analyst, Tax Examiner, Administrative Assistant, Clerk, Secretary

- Work Experience

20 or more years	= 46%
11-19 years	= 38%
7-10 years	= 9%
3-6 years	= 5%
less than 3 years	= 2%

- Appointment

Full-time permanent	= 92% (87%)
Part-time permanent	= 7% (2%)
Other	= 1% (11%)

JOB PERFORMANCE

- Most recent performance appraisal

Outstanding	= 40% (28%)
Exceeds fully successful	= 44% (49%)
Fully successful	= 14% (22%)
Other (minimally successful, unacceptable, other rating schedules)	= 2% (1%)

- Time period when most productive

Normal business hours	= 57%
Non-business hours (After 6 pm, before 7 am, weekends, etc.)	= 43%

WORK SITE CHARACTERISTICS

- Downtown, central, or business area of a city = 64%
- No availability of free parking = 55%
- Work routes with high traffic and frequent gridlock = 49%

Summary of Participant Group Profile. Most of the 522 Flexiplace participant survey respondents (72 percent) were married and/or living in families, nearly half (47 percent) had children under 18 living at home. Most were full-time professional employees (70 percent) with pre-Flexiplace job performance ratings at the 'Exceeds Fully Successful' or 'Outstanding' levels (84 percent) and most worked in urban downtown areas. The participants tended to be experienced in both life and work: their average age was 42 and 84 percent had 11 or more years of work experience.

With respect to racial composition, average age, and proportion of disabled employees, the Flexiplace participant group was very similar to the Federal non-postal civilian workforce. On the other hand, the participant group had proportionately more females, higher grades, more part time employees, and more employees with outstanding job performance ratings than does the Federal workforce.

A particularly important finding was that 43 percent of the participants reported that their most productive time periods for working were outside normal business hours. This finding has implications for efforts to improve workforce productivity: flexible work arrangements can be used to allow participants and their organizations to take fuller advantage of worker productivity peaks.

OPERATIONAL PERFORMANCE

The following project operation results were obtained from surveys administered after six and twelve months in the project. Most of the narrative focuses on the six-month results which were more complete at the time of this writing. Where supported by sufficient data, twelve-month results are discussed. In all of the tables in this document, data are presented in terms of percentages representing the proportions of respondents whose ratings/responses fall in the indicated categories. Respondents (for each table) are described in the table title.

PARTICIPANT JOB PERFORMANCE

To measure participant job performance, we surveyed the participants' supervisors, the participants, and customers/clients of the participants.

Supervisor Ratings. For each of the following factors, supervisors provided baseline and Flexiplace job performance ratings for their participating employees.

- **Quality** - The extent to which, on a consistent basis during the evaluation period, the quality of the employee's work met the generally applied standards in your office or reasonable expectations.

- **Quantity** - The extent to which, on a consistent basis during the evaluation period, the quantity of the employee's work met the generally applied standards in your office or reasonable expectations.

- **Timeliness** - The extent to which, on a consistent basis during the evaluation period, the timeliness of the employee's work met the generally applied standards in your office or reasonable expectations.

- **Interpersonal Disposition** - The extent to which, on a consistent basis during the evaluation period, the employee was pleasant/cooperative to work with.

- **Independence** - The extent to which, on a consistent basis during the evaluation period, the employee handled work assignments with the independence generally expected for the employee's experience, work assignments, and conditions in your office.

- **Currency of KSAs** - The extent to which, during the evaluation period, the employee's knowledge, skills, and abilities were up-to-date.

- **Availability/Accessibility** - The extent to which, on a consistent basis during the evaluation period, the employee was available/accessible for the timely conduct of business.

- **Overall** - The overall job performance during this evaluation period.

Supervisors submitted these job performance ratings for three separate rating periods:

(1) **Baseline period** (the six months immediately preceding implementation of the pilot)

(2) The **first six months of the pilot**

(3) The **final six months of the pilot**

Supervisors submitted two types of job performance ratings: **performance change ratings** and **performance level ratings**. For the performance change ratings, we asked supervisors to indicate, for the given rating period of Flexiplace participation, whether there had been improvement/decline in the participant's job performance (relative to the participant's performance during the prior workyear). We provided the following response scale for performance change ratings:

A = Decline

B = Slight Decline

C = No Change

D = Slight Improvement

E = Improvement

For convenience of presentation, the categories (A and B; D and E) on each end of the performance change scale were collapsed into single categories.

Performance level ratings indicated the supervisor's perception of the level of job performance for a given rating period. The following scale was used:

1 - Unsatisfactory
2 - Somewhat less than satisfactory
3 - Satisfactory
4 - Somewhat more than satisfactory
5 - Excellent

Because there was such a small number of participants receiving ratings of 1 or 2, these two categories were combined in our analysis.

Performance Change Ratings. **Table 1** presents performance change ratings for the specified job performance factors. The data support the following observations:

- In all factors, most participant job performance during Flexiplace was rated as unchanged from their pre-Flexiplace job performance. Across the performance factors, the percentage of participants with unchanged job performance ranged from 54 percent to 79 percent. The percentage for overall performance was 64 percent.

- In all factors except "availability," a significantly ($p < .01$) larger percentage of participants showed improvement than showed a decline. Across the performance factors, the percentage of participants with improved performance ranged from 11 percent to 39 percent (quantity of work produced had the highest improvement percentage). The percentage for overall performance was 33 percent.

- The slightly larger decline percentages for quantity, timeliness, and availability relative to the other factors are not large enough to be meaningful.

TABLE 1

Job Performance Factors and Corresponding Supervisor Ratings: Flexiplace Participants' First Six Months (n=216)

	Ratings (%)		
Factor	Decline	No Change	Improved
Quality	4	69	27
Quantity	7	54	39
Timeliness	12	60	28
Interpersonal Disposition	3	71	26
Independence	1	71	28
Keeping up-to-date	4	79	17
Availability/ Accessibility	15	74	11
Overall Performance	**3**	**64**	**33**

Table 2 summarizes supervisor ratings of participant job performance during the final six months of the project. The results replicate those shown above.

TABLE 2

Job Performance Factors and Corresponding Supervisor Ratings: Flexiplace Participants' Final Six Months (n=102)

	Ratings (%)		
Factor	Decline	No Change	Improved
Quality	5	63	32
Quantity	10	52	38
Timeliness	12	57	31
Interpersonal Disposition	5	70	25
Independence	4	66	30
Keeping up-to-date	1	77	22
Availability/ Accessibility	10	72	18
Overall Performance	**6**	**53**	**41**

Note: For the remaining information on supervisor ratings of participant job performance, ratings on the specified factors of job performance and overall job performance were very similar. Consequently, we will focus discussion on overall job performance.

Baseline Performance Level and Performance Change. Additional evidence of the impact of Flexiplace on job performance can be obtained by comparing Flexiplace performance change with pre-Flexiplace (baseline) performance level.

Figure 1 shows overall job performance change (six months into the pilot) by level of baseline (pre-Flexiplace) performance (performance levels 1 and 2 contained too few participants and, consequently, are omitted from discussion). The graph shows that the percentage of category 3 (satisfactory performance) participants showing improvement during Flexiplace was greater than that in either category 4 or category 5. This is important since, as a group, satisfactory performers have more room for improvement than have higher performing employees.

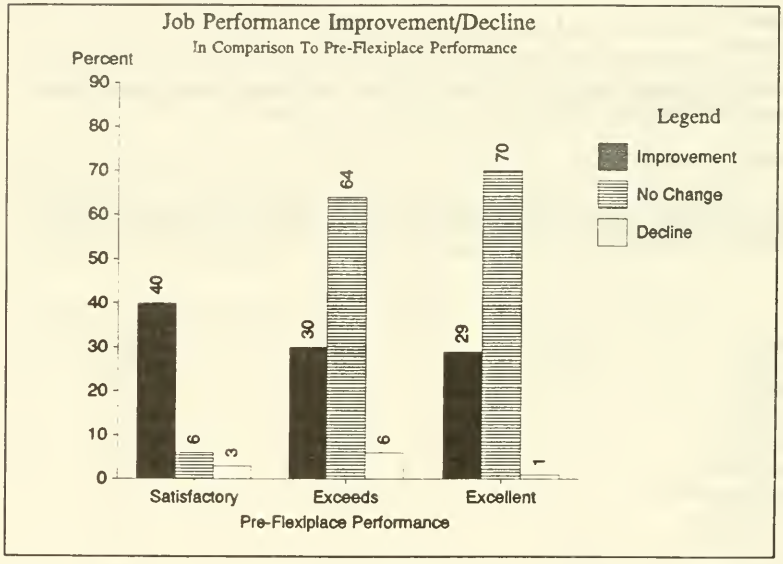

Figure 1. Percentages of Participants Showing **Improvement**, **No Change**, or **Decline** in Flexiplace Job Performance by Categories of Pre-Flexiplace Performance.

Performance Level Ratings. **Table 3** presents the distribution of supervisor ratings of the level of participant job performance for the three rating periods (baseline, six months, and 12 months). These data show very little change in the distribution of performance level ratings across the three rating periods: percentage change, from one rating period to another, for any o the performance levels was 6 percent or less.

TABLE 3

Supervisor Ratings of Level of Participant Job Performance for Three Rating Periods

	Ratings (%)			
Rating Period	Less Than Satisfact.	Satisfact.	More Than Satisfact.	Excell.
Baseline (n=379)	1	17	37	45
6-Months (n=223)	2	19	38	41
12-Months (n=110)	4	22	31	44

Supervisor Ratings of Control Employees. At the time this report was written, we had received 76 baseline ratings of control group employees but only 40 six-month ratings. The size of the latter number is not sufficient to support any solid comparative interpretations. We provide a summary of these data for information purposes with the caution that these data should be regarded as anecdotal. In terms of performance change, supervisors indicated that the job performance for 87 percent (34) of the control employees had not changed during the first six months of the pilot; 10 percent (4) were rated as improved and 1 control employee job performance was rated as declined. **Table 4** presents the distribution of control employee performance levels for the baseline and six-month rating periods. The table reflects a 15 percent drop in the number of control employees with excellent performance level ratings.

TABLE 4

Supervisor Ratings of Level of Control Employee Job Performance for Two Rating Periods

	Ratings (%)			
Rating Period	Less Than Satisfact.	Satisfact.	More Than Satisfact.	Excell.
Baseline (n=76)	0	20	30	50
6-Months (n=40)	2.5	32.5	30	35

Participant Self-Assessments. We asked Flexiplace participants to provide self-assessments regarding their job performance during the project. We provided them with the same performance change rating scales provided to their supervisors. We requested these self-assessments on some of the same job performance factors used with their supervisors; in addition, however, we included introspective factors such as ability to concentrate. **Tables 5 and 6** present participant responses for the initial six months and final six months, respectively, of the project. As noted with supervisor ratings, participant twelve-month self-assessments replicate their six-month assessments. Generally, participants were more likely than their supervisors to see improvement (as opposed to no change) in their job performance since entering Flexiplace. Of particular note are the participants' strongly positive responses to factors such as efficiency (relative amount of time required to accomplish a given amount of work), ability to concentrate while working, and motivation toward work.

TABLE 5

Job Performance Factors and Corresponding Participant Self-Assessments: Flexiplace Participants' First Six Months (n=224)

	Ratings (%)		
Factor	Decline	No Change	Improved
Quality	0	39	61
Quantity	2	29	69
Timeliness	2	38	60
Efficiency	2	17	81
Ability to Concentrate	1	11	88
Motivation Toward Work	0	26	74

TABLE 6

Job Performance Factors and Corresponding Participant Self-Assessments: Flexiplace Participants' Final Six Months (n=115)

	Ratings (%)		
Factor	Decline	No Change	Improved
Quality	1	30	69
Quantity	1	21	78
Timeliness	1	26	73
Efficiency	0	23	77
Ability to Concentrate	0	9	91
Motivation Toward Work	0	19	81

Customer/Client and Control Group Ratings. At the time this report was written, there were only 30 Customer/Client ratings and 40 control employee self-assessments in the data base; these numbers are too small to serve as representative samples of customers/clients or control employees. We are providing an analysis of these data, therefore, for information purposes only and with the same caution applied to the supervisor control ratings above.

The customer/client ratings of participant job performance are very similar to those provided by the supervisors. Most participant job performance was rated as unchanged except for quantity of work produced where most (50 percent) were rated as improved.
In contrast to participant self-assessments, the control employees were more likely to assess their six-months performance as unchanged as opposed to improved.

TABLE 7

Job Performance Factors and Corresponding Customer/Client Ratings: Flexiplace Participants' First Six Months (n=30)

	Ratings (%)		
Factor	Decline	No Change	Improved
Quality	0	80	20
Quantity	7	43	50
Timeliness	7	60	33
Interpersonal Disposition	7	70	23
Availability/ Accessibility	10	73	17
Communication	7	72	21

TABLE 8

Job Performance Factors and Corresponding Control Employee Self-Assessments: First Six Months of Flexiplace Pilot (n=40)

	Ratings (%)		
Factor	Decline	No Change	Improved
Quality	0	63	37
Quantity	2	48	50
Timeliness	7	58	35
Efficiency	2	58	40
Ability to Concentrate	12	58	30
Motivation Toward Work	12	55	33

Summary of Participant Job Performance Ratings. More than 90 percent of the supervisors and 95 percent of the participants judged that Flexiplace job performance was either unchanged or improved relative to pre-Flexiplace performance levels. When considering the implications of "unchanged" job performance ratings, it is important to note that 84 percent of the participants entered the Flexiplace pilot with job performance ratings of at least "exceeds fully successful" (44 percent with "exceeds fully successful" and 40 percent with "outstanding"). For the majority of the participants, therefore, Flexiplace job performance ratings of "unchanged" imply that a very high level of performance was maintained. While little weight can be placed on the customer/client and control group findings (because of their small sample sizes), their general direction was consistent with the overall job performance findings.

WORK-RELATED INTERPERSONAL COMMUNICATION

A key factor that can be affected by Flexiplace and, at the same time, affect the success of this work arrangement is interpersonal communication. Using the same scale as above, we asked participants and their supervisors to judge the impact of Flexiplace on the effectiveness of communication between participants and supervisors and between participants and co-workers. Participants also rated work assignment communications from supervisors. **Tables 9 and 10** present their responses.

TABLE 9

Judgments of Work-Related Interpersonal Communications: Flexiplace First Six Months: P=judged by participants (n=224); S=judged by supervisors (n=215)

	Ratings (%)		
Factor Between Participants and:	Decline	No Change	Improved
Supervisor (S) (effectiveness)\	4	72	24
Supervisor (P) (effectiveness)	5	70	25
Co-workers (S) (effectiveness)	7	76	17
Co-workers (P) (effectiveness)	7	75	18
Supervisor (P) (work assignment process)	2	68	30

TABLE 10

Judgments of Work-Related Interpersonal Communications: Flexiplace Final Six Months: P=judged by participants (n=115); S=judged by supervisors (n=102)

	Ratings (%)		
Factor Between Participants and:	Decline	No Change	Improved
Supervisor (S) (effectiveness)\	6	68	26
Supervisor (P) (effectiveness)	4	69	27
Co-workers (S) (effectiveness)	6	76	18
Co-workers (P) (effectiveness)	10	74	16
Supervisor (P) (work assignment process)	5	70	25

Summary of Interpersonal Communications. The pattern of judgments regarding interpersonal communication is similar to that regarding job performance. More than 90 percent of the respondents, both participants and their supervisors, judged that there was no change in the effectiveness of work-related interpersonal communication; of those perceiving a change, significantly more saw an improvement as opposed to a decline in communication effectiveness.

QUALITY OF PERSONAL LIFE

One of the more popular categories of telecommuting benefits is the participant's quality of life. We asked participants to rate the impact of Flexiplace on various quality of life factors. **Tables 11 and 12** reflect participant responses in this area.

TABLE 11

Participant Ratings of Flexiplace Impact on Quality of Personal Life Issues; First Six Months of Flexiplace (n=224)

	Ratings (%)		
Factor	Decline	No Change	Improved
Time for Family/ Personal Life	2	25	73
Time for Social/ Recreational Activity	2	41	57
Flexibility of			
Dependent Care Options	0	49	51
	0	58	42
Physical Health	1	29	70
Mental Health			
Overall Quality of Life	2	33	65

TABLE 12

Participant Ratings of Flexiplace Impact on Quality of Personal Life Issues; Final Six Months of Flexiplace (n=115)

	Ratings (%)		
Factor	Decline	No Change	Improved
Time for Family/ Personal Life	1	22	77
Time for Social/ Recreational Activity	1	33	66
Flexibility of Dependent Care Options	0	88	12
Physical Health	3	53	44
Mental Health	1	27	72
Overall Quality of Life	0	23	77

Summary of Quality of Personal Life. Participants' responses indicate that Flexiplace has had a positive impact on their quality of personal life. A substantial proportion of the participants responded that there had been at least some improvement attributable to the advent of Flexiplace (only 3 percent or fewer reported a decline). This finding is particularly timely in view of the recent national concern that American adults constantly feel pressed for time and feel that this time pressure has adverse implications for their families (Schor & Leete-Guy, 1992).

QUALITY OF WORK LIFE

Because much of the change and readjustment required for Flexiplace participation is in the work life area, the impact of Flexiplace on participant quality of work life is very important. We asked participants and supervisors about an array of work life issues that can be categorized as work environment (alternative worksite), interpersonal relationships, and job content. **Tables 13 and 14** reflect the responses for these issues.

TABLE 13

Ratings of Flexiplace Impact (First Six Months) on Quality of Work Life Issues: As Judged by Participants (P) (n=224) and Supervisors (S) (n=215)

	Ratings (%)		
Factor	Decline	No Change	Improved
Work Environ. (P)			
Adequacy of Equipment	25	46	29
Adequacy of Furnishings	7	58	35
Adequacy of Space	4	52	44
Work-Related Comfort	1	30	69
Freedom from Distraction	1	22	77
Health-Related Quality	0	34	66
Access to materials/ equipment	37	50	13
Participant Relationships with			
Supervisor (P)	4	73	23
Supervisor (S)	3	73	24
Co-Workers (P)	5	80	15
Co-Workers (S)	4	78	18
Sense of Belonging to Org. (P)	9	70	21
Job Content (P)			
Convenience for Meeting Job Requirements	6	46	48
Challenge of Work Assignments	2	68	30
Chances of Fulfilling Career	3	60	37

TABLE 14

Ratings of Flexiplace Impact (Final Six Months) on Quality of Work Life Issues: As Judged by Participants (P) (n=115) and Supervisors (S) (n=102)

Factor	Ratings (%)		
Work Environ. (P)	Decline	No Change	Improved
Adequacy of Equipment	17	49	34
Adequacy of Furnishings	5	58	37
Adequacy of Space	4	50	46
Work-Related Comfort	2	32	66
Freedom from Distraction	0	28	72
Health-Related Quality	0	37	73
Access to materials/ equipment	29	56	15
Participant Relationships with			
Supervisor (P)	5	71	24
Supervisor (S)	5	74	21
Co-Workers (P)	8	76	16
Co-Workers (S)	4	80	16
Sense of Belonging to Org. (P)	10	72	18
Job Content (P)			
Convenience for Meeting Job Requirements	2	43	55
Challenge of Work Assignments	1	69	30
Chances of Fulfilling Career	6	52	42

Summary of Quality of Work Life. In general, participant ratings of quality of work life were quite favorable, especially in view of the many personal and interpersonal adjustments involved. Regarding interpersonal relationship, job content, and most work environment factors, more than 90 percent of the ratings indicated no change or improved; a much greater proportion of the ratings indicated improvement as opposed to decline.

On the other hand, after the first six months in the project, 25 percent of the participants indicated that their job-related home office equipment was less adequate than that in their conventional offices; 37 percent of the participants indicated that their Flexiplace access to work materials was likewise less adequate than that in their conventional offices. Comparable data after one year in the project were 17 percent and 29 percent, respectively. These responses may be related to low funding allocations for the pilots and procedural difficulties typical in new programs.

PARTICIPANT COSTS

We asked participants to indicate the impact of Flexiplace on various categories of their job-related expenses. **Tables 15 and 16** present their responses in this area.

TABLE 15

Impact of Flexiplace (First Six Months) on Participant Job-Related Costs (n=224)

		Rating (%)	
Factor	Decrease	No Change	Increase
Transportation	74	20	6
Dependent Care	5	91	4
Home Maint.	0	67	33
Miscellaneous	73	20	7
Overall	30	61	9

TABLE 16

Impact of Flexiplace (Final Six Months) on Participant Job-Related Costs (n=115)

		Ratings (%)	
Factor	Decrease	No Change	Increase
Transportation	80	10	10
Dependent Care	17	83	0
Home Maint.	4	62	34
Miscellaneous	75	21	4
Overall	35	53	12

Summary of Participant Costs. More than 70 percent of the respondents reported reductions in job-related transportation and miscellaneous costs and no change in dependent care costs. Approximately one-third of the participants, however, experienced increased home maintenance (probably for utilities) costs due to participating in Flexiplace. In terms of an overall cost assessment, more than half of the respondents indicated no change in job-related costs while nearly a third reported a reduction. That there was no change in dependent care

costs appears to indicate that participants adhered to our guidance that Flexiplace is not a direct substitute for child care.

SICK LEAVE USAGE

Research findings shared by members of the Telecommuting Advisory Council have shown that flexible workplace arrangements can result in reduced usage of sick leave. Reduction in sick leave usage due to Flexiplace participation would benefit both the participant and the organization. An exact measure of sick leave usage, however, requires a fairly involved study beyond the scope and resources of this evaluation. One has to match comparable time periods and control for extenuating circumstances such as unusual or extended illness. To obtain an approximate measure, however, we asked participants to assess their Flexiplace sick leave usage relative to pre-Flexiplace usage. Their responses for 6/12 months respectively were as follows:

- 41%/45% indicated their Flexiplace sick leave usage was generally lower than prior to Flexiplace
- 45%/43% indicated no change in sick leave usage
- 12%/7% could not determine and 2%/5% reported an increase

If this finding is even close to being accurate, organizations using Flexiplace could see a reduction in operating costs as well as increased continuity of work flow (fewer work stoppages due to employee illness). A public health benefit related to this finding is that there would be a reduction of the impact of contagious illnesses since there would be a reduction of employees bringing such illnesses to the conventional office.

TRANSPORTATION IMPACT

The aforementioned research by members of the Telecommuting Advisory Council has identified numerous environmental benefits attributed to the use of alternative worksite arrangements. Most of these benefits are related to the expected reduction of automobile use, especially during rush hours. As with sick leave, an extensive study beyond the scope of this evaluation is required for an accurate reading on transportation impact. The U.S. Department of Transportation is conducting such a study (scheduled for completion in December, 1992). To obtain an approximate assessment, however, we included some general transportation impact questions in our participant survey. **Tables 17 and 18** present the primary findings from responses to these questions.

TABLE 17

Impact of Flexiplace (First Six Months) on Participant Overall Usage of One or More Vehicles (cars, vans, light trucks) (n=224)

	Ratings (%)			
Factor	Substantial Reduction	Minor Reduction	No Change	Increases
During Rush Hours	44	35	20	1
During Non-Rush Hours	18	18	60	4

TABLE 18

Impact of Flexiplace (Final Six Months) on Participant Overall Usage of One or More Vehicles (cars, vans, light trucks) (n=115)

	Ratings (%)			
Factor	Substantial Reduction	Minor Reduction	No Change	Increases
During Rush Hours	53	29	17	1
During Non-Rush Hours	25	10	60	5

Summary of Transportation Impact. The Flexiplace transportation impact responses showed that more than three-fourths of the participants reduced their vehicle usage during rush hours; more than one-third of the participants indicated reduced non-rush hour vehicle usage. These reduced vehicle usage findings are consistent with the earlier reported finding that Flexiplace participants experienced reduced transportation costs as a result of Flexiplace participation. That approximately half of the respondents reported substantial reductions in their rush hour vehicle usage is a promising indication for our national efforts to reduce air pollution, traffic congestion, and energy usage. A recent point of focus for traffic researchers (Mokhtarian, 1991) is determining whether telecommuting-induced reduction in rush hour vehicle usage is offset by increased vehicle usage at other time periods. Our results suggest the answer is no.

ORGANIZATIONAL PERFORMANCE

The job-related impact of Flexiplace is not limited to participants and their supervisors, but affects overall organizational performance as well. The difficulty in separating confounding influences of overall organizational performance (quality, quantity, etc. of work) requires an intensive examination which would burden supervisors and, possibly, interfere with job performance. We decided, therefore, to limit the scope of our examination of organizational performance. We asked supervisors for their judgements regarding organizational performance and Flexiplace feasibility.

Six-month ratings (n=62)/Twelve-month ratings (n=49):

- ▸ Supervising Flexiplace participants
  - 74%/72% Feasible as is
  - 14%/16% Feasible with modifications to Flexiplace
  - 9%/10% Not feasible, too difficult to supervise
  - 3%/ 2% Not sure

- ▸ Meeting organizational performance objectives
  - 71%/76% Feasible as is
  - 17%/12% Feasible with modifications to Flexiplace
  - 8%/10% Not feasible
  - 5%/ 2% Not sure

- ▸ Effectiveness of participant communication with co-workers compared with pre-Flexiplace effectiveness
  - 76%/76% No change
  - 17%/18% Improved
  - 7%/ 6% Decline

- ▸ Quality of participant relationship with co-workers compared with pre-Flexiplace quality
  - 78%/80% No change
  - 18%/16% Improved
  - 4%/ 4% Decline

Summary of Organizational Performance. Supervisory judgments on Flexiplace and organizational performance are important because they present a view of the collective functioning of participants and non-participants. The above data combined with the data discussed under "Overall Reactions to Flexiplace" (p. 35), suggest that Flexiplace is a feasible and desirable option for most organizations. More than 70 percent of the supervisors indicated that Flexiplace was feasible in terms of meeting organizational objectives and supervising participants. This information is based on a relatively small sample of

organizations and should be interpreted and applied cautiously. Finally, our focus group summaries and information from agency Flexiplace coordinators suggest that some of the modifications desired by supervisors include more supervisor control over selection and number of participants, more technical guidance on technological issues, more flexibility in agency-specified procedures, and increased agency funding for program operation (primarily for equipment for home use: computers, modems, etc.).

ORGANIZATIONAL COSTS OF FLEXIPLACE

We asked supervisors to assess costs incurred by their organizations as a direct result of Flexiplace activity. Specifically, we requested that supervisors provide estimates of cost differences, if any, between what was spent during Flexiplace participation and normal expenditures absent Flexiplace. We provided the following categories of expense for their responses:

- Equipment
- Furnishings
- Training and Development
- Mail/Shipping
- Maintenance/Repair
- Premium Pay
- Other Items

We also provided the following cost response scale:

A. $ 0	F. 1100-1400
B. 100-200	G. 1500-1900
C. 300-400	H. 2000-3000
D. 500-700	I. 4000-5000
E. 800-1000	J. 6000 or more

A substantial majority of the supervisors (81 percent - first six months and 86 percent - final six months) reported spending less than $200 (total) on equipment. The remaining supervisor responses on equipment costs were spread evenly among the other cost levels. Regarding the other expense categories, 90 percent or more of the supervisors indicated no additional expense due to Flexiplace.

The main cost finding was that more than 80 percent of the supervisors reported no additional expense due to Flexiplace. This finding may require further study since it may be indicative of under-funding typical for new initiatives. Also, in the long run with an expanded and broader spectrum of participants, there may be increased requirements for equipment. It should be noted, however, that the future is likely to bring increased expenditures for new equipment at conventional worksites as well. Such increased requirements may lead to Flexiplace operating costs which are higher than those currently

experienced. On the other hand, we anticipate long run reductions in facility costs with expanded utilization of Flexiplace. The ability of agencies to implement successful Flexiplace pilots with minimal funding, however, is a strong indication of the applicability of Flexiplace to diverse organizations.

OVERALL REACTIONS TO FLEXIPLACE

To assess the overall reaction of participants and supervisors to Flexiplace, we asked both groups to indicate the desirability of Flexiplace. We asked them to base their responses on an overall consideration of all relevant factors. Participants responded as follows:

Six months (n=224)/Twelve months (n=115)

- 68%/72% Very desirable, as is
- 22%/17% With some modification, very desirable
- 5%/10% Desirable, as is
- 4%/ 1% With some modification, desirable
- 1%/ 0% Other

From supervisors, we requested opinions on the desirability of further implementation of Flexiplace. Responses were as follows:

Six months (n=62)/Twelve months (n=49)

- 40%/54% Desirable, as is
- 39%/26% Desirable with minimal refinement
- 5%/ 6% Desirable with substantial refinement
- 9%/10% Undesirable
- 7%/ 4% Other

Summary of Overall Reactions. Considering all issues, more than three-fourths (79 percent after 6 months; 80 percent after 12 months) of the supervisors and nearly all (99 percent after 6 months; 100 percent after 12 months) of the participants judged Flexiplace to be a desirable option requiring, at most, minimal refinement.

FOCUS GROUP FINDINGS

The following findings are based on content review and consolidation of the focus group reports. From an analysis standpoint, the primary themes evident in focus group discussions of Flexiplace experiences appear to be consistent across agencies. We have categorized our analysis of the focus group information into three areas: positive aspects, negative aspects, and general observations.

POSITIVE ASPECTS

PARTICIPANTS

In general, Flexiplace participants were very positive and enthusiastic about their experience. The most commonly mentioned positive aspects of participation were:

-fewer distractions and interruptions
-more comfortable work environment
-increased ability to concentrate
-improved work performance/productivity
-reduced stress
-reduced costs

Additionally, several focus groups mentioned that Flexiplace improved participant quality of family life and control over personal time.

SUPERVISORS

While not as enthusiastic as the participants, the supervisors were, nonetheless, generally positive about their experience in the program. Most indicated that the pilot was going well, that there was no decline in participant job performance, and that participant morale improved as a result of participation in the program. Several expressed a desire to add more participants to the project.

NEGATIVE ASPECTS

Both participants and supervisors were very forthcoming in pinpointing and discussing Flexiplace problem areas. Participants and supervisors were concerned about the following issues:

EQUIPMENT/LOGISTICS

There was much discussion about the adequacy of equipment and logistical support. The focus groups suggested that the project would function more effectively with increased support in this area. For example, one frequent complaint focused on the need for more lap

top or other computers for home use. There were also telecommunications problems due to a lack of long distance calling cards, dedicated telephone lines, answering machines, etc. A few complaints focused on the need for procedures/support to facilitate the transportation of large volumes of work materials to and from home.

REACTIONS OF CO-WORKERS

There were two types of problems associated with non-participating co-workers: reluctance to call participants at home and sensitive/resentful reactions to not being in the program. In some cases, these problems diminished without supervisory intervention while in others, supervisory involvement resolved the problem. Examples of helpful supervisory response to non-participants included:

- Providing them with detailed information on the program,
- Explaining how and why participants were selected, and
- Explaining the prospects and specifics of eventual expansion of the program.

INFLEXIBLE AGENCY-BASED OPERATING PROCEDURES

Participants and supervisors at some agencies felt that agency-specified operating procedures (selection, scheduling, etc.) were too restrictive and inflexible. They felt that supervisors should have more freedom to tailor the program to their needs and to select participants.

WORK SCHEDULE

Many participants thought that the number of work-at-home days per week allowed by their agency was too few for effective utilization of the program.

SUPERVISOR BEHAVIOR

Some participants expressed an initial concern that their supervisors were too anxious, rigid, and controlling and that, in some cases, supervisors expected increases in participant job performance on their Flexiplace days.

WORKING MORE THAN NORMAL HOURS

Participants reported working more than their normal tours of duty on their Flexiplace days. Fair Labor Standards ramifications of Flexiplace and working more than normal tours of duty are covered in the operating guidelines.

GENERAL OBSERVATIONS

- Participants and supervisors stated that adequate regular planning and preparation on their part were important for successful completion of job assignments while in Flexiplace.

- After the initial two-to-three sessions, the involvement, vitality, and usefulness of the focus groups appeared to diminish.

- Participating organizations appeared to resolve most adjustment problems (supervisor and co-worker sensitivity, scheduling issues, etc.) in two-to-three months.

SUMMARY OF FOCUS GROUP FINDINGS

The focus group reports provided an evaluation perspective different from that of survey questionnaires and, therefore, served to clarify and/or add to the material obtained from the survey. The focus group findings that were positive tended to mirror findings from the survey material. The negative findings were mostly issues surrounding organizational adjustment to Flexiplace, such as obtaining equipment, adjusting co-worker relationships, and establishing schedules. These findings provided us with additional information that should be included in our guidelines for participating organizations. Our general observations tended to corroborate the finding that issues associated with organizational adjustment to Flexiplace represent the primary areas of difficulty for Flexiplace operation. There appears, however, to be about a two to three month period in which organizations resolve or begin to resolve these issues. Likewise, the usefulness of focus groups appears to begin to diminish after three months.

FLEXIPLACE MANAGEMENT TEAM OBSERVATIONS

The FMT has made some evaluation observations which do not appear elsewhere in our data.

AGENCY MANAGEMENT RESPONSE

From our viewpoint, the most difficult and challenging aspect of this whole project is to encourage management to see the benefits of participating in the Flexiplace program. We base this assertion on information received from agency coordinators, Flexiplace focus groups, personnel directors, the "Survey of Federal Employees", public and private sector research findings, and from our own experience implementing Flexiplace. It appears that management reluctance is caused by anxiety over change, fear of loss of control, fear of union involvement, negative attitudes toward subordinates, and/or general inertia. In addition to hindering efforts to establish Flexiplace pilots, management reluctance also hindered efforts to disseminate Flexiplace information to Federal employees.

Reluctant managers were unmoved by information on the numerous benefits and success stories associated with private sector and State/local government telecommuting programs. However, they appeared to benefit from small meetings conducted by Flexiplace coordinators who addressed the managers' concerns. They were also responsive to information on the experiences of similar Federal organizations already participating (including testimonials from participants and supervisors), to mandates from top management, and to organizational contingencies (such as loss of workspace or serious illness of valued employees).

While we have focused on management reluctance, it is important to note that we received a substantial amount of management support and cooperation without which we could not have conducted this program successfully. Also, now that the Flexiplace program has a successful track record in the 13 participating agencies, managers in other agencies are displaying greater interest in participation. Finally, we fully expect that the findings in this report will have a persuasive impact on management thinking.

FLEXIPLACE TRAINING

We designed Flexiplace training for use with class-size groups. Initially, this design worked satisfactorily. As the project continued, however, agencies began to approve participation for one or two individuals at a time as opposed to the initial implementation of larger numbers of participants. This presented a problem because agencies had to either delay participation until sufficient numbers were available for a training class or implement without training. Consequently, we developed and are piloting an additional training package designed for self-administration to accommodate one or two participants at a time.

PROGRAM DOCUMENTATION

We found that the expenditure of resources in preparing the operating guidelines was well-invested. These guidelines provided the reference necessary to assist and even influence organizational participation.

We also found that our newsletter was extremely useful as a marketing tool as well as a source of information to participants and to the public. We continue to receive numerous requests for the operating guidelines as well as the newsletter.

A list of other documents produced in support of Flexiplace is provided at Appendix E.

AGENCY COORDINATORS

We observed that the quality of the Flexiplace coordinators was a critical ingredient for the success of the pilot program. In some cases, the success or lack thereof was directly attributable to the capability and motivation of the individual designated to be the agency coordinator.

RECRUITING AND RETENTION

As mentioned at the beginning of this report, one of the initial reasons for establishing Flexiplace was to improve the Federal Government's ability to recruit and retain capable employees. In the operating guidelines we specify that Flexiplace should not be used with trainee-level employees; it may be used, however, with new non-trainee employees; some such new employees may require an initial orientation period before beginning Flexiplace. Flexiplace may be used to target new labor markets such as severely disabled individuals, individuals with other personal constraints, and individuals who live a long distance from the job site.

There is a very beneficial linkage between employee enthusiasm for the program, productivity, recruitment, and retention. Employee enthusiasm for Flexiplace may improve the organization's ability to retain quality employees. Higher retention rates mean fewer situations of productivity loss due to the hiring/training/adjustment of new employees. Employee enthusiasm for the program may also improve the organization's ability to recruit quality employees. Recruiting quality employees means maintaining/improving overall organizational productivity.

While the size and newness of the project prevent us from making a direct and meaningful assessment of Flexiplace impact on recruiting and retention, we have information which indirectly bears on this issue.

RECRUITING

After information on Flexiplace appeared in various media, we began to receive a continuing flow of resumes, phone calls, and written requests seeking Flexiplace jobs. Many of these requests come from individuals currently employed in the private sector or in state/local government organizations. We also receive such requests from disabled individuals as well as advocacy groups for disabled employees.

RETENTION

The "Survey of Federal Employees" discussed in the preceding section included items which, indirectly, bear on Flexiplace and retention. When asked about Flexiplace participation, 950 of the 32,000 respondents indicated that they were participants. When asked about plans for seeking a new job, significantly (chi-square=45.8, $p<.01$) more of the Flexiplace respondents (59 percent) than non-Flexiplace respondents (48 percent) answered 'no'. Also, significantly more (chi-square=38.9, $p<.01$) of the Flexiplace respondents (64 percent) than non-Flexiplace respondents (54 percent) agreed that the Federal Government is a great place to work. Care must be exercised in interpreting and applying these responses; they may be subject to pre-selection bias and/or to erroneous indication of Flexiplace participation.

SUMMARY OF RECRUITING AND RETENTION

While the newness and limited size of the Flexiplace project prevented us from assessing its impact on recruiting and retention, anecdotal and indirectly-related information suggests that lexiplace may have a positive impact in this area.

ADDITIONAL MANAGEMENT ISSUES

In this section, we will focus on the additional management issues of oversight, costs, communication/access, and general pitfalls. These are difficult issues and, while available data are informative, they will not support definitive conclusions in these areas. When utilization of Flexiplace has been sufficiently expanded, these issues will provide excellent research topics.

OVERSIGHT OF EMPLOYEES

One of the most commonly discussed management concerns is oversight of Flexiplace employees, effective oversight systems, and types of work that are amenable to such oversight. Our response is that managers should manage by results, that is, they should focus their oversight on the work produced by the employee as opposed to directly overseeing the employee. Utilizing such results, the manager can certify time and attendance in a legally approved manner. Conceptually speaking, the application of management by results is a straightforward process with production-oriented jobs in which employee output is countable over relatively short periods of time (claims processed per day, e.g.) For jobs that are not production-oriented, regular use of substantive progress reporting is recommended. Employees in both types of jobs participated in the pilot. Most of the participants, however, were in non-production-oriented jobs. While our data does not confirm actual use of management by results, we found no indication of supervisor problems managing Flexiplace employees. Finally, we do not recommend the use of automated monitoring systems to track Flexiplace employee performance (see pitfalls).

COSTS

Due to the highly variable nature of the relevant factors and to the difficulty of quantifying many of them (morale, e.g.), it is not practical, currently, to venture a meaningful judgement of Flexiplace cost-effectiveness. Supervisor responses to the Flexiplace surveys indicate that Flexiplace program costs are highly variable and generally depend on the individual circumstances of the piloting organization. The data show that Flexiplace can be operated on a shoestring budget without disrupting the organization's ability to accomplish its mission. This is due, at least partially, to the availability of cost saving options such as utilization of surplus or employee-owned equipment, establishment of procedures for lending/rotating equipment among Flexiplace participants. On the other hand, some agencies with larger budgets have spent larger sums of money purchasing new equipment for participants.

On the other side of the ledger, Flexiplace utilization has created numerous opportunities for operating cost savings/cost avoidance. Long term cost savings for agencies using Flexiplace can result from reduced facility space and facility maintenance requirements. More immediate cost savings can arise from improved productivity and reduced use of sick leave.

Our data has shown evidence of both. Flexiplace potential for enhanced recruiting and retention can lead to cost avoidance from reduced requirements for new employee recruiting, hiring, and training resources.

COMMUNICATIONS/ACCESSIBILITY

A frequent concern expressed by prospective managers of Flexiplace employees is in the area of communications and access between the organization and the participant. Adequate communications and access can be maintained through the use of proper pre-Flexiplace preparation which includes establishing procedures and schedules, core working/availability hours, and appropriate safe-guards and back-ups. This preparation should also include consideration of circumstances involving non-Flexiplace employees as well as accommodations for unexpected organizational needs. The resulting details should be documented in the Flexiplace work agreement to ensure understanding by all parties. We addressed these issues in the Flexiplace operating guidelines and, also, in the Flexiplace training administered to participants and their supervisors. According to the survey findings and focus group responses, supervisors were successful in maintaining or improving the effectiveness of their communication with Flexiplace participants: 70 percent of the supervisors indicated no change in the effectiveness of their communication with Flexiplace participants and 25% indicated an improvement.

PITFALLS

Based on information from the focus groups, management team observations, and reports from agency Flexiplace coordinators, we have developed the following list of potential pitfalls.

- Establishing rigid agency-wide operating policies and procedures which do not allow supervisors and participants room to adjust the program to suit their needs. Flexibility within reasonable legal parameters is a key ingredient in establishing agency policies. Rigidity, on the other hand, can ruin the experience for participating organizations.

- Allowing problem employees in the program. Unless there is a careful diagnosis indicating that flexiplace is a specific remedy, problem employees will remain problems in the program and jeopardize the program for others.

- Allowing employees in the program without adequate Flexiplace training (orientation). Employees and their supervisors need to understand the relevant policies, procedures, and other factors associated with successful operation of Flexiplace. Without such understanding, unnecessary problems can occur which put a strain on the operation of the program.

- Not informing and working with unions in a timely manner. Agencies planning to allow union represented employees in the program should follow our guidelines for

including unions in the process as early as possible in the planning stages. Unions perceiving they have been bypassed or caught off-guard are not likely to respond favorably to the implementation effort.

- Starting the programs without proper planning and preparation. Supervisors should not begin the program until they have worked out operating procedures, expectations, schedules, lines of communication, etc. with both participants and non-participants. Premature start-up places unnecessary strain on an organization which is already trying to adjust to a new circumstance.

- Coercing managers to participate. Agencies should avoid coercing unwilling managers to allow their subordinates to participate. This leads to serious problems with employee/manager relationships and sometimes to management reactions which stifle and/or endanger the program.

- Automated monitoring of employee performance (monitoring an employee's key strokes and time on/off a computer via electronic devices, e.g.). This should not be done. Such monitoring has been shown to create stressful working conditions, is the subject of proposed Congressional legislation banning such monitoring, and is contrary to the management by results philosophy of Flexiplace.

- Allowing Flexiplace to inconvenience and/or unfairly burden non-participating employees. Inadequate planning and preparation can lead to this situation which causes both morale and job performance problems.

CONCLUSION

We have reached a series of conclusions based on findings from a broad range of sources: participants, supervisors, unions, management team observations, and focus groups. These findings covered a comprehensive range of issues and factors relevant to Flexiplace.

- Using measures in areas such as job performance, motivation, quality of life, and costs, indications were that Flexiplace, using employees with proven performance, was a success. This is not surprising since the PCMI task force consolidated the designs of proven successful telecommuting programs and refined the result to suit the Federal environment. Due to their small project participation numbers, caution should be exercised in generalizing our findings and conclusions to younger, lower-graded employees. According to the findings, with minor refinements in guidance materials and utilization with proven, successfully performing employees, Flexiplace is ready for general implementation in the Federal personnel management system.

- Flexiplace is a significant and effective addition to Federal efforts to help employees improve their quality of work and family lives and otherwise improve their handling of work/family issues. Participating employees were very positive about their Flexiplace experience. Their indications of improved motivation toward work, quality of life, health and stress levels were impressive.

- From a budgetary standpoint, Flexiplace proved to be a versatile mechanism. Most participating organizations spent very little money on their pilot programs. That some participants experienced declines in access to materials and adequacy of equipment neither impaired job performance nor participant enthusiasm for the project. The fact that the pilot worked well with minimal funding is very encouraging. In some cases, however, increased funding would be very beneficial for Flexiplace. Such funding could relieve equipment/materials difficulties and make Flexiplace more effective than it already is.

- Flexiplace shows promise as a mechanism for reducing Federal operating and health care costs. Indications of improved job performance (productivity), reduced usage of sick leave (benefits), improved health (health care), and reduced vehicle usage (transportation/energy issues) for a significant portion of the participant group suggest long run reduction in costs associated with these areas.

- Two primary and significant areas of problems were revealed in the pilot: management reluctance to participation and organizational adjustment to Flexiplace. Both problems are rooted in the difficulty of institutional behavior change.

  A related problem is that, because of reservations and/or misperceptions, many managers are not disseminating information about the program (OSIS, 1992). Despite efforts to market the program (FPM letters, newsletters, conference presentations, agency visits, regional visits, videos, success stories, etc.) and despite success in obtaining media

attention, we continue to receive complaints that employees are not being informed or are being misinformed about the existence of Flexiplace. According to a December survey of approximately 30,000 Federal employees (conducted by OPM), more than 70 percent of Federal employees indicated that they did not know about the pilot project. The survey also indicates that managers and supervisors, especially Senior Executive Service personnel, are more likely than are subordinates to be aware of the project.

Flexiplace implementation requires awareness, sensitivity, persistence, and effective planning to meet the challenge provided by these problem areas.

- We were not surprised that participants were more positive in their evaluation of Flexiplace than their supervisors. The generally positive response of the supervisors, however, lends credibility to the conclusion that Flexiplace is a desirable addition to the Federal personnel management system. Further credibility is provided by the fact that the findings presented here are consistent with the general trend of evaluation findings on Flexiplace (telecommuting) programs.

Note on Interpretation of the Evaluation Information. Questions may arise as to whether these findings can be generalized to the Federal workforce. As noted earlier, the participants in this project were not selected on a random basis and, therefore, may not be completely representative of the Federal population. In fact, the number of lower graded, younger participants in our pilot group was noticeably small. This fact is reflected in our conclusions and recommendations. Also, one might conclude that the results are biased because the participants and their supervisors were volunteers who may have had positive expectations of the Flexiplace experience and who may have been motivated by a desire to ensure the success of the project.

As with the pilot project, participation in general (post-pilot) Flexiplace arrangements will be voluntary and will be limited to employees with proven performance records. Additionally, in both the pilot and general arrangements, the participant is (will be) aware that decreased job performance will lead to removal from the program. Thus, the resulting expectations of pilot and general Flexiplace participants should be reasonably similar.

RECOMMENDATIONS

Having reviewed the available information, our observations, and the immediate and long term requirements for successful implementation, the FMT recommends the following actions:

1. That the PCMI ▸

   - ▸ Endorse the concept of Flexiplace, affirm that agencies have the authority to enter into Flexiplace arrangements, yet alert agencies that Flexiplace is not appropriate in all circumstances;
   - ▸ Publicize the results of the Flexiplace Pilot (home-based component) and take steps to increase Federal employee awareness of Flexiplace;
   - ▸ Formally acknowledge agencies that participated in the pilot, managers who volunteered their organizations, and participants themselves for a job well done;
   - ▸ Examine the utility of providing incentives for managers who establish Flexiplace arrangements in their organizations;
   - ▸ Request legislation that repeals the law prohibiting Federal agencies from purchasing telephone equipment for employee residences;
   - ▸ Urge organizations such as the National Capital Planning Commission, GSA, and agency procurement offices to include Flexible workplace arrangements in their Federal building planning and technology purchasing plans.

2. That OPM provide support and technical assistance to agencies establishing Flexiplace arrangements; this support should include providing guidance in the Federal Personnel Manual.

3. That GSA publish guidance in the Federal Information Resources Management Regulations on the use of computers and telephones for Federal employees working in alternative worksites.

REFERENCES

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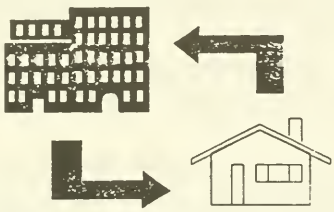
APPENDICES A, B, C, AND D

FLEXIPLACE SURVEY QUESTIONNAIRES

APPENDIX A

The Federal Flexible Workplace Project

FLEXIPLACE



FW Employee Background Questionnaire

Evaluation Conducted by the
U.S. Office of Personnel Management

The Federal Flexible Workplace Project, or "Flexiplace", is an 18-month pilot study sponsored by the President's Council on Management Improvement (PCMI) and designed to examine the feasibility of alternative workplace arrangements in the Federal government. Any questions regarding the content of this questionnaire should be directed to your agency Flexiplace coordinator. Further information can be obtained from:

Wendell Joice, PhD	Todd Wheeler	Ernest Paskey
(202) 606-2329	(202) 606-2130	(202) 606-0860
FTS 266-2329	FTS 266-2130	FTS 266-0860

Office of Personnel Research & Development
U.S. Office of Personnel Management
1900 E Street, NW
Room 6462
Washington, D.C. 20415

FLEXIBLE WORKPLACE PROJECT

FLEXIBLE WORKPLACE EMPLOYEE BACKGROUND QUESTIONNAIRE, INSTRUCTIONS, AND SAMPLE ANSWER SHEET

Dear Flexible Workplace Participant,

Thank you for agreeing to participate in this very worthwhile project. As a participant, you will be instrumental in determining the feasibility, desirability, and optimal design for Flexible Workplace (FW) as an alternative work arrangement for Federal employees.

In order to evaluate the FW experience, we are asking that you provide us with information now and at the end of each 6-month period in this one-year project. The requested information will focus on general personal characteristics as well as your perceptions and opinions. Each 6 months, the evaluation forms will be sent to you, accompanied by a pre-addressed return envelope; when you have completed the forms, place them in the envelope and mail to the project team.

Please use the answer sheet to provide the requested information. If you have any questions or problems, contact your agency coordinator whose name and phone number should be listed on this package.

PLEASE COMPLETE ALL FORMS AND MAIL IN THE RETURN ENVELOPE WITHIN 5 DAYS OF RECEIPT. YOUR RESPONSES ARE NOT SUBJECT TO AGENCY REVIEW, WILL REMAIN STRICTLY CONFIDENTIAL, WILL BE AGGREGATED WITH OTHER PARTICIPANT DATA, WILL BE USED FOR RESEARCH PURPOSES ONLY, AND WILL BE MAILED, BY YOU, DIRECTLY TO THE PROJECT EVALUATION TEAM. ACCESS TO YOUR INDIVIDUAL RESPONSES WILL BE LIMITED SOLELY TO THE PROJECT EVALUATION TEAM.

PRIVACY STATEMENT

The U.S. Office of Personnel Management is authorized by sections 1103, 1302, and 3301 of title 5 of the U.S. Code to collect the information requested in this document. The information you provide will be aggregated with similar information from other participants and used, in summary form, to evaluate this project. We are requesting your name in order to track, analyze, and categorize your responses during the project. No information of an individually identifiable nature will be disclosed. Furnishing your response to this document is voluntary; without your response, however, we will be unable to evaluate the feasibility of the flexible workplace option.

ANSWER SHEET INSTRUCTIONS

(USE THE SAMPLE ANSWER SHEET AS A GUIDE)

I. ON THE ANSWER SHEET:

- o Read instructions on the front of the answer sheet.
- o Use a # 2 pencil only.
- o Code your name, birth date, sex, and grade (GS or WG-level) in the indicated spaces.
- o Code your 10-digit PROJECT CODE in the grid labelled IDENTIFICATION NUMBER. Your project code should have been provided to you by your agency coordinator or by your supervisor. If you don't have your code, check with your supervisor or your coordinator.
- o Code your occupational series in the grid labelled SPECIAL CODES. Use columns M through P for 4-digit occupational series or columns N through P for 3-digit occupational series. DO NOT USE columns K or L for coding occupational series (see example on sample answer sheet).
- o Code your responses to the questionnaire items in the appropriate spaces on the answer sheet.
- o At the end of this questionnaire, you will be asked to skip to answer sheet item #120 and code response "A". This code will be used by our computer program to determine which type of evaluation form is being processed.

II. When you have completed the questionnaire, check your answer sheet to ensure that you have coded all the required information and that you have followed the marking instructions for errors and stray marks.

III. Place your answer sheet in the pre-addressed envelope (DO NOT FOLD THE ANSWER SHEET) and mail.

IV. DO NOT SUBMIT PHOTOCOPIES OF YOUR COMPLETED ANSWER SHEET

1. Marital/Family/Household Living Status

   A. Married (living with spouse) or not married but living in a family-type relationship with another adult
   B. Single, separated, divorced, or widowed (not living in a family type relationship with another adult)
   C. Other _____

2. Do you have an aged parent(s), or other adult(s), for whom you provide care, and who requires physical assistance in maintaining his or her health/welfare?

   A. Yes
   B. No

3. Number of pre-school children under your care and living with you

   A. 0
   B. 1
   C. 2
   D. 3
   E. 4 or more

4. Number of dependent children, age 5 through 12, living with you

   A. 0
   B. 1
   C. 2
   D. 3
   E. 4 or more

5. Number of dependent children, age 13 through 18, living with you

   A. 0
   B. 1
   C. 2
   D. 3
   E. 4 or more

6. While participating in the FW project, will you be living with one or more children or adults who, because of a handicapping condition, are fully or partially dependent upon your physical assistance or who otherwise require your personal attention for their health and physical well-being?

   A. Yes
   B. No

7. Indicate your racial category

   A. American Indian or Alaskan Native
   B. Asian or Pacific Islander
   C. Black, non-Hispanic
   D. White, non-Hispanic
   E. Hispanic

8. Pay Plan

   A. GS (General Schedule)
   B. GM (General Merit)
   C. WG (Wage Grade)
   D. WL (Wage Leader)
   E. Other _____

9. Years in current position (The position with your current general job duties; do not confuse with grade or step)

   A. Less than one year
   B. 1 to 2 years
   C. 3 to 4 years
   D. 5 to 6 years
   E. 7 to 8 years
   F. 9 or more years

10. Total years of work experience (Include Federal and non-Federal; full and part-time, paid and volunteer experience)

   A. Less than one year
   B. 1 to 2 years
   C. 3 to 4 years
   D. 5 to 6 years
   E. 7 to 8 years
   F. 9 to 10 years
   G. 11 to 12 years
   H. 13 to 15 years
   I. 16 to 18 years
   J. 20 or more years

11. Your current position

   A. Clerical/Secretarial, non-supervisor
   B. Professional, non-supervisor
   C. Technical or Administrative, non-supervisor
   D. Supervisor
   E. Manager (a person who supervises supervisors)
   F. Other _____

12. Does the major portion of your job have a set number (quota) of specific work products that you are routinely expected to complete (eg., cases, forms) in a set period of time?

   A. Yes
   B. No

DEFINITION: In this questionnaire, "conventional worksite" refers to the worksite where you regularly performed your job prior to the flexiplace project.

13. Conventional work site location

A. Downtown, central, or business area of a city
B. Within city, but not in central or business area
C. Nearby suburbs of a city
D. Rural or remote non-urban area
E. Other _____

14. Availability of free parking to you at your conventional work site

A. Abundant
B. Some
C. Very little
D. None

15. Convenience of public transportation from your residence to your conventional work site

A. No public transportation
B. Very inconvenient
C. Somewhat inconvenient
D. Somewhat convenient
E. Very convenient

16. Nature of traffic flow from your residence to your conventional work site at times you are traveling to work

A. High traffic with frequent gridlock
B. High traffic, but flows smoothly
C. Moderate traffic
D. Minimal traffic

17. Regarding amount of travel time, indicate your primary means of travel from your residence to your conventional worksite?

A. Automobile (car pool)
B. Automobile (driving alone)
C. Motor cycle
D. Public transportation (bus, subway, train, etc.)
E. Bicycle
F. Walking
G. Other _____

18. Indicate the amount of time typically required for your travel, one-way, from your residence to your conventional worksite. (Select the response closest to your answer)

    A. 1/2 hour
    B. 1 hour
    C. 1 1/2 hours
    D. 2 hours
    E. 2 1/2 hours
    F. 3 or more hours

19. Indicate the type of work station you utilized at your conventional worksite

    A. Private cubicle
    B. Private office
    C. Semi-private office or cubicle (containing two or more workers)
    D. Open-space work area
    E. Other

20. Do you have a physical disability that requires special work-related arrangements?

    A. Yes
    B. No

21. Is your interest in participating in this project related to a physical disability that you have?

    A. Yes
    B. No

BASED ON YOUR PERSONAL OPINION AND EXPERIENCE DURING THE LAST SIX MONTHS PRIOR TO THE FLEXIPLACE PROJECT, RATE THE FACTORS IN ITEMS 22 THROUGH 58. USE THE FOLLOWING SCALE FOR YOUR RESPONSES:

A	B	C	D
Excellent	Good	Fair	Poor

---

22. Quality of your work

23. Quantity of your work

24. Timeliness of your completion of work assignments

25. Your efficiency (relative time required to accomplish a given amount of work)

26. Your interest in your work

A Excellent	B Good	C Fair	D Poor

27. Level of creativity or initiative regarding your work

28. Ability to concentrate while working

29. Your overall motivation toward work

30. Your general worker status as perceived by others in your organizational unit

31. Your chances for a fulfilling career

32. The effectiveness of the process by which your supervisor assigns work to you

33. The fairness of distribution of work assignments in your organizational unit

34. Assigned time frames for completing work assignments

35. The challenge of your current work assignments

36. Convenience of access to job-related material/equipment

37. Quality of your relationships with co-workers

38. Quality of your relationship with your supervisor

39. Effectiveness of your communication with your supervisor

40. Convenience of your communication with your supervisor

41. Effectiveness of your communication with fellow employees in your organizational unit

42. Effectiveness of work-related communication with individuals from other organizations

43. Convenience of your schedule of work hours relative to meeting work-related requirements and interests

44. Convenience of your schedule of work hours relative to meeting your personal life requirements and interests

45. Your sense of belonging to your organization

46. Your self-esteem as a worker

A	B	C	D
Excellent	Good	Fair	Poor

YOUR PERSONAL LIFE PRIOR TO THE FLEXIPLACE PROJECT

47. Quantity of time available for family/personal life

48. Quantity of time available for social/recreational activity

49. Overall quality of family/personal life

50. Flexibility of dependent care options

51. Your physical health

52. Your mental health

YOUR WORK ENVIRONMENT (CONVENTIONAL WORKSITE)

53. Adequacy of work-related equipment including telecommunications and computer equipment

54. Adequacy of work-related furnishings

55. Adequacy of work-related space

56. Comfort of your work station

57. Freedom from distraction at your work station

58. Health-related quality of your work environment

YOUR INDIVIDUAL COSTS PRIOR TO THE FLEXIPLACE PROJECT

USE THE FOLLOWING SCALE FOR YOUR RESPONSES TO ITEMS 59 TO 63

A	B	C	D
Very High	High	Moderate	Low

59. Job-related transportation costs (day-to-day)

60. Job-related miscellaneous costs (day-to-day)

61. Dependent care costs

62. Home maintenance/utility costs

63. Overall costs (other than one-time costs for equipment, furnishings, facilities, etc.)

FOR ITEMS 64-73, SELECT THE RESPONSE CLOSEST TO YOUR INTENDED ANSWER REGARDING YOUR EXPERIENCE PRIOR TO FLEXIPLACE

---

64. Indicate your Federal employment status

A. Permanent appointment/full-time schedule
B. Permanent appointment/part-time schedule
C. Temporary appointment/full-time schedule
D. Temporary appointment/part-time schedule
E. Other _____

65. If you were a part-time Federal employee, indicate your typical work schedule

A. 5 days per week
B. 4 days per week
C. 3 days per week
D. 2 days per week
E. 1 day per week
F. Less than 1 day per week
G. Not employed part-time
H. Other_____

66. Was your schedule of work hours an alternative work schedule (AWS) which permits you to take certain week days off as a result of working extra hours on other days?

A. Yes
B. No

67. Which one of the following applies to your schedule of work hours prior to flexiplace?

A. Permanent or rotating shifts occurring primarily between 6 p.m. and 7 a.m. on weekdays or weekends
B. Primarily normal business hours (between 7 a.m. and 6 p.m., no weekends)
C. Primarily normal business hours (including both weekdays and weekends on a regular basis)
D. Mixed and/or rotating shifts with approximately 1/3 to 1/2 of work hours between 7 a.m. and 6 p.m.
E. Work hours are highly variable and frequently do not occur in continuous shifts
F. Other (specify) _____

68. Was your typical schedule of work hours variable (flexible) in such a way that you could frequently (once a week or more) change your schedule by an hour or more?

A. Yes
B. No

69. Which one of the following statements applies to your typical schedule of work hours prior to flexiplace?

A. Work hours are primarily determined by me but, once established, may not vary
B. Work hours are primarily determined by me and may vary according to my determination
C. Work hours are primarily determined by my supervisor and/or agency management
D. Work hours are primarily established through negotiated and/or mutual agreement between me and my supervisor and, once established, may not vary
E. Same as D except work hours may vary
F. Other (specify) _____

70. Regardless of your current schedule of work hours, during which one of the following time periods are you likely to be more productive than during normal business hours (7 a.m. to 6 p.m.)?

A. None, I am likely to be most productive during normal business hours
B. Late evening, weekdays (after 6 p.m.)
C. Early morning, weekdays (before 7 a.m.)
D. Weekends
E. Combination of B and C
F. Combination of B and D
G. Combination of C and D

71. Indicate your perception of the fairness/accuracy of your most recent performance appraisal in your current position.

A. Very fair/accurate
B. Moderately fair/accurate
C. Somewhat unfair/inaccurate
D. Very unfair/inaccurate
E. Have not received a performance appraisal in my current position

72. Indicate the overall rating you received in your most recent official performance appraisal.

A. Outstanding
B. Exceeds Fully Successful
C. Fully Successful
D. Minimally Successful
E. Unacceptable
F. Other _____

73. Indicate the approximate distance in miles from your residence to your conventional worksite

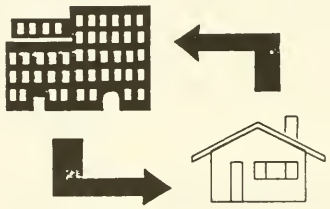
A.	2 or fewer miles	F.	41-60
B.	3-5	G.	61-100
C.	6-10	H.	101-150
D.	11-20	I.	151-200
E.	21-40	J.	more than 200 miles

ON YOUR ANSWER SHEET, SKIP TO ITEM #120 AND CODE RESPONSE "A".

APPENDIX B

The Federal Flexible Workplace Project

FLEXIPLACE



FW Employee Evaluation of Flexiplace Experience

(Six Months)

Evaluation Conducted by the
U.S. Office of Personnel Management

The Federal Flexible Workplace Project, or "Flexiplace," is an 18-month pilot study sponsored by the President's Council on Management Improvement (PCMI) and designed to examine the feasibility of alternative workplace arrangements in the Federal Government. Any questions regarding the content of the this questionnaire should be directed to your agency Flexiplace coordinator. Further information can be obtained from:

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FTS 266-2329	FTS 266-2130	FTS 266-0860

Office of Personnel Research & Development
U.S. Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

FORMS FOR PARTICIPATING EMPLOYEE EVALUATION OF THE FW EXPERIENCE

Dear Flexible-Workplace Project Participant,

Please use the following instructions, questionnaire, and enclosed answer sheet to provide evaluation information (ratings) regarding your experience with the flexible workplace (FW) arrangement. Most of the items focus on your FW experience during the most recent evaluation period relative to your experience during the work year prior to the implementation of the FW Project. This Flexible Workplace (FW) project is scheduled to cover one full year. For evaluation purposes, we have divided the project year into 2 six-month EVALUATION PERIODS; we are requesting your response to this questionnaire for the first 6 months in the FW project (first evaluation period) and for the final six months (second evaluation period). YOUR RESPONSES WILL BE KEPT CONFIDENTIAL; THEY WILL BE SENT DIRECTLY TO THE OPM EVALUATION TEAM; THE EVALUATION TEAM WILL USE THESE RESPONSES FOR RESEARCH PURPOSES ONLY AND WILL BE THE ONLY PERSONNEL WITH ACCESS TO YOUR RESPONSES.

PRIVACY STATEMENT

The U. S. Office of Personnel Management is authorized by sections 1103, 1302, and 3301 of title 5 of the U. S. Code to collect the information requested in this document. The information you provide will be aggregated with similar information from other participants and used, in summary form, to evaluate this project. We are requesting your name in order to track, analyze, and categorize your responses during the project. No information of an individually identifiable nature will be disclosed. Furnishing your response to this document is voluntary; without your response, however, we will be unable to evaluate the feasibility of the flexible workplace option.

ANSWER SHEET INSTRUCTIONS

(USE THE SAMPLE ANSWER SHEET AS A GUIDE)

I. ON THE ANSWER SHEET:

- o Read instructions on the front of the answer sheet
- o Use a # 2 pencil only.
- o Code your name, birth date, sex, and grade (GS or WG-level) in the indicated spaces.
- o Code your 10-digit PROJECT CODE in the grid labelled IDENTIFICATION NUMBER. Your project code should have been provided to you by your agency coordinator or by your supervisor. If you don't have your code, check with your supervisor or your coordinator.

- At the end of this questionnaire, you will be asked to skip to answer sheet item #120 and code response "B". This code will be used by our computer program to determine which type of evaluation form is being processed.

II. When you have completed the questionnaire, check your answer sheet to ensure that you have coded all the required information and that you have followed the marking instructions for errors and stray marks.

III. Place your answer sheet in the pre-addressed envelope (DO NOT FOLD THE ANSWER SHEET) and mail.

IV. DO NOT SUBMIT PHOTOCOPIES OF YOUR COMPLETED ANSWER SHEET

FOR ITEMS 1-39, COMPARE THE LISTED FACTORS OF YOUR FW WORK EXPERIENCE DURING THE MOST RECENT EVALUATION PERIOD WITH YOUR EXPERIENCE DURING THE WORK YEAR PRIOR TO YOUR PARTICIPATION IN THIS PROJECT.

Use the following scale for your responses:

A	B	C	D	E
Decline/ Decrease	Slight Decline/ Decrease	No Change	Slight Improvement/ Increase	Improvement/ Increase

NOTE: WE ARE PRIMARILY INTERESTED IN THE IMPACT OF YOUR FW EXPERIENCE. IF YOU HAVE NOT EXPERIENCED A CHANGE FOR A GIVEN FACTOR, INDICATE 'NO CHANGE'. ALSO INDICATE "NO CHANGE" FOR ANY FACTOR IN WHICH YOU HAVE EXPERIENCED A CHANGE BUT YOU CONSIDER THE CHANGE UNRELATED TO YOUR FW PARTICIPATION.

---

1. Quality of your work
2. Quantity of your work
3. Timeliness of your work
4. Your Efficiency (relative time required to accomplish a given amount of work)
5. Your interest in your work
6. Level of creativity or initiative regarding your work
7. Ability to concentrate while working
8. Your overall motivation toward work
9. Your general worker status as perceived by others in your organizational unit

A Decline/ Decrease	B Slight Decline/ Decrease	C No Change	D Slight Improvement/ Increase	E Improvement/ Increase

10. Your chances for a fulfilling career

11. The effectiveness of the process by which your supervisor assigns work to you

12. The fairness of distribution work assignments in your organizational unit

13. Assigned time frames for completing work assignments

14. The challenge of your current work assignments

15. Convenience of access to job-related material/equipment

16. Quality of your relationships with co-workers

17. Quality of your relationship with your supervisor

18. Your supervisor's attitude toward your work arrangement

19. Effectiveness of your communication with your supervisor

20. Convenience of your communication with your supervisor

21. Effectiveness of your communication with fellow employees in your organizational unit

22. Effectiveness of your work assignment, planning, and scheduling with your supervisor

23. Effectiveness of work-related communication with individuals from other organizations

24. Convenience of your schedule of work hours relative to meeting your work-related requirements and interests

25. Your sense of belonging to your organization

26. Your self-esteem as a worker

<u>YOUR PERSONAL LIFE</u>

27. Quantity of time available for family/personal life

28. Quantity of time available for social/recreational activity

A	B	C	D	E
Decline/ Decrease	Slight Decline/ Decrease	No Change	Slight Improvement/ Increase	Improvement/ Increase

29. Overall quality of family/personal life

30. Flexibility of dependent care options

31. Your physical health

32. Your mental health

YOUR WORK ENVIRONMENT

33. Adequacy of work-related equipment at your FW site (including telecommunications and computer equipment)

34. Adequacy of work-related furnishings at your FW site

35. Adequacy of work-related space, room, etc. at your FW site

36. Work-related comfort at your FW site

37. Freedom from distraction at your FW site

38. Health-related quality of your FW work environment

OVERALL

39. The overall quality, for you, of your employment arrangement.

FOR ITEMS 40-44, USE THE FOLLOWING SCALE FOR YOUR RATINGS:

A	B	C	D	E
Decrease	Slight Decrease	No Change	Slight Increase	Increase

YOUR INDIVIDUAL COSTS

40. Job-related transportation cost (day-to-day)

41. Job-related miscellaneous costs (day-to-day)

42. Dependent care costs

43. Home maintenance/utility costs

44. Overall costs (other than one-time costs for equipment, furnishings, facilities, etc.) associated with FW participation

FOR ITEMS 45-55, SELECT THE RESPONSE CLOSEST TO YOUR INTENDED ANSWER.

45. Indicate your current Federal employment status

A. Permanent/full-time
B. Permanent/part-time
C. Temporary/full-time
D. Temporary/part-time
E. Other _____

46. If you are a part-time employee (in your Federal position), indicate your typical work schedule

A. 5 days per week
B. 4 days per week
C. 3 days per week
D. 2 days per week
E. 1 day per week
F. Less than 1 day per week
G. Not employed part-time
H. Other _____

47. Is your current schedule of work hours an alternative work schedule (AWS) which permits you to take certain week days off as a result of working extra hours on other days?

A. Yes
B. No

48. Which one of the following applies to your schedule of work hours?

A. Permanent or rotating shifts occurring primarily between 6 p.m. and 7 a.m. on weekdays or weekends
B. Primarily normal business hours (between 7 a.m. and 6 p.m., no weekends)
C. Primarily normal business hours (including both weekdays and weekends on a regular basis)
D. Mixed and/or rotating shifts with approximately 1/3 to 1/2 of work hours between 7 a.m. and 6 p.m.
E. Work hours are highly variable and frequently do not occur in continuous shifts
F. Other (specify) _____

49. Is your typical schedule of work hours variable (flexible) in such a way that you frequently (once a week or more) change your schedule by an hour or more?

A. Yes
B. No

50. Which one of the following statements applies to your typical schedule of work hours?

A. Work hours are primarily determined by me but, once established, may not vary
B. Work hours are primarily determined by me and may vary according to my determination
C. Work hours are primarily determined by my supervisor and/or agency management
D. Work hours are primarily established through negotiated and/or mutual agreement between me and my supervisor and, once established, may not vary
E. Same as D except work hours may vary
F. Other (specify) _____

51. Regardless of your current schedule of work hours, during which one of the following time periods are you likely to be more productive than during normal business hours (7 a.m to 6 p.m.)?

A. None, I am likely to be most productive during normal business hours
B. Late evening, weekdays (after 6 p.m.)
C. Early morning, weekdays (before 7 a.m.)
D. Weekends
E. Combination of B and C
F. Combination of B and D
G. Combination of C and D

52. Indicate the difference, if any, between your FW schedule of work hours and the hours you typically worked during the year prior to this project.

FW schedule is

A. Substantially more flexible
B. Slightly more flexible
C. Substantially more fixed
D. Slightly more fixed
E. Not different

53. If you have received an official performance appraisal (by your supervisor) during the past six month period while participating in FW, indicate your perception of the fairness/accuracy of the appraisal.

A. Have not received an appraisal during this period
B. Very fair/accurate
C. Somewhat fair/accurate
D. Somewhat unfair/inaccurate
E. Very unfair/inaccurate

54. If you have received an official performance appraisal (by your supervisor) during the past six-month period while participating in FW, how did it compare to the previous appraisal?

    A. Have not received an appraisal during this period
    B. Higher than previous appraisal
    C. Lower than previous appraisal
    D. Equal to the previous appraisal

55. Comparing your recent use of sick leave during the past six months with your sick leave usage during the same six months of the previous year (excluding catastrophic long term illness or pregnancy), which one of the following is true?

    A. Recent use of sick leave was generally higher than in the previous year
    B. Recent use of sick leave was generally lower than in the previous year
    C. Recent use of sick leave was generally the same as in the previous year
    D. Cannot make determination

ITEMS 56 THROUGH 65 REFER TO THE FLEXIBLE WORKPLACE PARTICIPANT TRAINING YOU RECEIVED AT THE BEGINNING OF THE PROGRAM. BASE YOUR RESPONSES ON YOUR PERSONAL OPINION.

---

56. To what extent did your FW training help provide a successful transition to the FW arrangement?

    A. Very helpful
    B. Helpful
    C. Slightly helpful
    D. Not helpful
    E. Did not receive training

IF YOU DID NOT RECEIVE FLEXIPLACE TRAINING, SKIP TO ITEM 66.

57. Was adequate time allotted for training?

    A. Yes
    B. No

58. Rate the coverage of the training

    A. Training covered too many topics
    B. Training covered too few topics
    C. Training coverage was adequate

59. Were there topics that you think should be added or should receive greater emphasis?

A. Yes (specify) _____
B. No

_____

_____

_____

60. Were there topics that you think should be omitted or deemphasized?

A. Yes (specify) _____
B. No

_____

_____

_____

61. Were the training materials adequate?

A. Adequate
B. Fair
C. Inadequate

62. Was the training environment adequate?

A. Yes
B. No

63. Was the trainer effective?

A. Very Effective
B. Effective
C. Fair
D. Ineffective

64. Was the class size appropriate?

A. Yes
B. Too small
C. Too large

65. Was the method of presentation effective?

A. Very Effective
B. Effective
C. Fair
D. Ineffective

ITEMS 66 THROUGH 70 REFER TO THE FLEXIBLE WORKPLACE FOCUS GROUPS WHICH YOU ATTEND.

66. To what extent is your FW focus group helpful to your FW participation?

A. Very helpful
B. Helpful
C. Slightly helpful
D. Not helpful
E. Do not belong to a FW focus group

IF YOU DO NOT BELONG TO A FLEXIPLACE FOCUS GROUP, SKIP ITEMS 67 THROUGH 70.

67. Rate the frequency of focus group meetings

A. Unnecessarily frequent
B. Not sufficiently frequent
C. Frequency is appropriate

68. Rate the length of focus group meetings

A. Too long
B. Too short
C. Just right

69. Rate the effectiveness of the group facilitator

A. Very effective
B. Effective
C. Fair
D. Ineffective

Comment _____
_____
_____

70. Rate the format of the group meetings (i.e., how the group is run)

A. Very effective
B. Effective
C. Fair
D. Ineffective

Comment _____
_____
_____

71. Considering only transportation/travel issues, how desirable for you is your flexiplace arrangement?

A. With some modification, very desirable
B. Very desirable as is
C. With some modification, desirable
D. Desirable as is
E. Neutral (neither desirable nor undesirable)
F. Undesirable
G. Don't know

Comment _____
_____
_____

72. Considering only personal cost issues, is flexiplace a feasible work arrangement for you?

A. With some modifications, yes
B. Yes, as is
C. No
D. Don't know

Comment _____
_____
_____

73. Considering only personal cost issues, how desirable for you is your flexiplace arrangement?

A. With some modification, very desirable
B. Very desirable as is
C. With some modification, desirable
D. Desirable as is
E. Neutral (neither desirable nor undesirable)
F. Undesirable
G. Don't know

Comment _____
_____
_____

74. Considering only job performance and job satisfaction issues, is flexiplace a feasible work arrangement for you?

A. With some modifications, yes
B. Yes, as is
C. No
D. Don't know

Comment _____
_____
_____

75. Considering only job performance and job satisfaction issues, how desirable for you is your flexiplace arrangement?

A. With some modification, very desirable
B. Very desirable as is
C. With some modification, desirable
D. Desirable as is
E. Neutral (neither desirable nor undesirable)
F. Undesirable
G. Don't know

Comment _____
_____
_____

76. Considering only personal life issues in general, how desirable, for you, is your flexiplace arrangement?

A. With some modification, very desirable
B. Very desirable as is
C. With some modification, desirable
D. Desirable as is
E. Neutral (neither desirable nor undesirable)
F. Undesirable
G. Don't know

Comment _____
_____
_____

77. Considering all issues, is flexiplace a feasible work assignment for you?

A. With some modifications, yes
B. Yes, as is
C. No
D. Don't know

Comment _____
_____
_____

78. Considering all issues, how desirable for you is your flexiplace arrangement?

A. With some modification, very desirable
B. Very desirable as is
C. With some modification, desirable
D. Desirable as is
E. Neutral (neither desirable nor undesirable)
F. Undesirable
G. Don't know

Comment _____
_____
_____

TRANSPORTATION IMPACT

One of the long-range goals of the Flexiplace Project is to improve peak-period transportation and other traffic flow problems. Thus, it is important that we determine the flexiplace impact on your travel patterns. The following questions focus on your travel patterns.

DEFINITIONS:

- o Conventional Worksite refers to your main worksite prior to your flexiplace arrangement
- o Alternative Worksite refers to your home, satellite office, or other location that serves as your flexiplace alternative to your conventional worksite
- o One-Way Trip refers to either your travel from your residence to your worksite or from your worksite to your residence. Each is a separate trip. Thus, on a typical workday, you probably have 2 one-way trips.

---

o Refer to the grid labelled "special codes" on side 1 of your answer sheet. Using columns K, L, and M, code the distance (in miles) from your residence to your conventional worksite. Code zeros in columns K or L if not used in your response. See example on sample answer sheet.

---

79. Is your alternative worksite your home?

A. Yes
B. No (Specify) _____

80. During a typical 2-week period, on how many days do you work at your alternative worksite?

A.	1	F.	6
B.	2	G.	7
C.	3	H.	8
D.	4	I.	9
E.	5	J.	10 or more

81. During a typical 2-week period, prior to your flexiplace participation, on how many days did you work at your conventional worksite?

A.	1	F.	6
B.	2	G.	7
C.	3	H.	8
D.	4	I.	9
E.	5	J.	10 or more

82. During a typical 2-week period while participating in flexiplace, on how many days do you work at your conventional worksite?

A. 1	F. 6
B. 2	G. 7
C. 3	H. 8
D. 4	I. 9
E. 5	J. 10 or more

IN ITEMS 83 THROUGH 96, PLEASE PROVIDE A PROFILE OF YOUR MOST TYPICAL MEANS OF TRAVEL TO WORK (CONVENTIONAL WORKSITE). FOR EACH ITEM USE THE FOLLOWING SCALE TO ESTIMATE THE PERCENTAGE OF ONE-WAY DISTANCE COVERED BY THE INDICATED MEANS OF TRAVEL:

A	B	C	D	E	F	G	H	I	J
Don't Use	10%	20%	30%	40%	50%	60%	70%	80%	90-100%

PRIOR TO FLEXIPLACE PARTICIPATION (RESIDENCE TO CONVENTIONAL WORKSITE, ONE-WAY):

83. Driving alone in car, van, or truck

84. Motorcycle/ motorbike/ motorscooter

85. Carpool/ vanpool

86. Bus

87. Train/ subway/ commuter rail

88. Walk/ jog/ bicycle

89. Other (specify) _____

DURING FLEXIPLACE PARTICIPATION (RESIDENCE TO CONVENTIONAL WORKSITE, ONE-WAY):

90. Driving alone in car, van, or truck

91. Motorcycle/ motorbike/ motorscooter

92. Carpool/ vanpool

93. Bus

94. Train/ subway/ commuter rail

95. Walk/ jog/ bicycle

96. Other (specify) _____

ITEMS 97 THROUGH 104 REFER TO THE NUMBER OF TRIPS, AS DESCRIBED FOR QUESTIONS 83 THROUGH 96, YOU MADE OR MAKE DURING A TYPICAL TWO-WEEK PERIOD. USE THE FOLLOWING SCALE FOR YOUR RESPONSES:

A	B	C	D	E	F	G	H	I	J
1	2	3	4	5	6	7	8	9	10

PRIOR TO FLEXIPLACE PARTICIPATION (RESIDENCE TO CONVENTIONAL WORKSITE, ONE-WAY):

97. Number of most typical one-way trips made during first week of two-week period.

98. Number of such trips made during rush (peak period) hours during first week.

99. Number of most typical one-way trips made during second week of two-week period.

100. Number of such trips made during rush (peak period) hours during second week.

DURING FLEXIPLACE PARTICIPATION (RESIDENCE TO CONVENTIONAL WORKSITE, ONE-WAY):

101. Number of most typical one-way trips made during first week of two-week period.

102. Number of such trips made during rush (peak period) hours during first week.

103. Number of most typical one-way trips made during second week of two-week period.

104. Number of such trips made during rush (peak period) hours during second week.

105. If your most typical trip profile prior to flexiplace is different from that during flexiplace, how much did the flexiplace arrangement influence this change?

A. It was the most important factor
B. It was an important factor, but there were other factors at least as important
C. It was not an important factor
D. There was no change in trip profiles

106. Has your participation in flexiplace resulted in a changed amount of net overall usage (miles driven), of one or more vehicles (cars, vans, or light trucks), during rush (peak period) hours?

A. Yes, substantial reduction
B. Yes, minor reduction
C. Yes, substantial increase
D. Yes, minor increase
E. No, no net change

107. Has your participation in flexiplace resulted in a changed amount of net overall usage (miles driven) of one or more vehicles (cars, vans, light trucks), during non-rush hours?

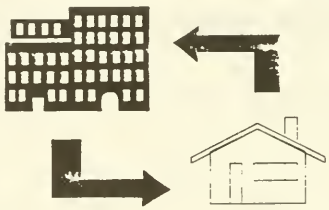
A. Yes, substantial reduction
B. Yes, minor reduction
C. Yes, substantial increase
D. Yes, minor increase
E. No, no net change

** ON YOUR ANSWER SHEET, SKIP TO ITEM #120 AND CODE RESPONSE "B".**

APPENDIX C

The Federal Flexible Workplace Project

FLEXIPLACE



Supervisory Evaluation of FW/Control Employee Performance

(Six Month Evaluation)

Evaluation Conducted by the
U.S. Office of Personnel Management

The Federal Flexible Workplace Project, or "Flexiplace," is an 18-month pilot study sponsored by the President's Council on Management Improvement (PCMI) and designed to examine the feasibility of alternative workplace arrangements in the Federal Government. Any questions regarding the content of the this questionnaire should be directed to your agency Flexiplace coordinator. Further information can be obtained from:

Wendell Joice, PhD
(202) 606-2329
FTS 266-2329

Todd Wheeler
(202) 606-2130
FTS 266-2130

Ernest Paskey
(202) 606-0860
FTS 266-0860

Office of Personnel Research & Development
U.S. Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

FORMS FOR SUPERVISORY EVALUATION OF FW AND CONTROL EMPLOYEE PERFORMANCE

Dear Supervisor,

Please use the following instructions to provide job performance ratings for your subordinates who are participating in the flexible workplace (FW) project as FW employees or as control employees. USE A SEPARATE ANSWER SHEET FOR EACH PARTICIPATING SUBORDINATE. If you do not have enough answer sheets, contact your agency FW project coordinator.

Rating Instructions

I. Regardless of whether you are supervising FW or control employees, you are being asked to submit performance rating information on three separate evaluation occasions:

   (1) At the beginning of the FW project in your organization- Ratings should cover employee performance during the six months immediately preceding implementation of the FW project.

   (2) After six months in the project - Ratings should cover employee performance during the first six months of the project.

   (3) After 12 months (end of project) - Ratings should cover employee performance during the final six months of the project.

II. The ratings you submit should cover the specified rating period only.

III. Except where requested, do not be influenced by the employee's prior performance and ratings associated with periods prior to that covered by this form. Avoid over-generalizing; evaluate the employee honestly and accurately for each separate rating.

IMPORTANT: The Performance Ratings Requested In This Document are For Research Purposes Only. They are not official employee performance appraisals, are not subject to regulations governing official performance appraisals, and will have no bearing on official performance appraisals.

COVER LETTER TO SUPERVISORS OF FW EMPLOYEES

Dear Supervisor,

Thank you for agreeing to participate in the Federal Flexible Workplace (FW) Pilot Project. This is a very challenging and progressive effort on behalf of the Federal workforce. Your participation will be instrumental in determining the feasibility, desirability, and optimal operating procedures for the FW alternative for Federal employees.

Evaluation is a key element in this project and we are asking you and your employees to provide evaluation information about your FW experiences.

This is a one-year pilot project. We are requesting evaluation information on 3 occasions: at the beginning of the project, after 6 months, and at the end of the pilot.

Enclosed are questionnaires, answer sheets, sample answer sheets, and a pre-addressed return envelope.

If you have any questions or problems, contact your agency coordinator whose name and phone number should be listed on this package.

PLEASE COMPLETE ALL FORMS AND MAIL IN THE RETURN ENVELOPE WITHIN 5 DAYS OF RECEIPT.

YOUR RESPONSES ARE NOT SUBJECT TO AGENCY REVIEW, WILL REMAIN STRICTLY CONFIDENTIAL, WILL BE AGGREGATED WITH OTHER PARTICIPANT DATA, WILL BE USED FOR RESEARCH PURPOSES ONLY, AND WILL BE MAILED, BY YOU, DIRECTLY TO THE PROJECT EVALUATION TEAM. ACCESS TO YOUR INDIVIDUAL RESPONSES WILL BE LIMITED SOLELY TO THE PROJECT EVALUATION TEAM.

PRIVACY STATEMENT

The U. S. Office of Personnel Management is authorized by sections 1103, 1302, and 3301 of title 5 of the U. S. Code to collect the information requested in this document. The information you provide will be aggregated with similar information from other participants and used, in summary form, to evaluate this project. We are requesting your name in order to track, analyze, and categorize your responses during the project. No information of an individually identifiable nature will be disclosed. Furnishing your responses to this document is voluntary; without your response, however, we will be unable to evaluate the feasibility of the flexible workplace option.

PLEASE COMPLETE ALL FORMS AND MAIL IN THE RETURN ENVELOPE WITHIN 5 DAYS OF RECEIPT.

YOUR RESPONSES ARE NOT SUBJECT TO AGENCY REVIEW, WILL REMAIN STRICTLY CONFIDENTIAL, WILL BE AGGREGATED WITH OTHER PARTICIPANT DATA, WILL BE USED FOR RESEARCH PURPOSES ONLY, AND WILL BE MAILED, BY YOU, DIRECTLY TO THE PROJECT EVALUATION TEAM, ACCESS TO YOUR INDIVIDUAL RESPONSES WILL BE LIMITED SOLELY TO THE PROJECT EVALUATION TEAM.

If you have any questions, contact the agency coordinator whose name and phone number are listed on the cover of this material.

ANSWER SHEET INSTRUCTIONS

I. ON THE ANSWER SHEET:

- Read instruction on the front of the answer sheet
- Use a # 2 pencil only.
- Code your name, birth date, sex, and grade (GS-level) in the indicated spaces.
- Code your 10-digit PROJECT CODE in the grid labelled IDENTIFICATION NUMBER. Your project code should have been provided to you by your agency coordinator or by your supervisor. If you don't have your code, check with your supervisor or your coordinator.
- In the grid labelled SPECIAL CODES, code the last six digits of the project code of the employee being rated.
- Code your responses to the questionnaire items in the appropriate spaces on the answer sheet.
- At the end of this questionnaire, you will be asked to skip to answer sheet item #119 and code response "A". This code will be used by our computer program to determine which type of evaluation form is being processed.

II. When you have completed the questionnaire, check your answer sheet to ensure that you have coded all the required information and that you have followed the marking instructions for errors and stray marks.

III. Place your answer sheet in the pre-addressed envelope (DO NOT FOLD THE ANSWER SHEET) and mail.

IV. DO NOT SUBMIT PHOTOCOPIES OF YOUR COMPLETED ANSWER SHEET

EMPLOYEE PERFORMANCE QUESTIONNAIRE

USE THE FOLLOWING SCALE TO RATE THE FW OR CONTROL EMPLOYEE ON THE FACTORS DESCRIBED BELOW:

A	B	C	D	E
Unsatisfactory	Somewhat Less Than Satisfactory	Satisfactory	Somewhat More Than Satisfactory	Excellent

1. Quality - The extent to which, on a consistent basis during the evaluation period, the quality of the employee's work met the generally applied standards in your office or reasonable expectations.

2. Quantity - The extent to which, on a consistent basis during the evaluation period, the quantity of the employee's work met the generally applied standards in your office or reasonable expectations.

3. Timeliness - The extent to which, on a consistent basis during the evaluation period, the timeliness of the employee's work met the generally applied standards in your office or reasonable expectations.

4. Interpersonal-Disposition - The extent to which, on a consistent basis during the evaluation period, the employee was pleasant/cooperative to work with.

5. Independence - The extent to which, on a consistent basis during the evaluation period, the employee handled work assignments with the independence generally expected for the employee's experience, work assignments, and conditions in your office.

6. Currency of KSA's - The extent to which, during the evaluation period, the employee's knowledge, skills, and abilities were up-to-date.

7. Availability/-Accessibility - The extent to which, on a consistent basis during the evaluation period, the employee was available/accessible for the timely conduct of business.

8. Overall - The overall job performance during this evaluation period.

9. The quality of this employee's relationships with co-workers

10. The quality of your relationship with this employee

11. The effectiveness of communication between you and this employee

12. The effectiveness of communication between this employee and co-workers

---

13. Indicate the length of time you have supervised this employee. (Select the response category closest to your intended answer)

A. 1 to 3 months	F. 4 years
B. 4 to 6 months	G. 5 years
C. 7 to 12 months	H. 6 years
D. 2 years	I. 7 years
E. 3 years	J. 8 or more years

*** If the work performed by the employee can be routinely measured by numbers of work products completed in a given time period and the resulting numbers are fair and accurate measures of employee performance, please provide a summary of these numbers to us in the form typically used. Enclose the summary in the return envelope along with your completed answer sheet. ***

ITEMS 14-26 REFER TO THE PRECEDING RATING FACTORS. FOR EACH OF THESE FACTORS, INDICATE WHETHER, DURING THE RATING PERIOD UNDER CONSIDERATION, THERE HAS BEEN IMPROVEMENT/DECLINE IN THE EMPLOYEE'S PERFORMANCE RELATIVE TO THE EMPLOYEE'S PERFORMANCE DURING THE WORK YEAR PRIOR TO THE FW PROJECT. USE THE FOLLOWING SCALE FOR YOUR RATINGS:

A	B	C	D	E
Decline	Slight Decline	No Change	Slight Improvement	Improvement

---

14. Quality

15. Quantity

16. Timeliness

17. Interpersonal Disposition

18. Independence

19. Currency

20. Availability/Accessibility

21. Overall

22. Chances for promotion

23. Quality of relationship with co-workers

24. Quality of relationship with you

25. Effectiveness of communication between you and this employee

26. Effectiveness of communication between this employee and co-workers

---

27. Indicate the number of days (8 hours periods) of sick leave used by this employee during the last six months (Select the response closest to your intended answer).

A. 0	F. 5
B. 1	G. 6
C. 2	H. 7
D. 3	I. 8
E. 4	J. 9 or more

28. If you responded "9 or more" (response J) on item 32 indicate the response closest to your intended answer.

A. 9	F. 14
B. 10	G. 15
C. 11	H. 16
D. 12	I. 17
E. 13	J. 18 or more

29. Indicate the number of days (8 hour periods) administrative leave granted to this employee for weather-related or other office shut-down reasons during the last six months (Select the response closest to your intended answer)

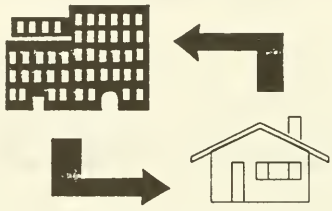
A. 0	F. 5
B. 1	G. 6
C. 2	H. 7
D. 3	I. 8
E. 4	J. 9 or more

ON YOUR ANSWER SHEET, SKIP TO ITEM #119 AND CODE RESPONSE "A".

APPENDIX D

The Federal Flexible Workplace Project

FLEXIPLACE



Supervisory Evaluation of Organizational Unit

(Six Months)

Evaluation Conducted by the
U.S. Office of Personnel Management

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Office of Personnel Research & Development
U.S. Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

COVER LETTER TO SUPERVISORS OF FW EMPLOYEES

Dear Supervisor,

Thank you for agreeing to participate in the Federal Flexible Workplace (FW) Pilot Project. This is a very challenging and progressive effort on behalf of the Federal workforce. Your participation will be instrumental in determining the feasibility, desirability, and optimal operating procedures for the FW alternative for Federal employees.

Evaluation is a key element in this project and we are asking you and your employees to provide evaluation information about your FW experiences.

This is a one-year pilot project. We are requesting evaluation information on 3 occasions: at the beginning of the project, after 6 months, and at the end of the pilot.

Enclosed are questionnaires, answer sheets, sample answer sheets, and a pre-addressed return envelope.

If you have any questions or problems, contact the your agency coordinator whose name and phone number should be listed on this package.

PLEASE COMPLETE ALL FORMS AND MAIL IN THE RETURN ENVELOPE WITHIN 5 DAYS OF RECEIPT.

YOUR RESPONSES ARE NOT SUBJECT TO AGENCY REVIEW, WILL REMAIN STRICTLY CONFIDENTIAL, WILL BE AGGREGATED WITH OTHER PARTICIPANT DATA, WILL BE USED FOR RESEARCH PURPOSES ONLY, AND WILL BE MAILED, BY YOU, DIRECTLY TO THE PROJECT EVALUATION TEAM. ACCESS TO YOUR INDIVIDUAL RESPONSES WILL BE LIMITED SOLELY TO THE PROJECT EVALUATION TEAM.

FORMS FOR SUPERVISORY EVALUATION OF ORGANIZATIONAL UNIT PERFORMANCE

Dear Supervisor,

The enclosed evaluation materials focus on the performance and functioning of the organizational unit which you supervise. Most of the items request your evaluation of your organizational unit's performance during the most recent evaluation period. Other items request personal profile information which we are collecting from all participants and supervisors.

PRIVACY STATEMENT

This U. S. Office of Personnel Management is authorized by sections 1103, 1302, and 3301 of title 5 of the U. S. Code to collect the information requested in this document. The information you provide will be aggregated with similar information from other participants and used, in summary form, to evaluate this project. We are requesting your name in order to track, analyze, and categorize your responses during the project. No information of an individually identifiable nature will be disclosed. Furnishing your response to this document is voluntary; without your response, however, we will be unable to evaluate the feasibility of the flexible workplace option.

QUESTIONNAIRE INSTRUCTIONS

I. We are requesting that you respond to this questionnaire on 2 separate evaluation occasions: (1) after six months into the project, and (2) at the end (12 months) of your participation in the project.

II. When you complete the questionnaire after six months in the project or at the end of the project, base your responses on your organizational unit's performance during the most recent six month period in the project (EVALUATION PERIOD) compared to its performance during the work year prior to the project.

ANSWER SHEET INSTRUCTIONS

(USE THE SAMPLE ANSWER SHEET AS A GUIDE)

I. ON THE ANSWER SHEET:

- o Read the instructions on the front of the answer sheet.
- o Use a # 2 pencil only.

- Code your name, birth date, sex, and grade (GS or WG-level) in the indicated spaces.

- Code your 10-digit PROJECT CODE in the grid labelled IDENTIFICATION NUMBER. Your project code should have been provided to you by your agency coordinator. If you don't have your code, check with your coordinator.

- Code your occupational series in the grid labelled SPECIAL CODES. Use columns M through P for 4-digit occupational series or columns N through P for 3-digit occupational series. Do not use columns K or L for coding occupational series (See example on sample answer sheet).

- Code your responses to the questionnaire items in the appropriate spaces on the answer sheet.

- At the end of this questionnaire, you will be asked to skip to answer sheet item #120 and code response "C". This code will be used by our computer program to determine which type of evaluation form is being processed.

II. When you have completed the questionnaire, check your answer sheet to ensure that you have coded all the required information and that you have followed the marking instructions for errors and stray marks.

III. Place your answer sheet in the pre-addressed envelope (DO NOT FOLD THE ANSWER SHEET) and mail.

IV. DO NOT SUBMIT PHOTOCOPIES OF YOUR COMPLETED ANSWER SHEET

FOR ITEMS 1 THROUGH 4, SELECT THE RESPONSE CATEGORY THAT IS CLOSEST TO YOUR INTENDED ANSWER.

---

1. Indicate the number of Workman's Compensation claims within your organizational unit during the 12 months prior to participation in Flexiplace.

A. 0	F. 5
B. 1	G. 6
C. 2	H. 7
D. 3	I. 8
E. 4	J. 9 or more

2. Indicate the number of Workman's Compensation claims within your organizational unit in the last six months.

A.	0	F.	5
B.	1	G.	6
C.	2	H.	7
D.	3	I.	8
E.	4	J.	9 or more

3. Indicate the length of time you have supervised this organizational unit.

A.	1 to 3 months	F.	4 to 6 years
B.	4 to 6 months	G.	7 to 10 years
C.	7 to 12 months	H.	11 or more years
D.	13 to 23 months		
E.	2 to 3 years		

4. Indicate the length of your <u>total</u> experience as a supervisor.

A.	Less than a year	F.	9 to 10 years
B.	1 to 2 years	G.	11 to 15 years
C.	3 to 4 years	H.	16 or more years
D.	5 to 6 years		
E.	7 to 8 years		

5. Total years of work experience

A.	1 to 2 years	F.	11 to 12 years
B.	3 to 4 years	G.	13 to 15 years
C.	5 to 6 years	H.	16 to 18 years
D.	7 to 8 years	I.	20 or more years
E.	9 to 10 years		

Items 6-33 refer to costs incurred by your organization <u>as a direct result of FW Participation</u>. We are interested in ascertaining estimates of <u>cost difference</u>, if any, between what you spent during the last six months of FW participation and what would be normally incurred without FW participation. For each expense category listed below, indicate

- the approximate <u>difference</u>, in dollars, between what your organizational unit spent during the last six months of FW participation and what normally would have been spent,
- whether the <u>difference</u> is an increase or decrease relative to what would have been spent,

- o the percentage (divide the difference by your estimate of the normal expenditure and multiply the result by 100) of the difference relative to normal expense, and

- o the number of FW employees for whom expenditure was made.

Again this information should be restricted to costs incurred during the last six months of FW participation. SELECT THE RESPONSE THAT IS CLOSEST TO YOUR INTENDED ANSWER.

AMOUNT SPENT ON ACQUISITION OF EQUIPMENT TO SUPPORT ALTERNATIVE WORK SITES

6. Difference (dollars) in amount spent relative to normal costs

A. $ 0	F. $ 1100 - 1400
B. 100 - 200	G. 1500 - 1900
C. 300 - 400	H. 2000 - 3000
D. 500 - 700	I. 4000 - 5000
E. 800 - 1000	J. 6000 or more

7. Is difference an increase or decrease relative to normal costs?

A. Increase
B. Decrease
C. No difference in this expense category

8. Percentage of difference relative to normal costs

A. 0-4 %	F. 25-29 %
B. 5-9 %	G. 30-34 %
C. 10-14 %	H. 35-39 %
D. 15-19 %	I. 40-44 %
E. 20-24 %	J. 45 % or more

9. Number of FW employees for whom expenditure made

A. 1	F. 6
B. 2	G. 7
C. 3	H. 8
D. 4	I. 9
E. 5	J. 10 or more

AMOUNT SPENT ON ACQUISITION OF FURNISHINGS FOR ALTERNATIVE WORK SITES

10. Difference (dollars) in amount spent relative to normal costs

A. $ 0	F. $ 1100 - 1400
B. 100 - 200	G. 1500 - 1900
C. 300 - 400	H. 2000 - 3000
D. 500 - 700	I. 4000 - 5000
E. 800 - 1000	J. 6000 or more

11. Is difference an increase or decrease relative to normal costs?

A. Increase
B. Decrease
C. No difference in this expense category

12. Percentage of difference relative to normal costs

A. 0-4 %	F. 25-29 %
B. 5-9 %	G. 30-34 %
C. 10-14 %	H. 35-39 %
D. 15-19 %	I. 40-44 %
E. 20-24 %	J. 45 % or more

13. Number of FW employees for whom expenditure made

A. 1	F. 6
B. 2	G. 7
C. 3	H. 8
D. 4	I. 9
E. 5	J. 10 or more

AMOUNT SPENT ON EMPLOYEE TRAINING AND DEVELOPMENT

14. Difference (dollars) in amount spent relative to normal costs

A. $ 0	F. $ 1100 - 1400
B. 100 - 200	G. 1500 - 1900
C. 300 - 400	H. 2000 - 3000
D. 500 - 700	I. 4000 - 5000
E. 800 - 1000	J. 6000 or more

15. Is difference an increase or decrease relative to normal costs?

A. Increase
B. Decrease
C. No difference in this expense category

16. Percentage of difference relative to normal costs

A.	0-4 %	F.	25-29 %
B.	5-9 %	G.	30-34 %
C.	10-14 %	H.	35-39 %
D.	15-19 %	I.	40-44 %
E.	20-24 %	J.	45 % or more

17. Number of FW employees for whom expenditure made

A.	1	F.	6
B.	2	G.	7
C.	3	H.	8
D.	4	I.	9
E.	5	J.	10 or more

AMOUNT SPENT ON MAIL/SHIPPING

18. Difference (dollars) in amount spent relative to normal costs

A.	$ 0	F.	$ 1100 - 1400
B.	100 - 200	G.	1500 - 1900
C.	300 - 400	H.	2000 - 3000
D.	500 - 700	I.	4000 - 5000
E.	800 - 1000	J.	6000 or more

19. Is difference an increase or decrease relative to normal costs?

A. Increase
B. Decrease
C. No difference in this expense category

20. Percentage of difference relative to normal costs

A.	0-4 %	F.	25-29 %
B.	5-9 %	G.	30-34 %
C.	10-14 %	H.	35-39 %
D.	15-19 %	I.	40-44 %
E.	20-24 %	J.	45 % or more

21. Number of FW employees for whom expenditure made

A.	1	F.	6
B.	2	G.	7
C.	3	H.	8
D.	4	I.	9
E.	5	J.	10 or more

AMOUNT SPENT ON MAINTENANCE/REPAIR OF EQUIPMENT OR FURNISHINGS

22. Difference (dollars) in amount spent relative to normal costs

A. $ 0	F. $ 1100 - 1400
B. 100 - 200	G. 1500 - 1900
C. 300 - 400	H. 2000 - 3000
D. 500 - 700	I. 4000 - 5000
E. 800 - 1000	J. 6000 or more

23. Is difference an increase or decrease relative to normal costs?

A. Increase
B. Decrease
C. No difference in this expense category

24. Percentage of difference relative to normal costs

A. 0-4 %	F. 25-29 %
B. 5-9 %	G. 30-34 %
C. 10-14 %	H. 35-39 %
D. 15-19 %	I. 40-44 %
E. 20-24 %	J. 45 % or more

25. Number of FW employees for whom expenditure made

A. 1	F. 6
B. 2	G. 7
C. 3	H. 8
D. 4	I. 9
E. 5	J. 10 or more

AMOUNT SPENT ON PREMIUM PAY (e.g., overtime, night differential, Sunday, and holiday pay)

26. Difference (dollars) in amount spent relative to normal costs

A. $ 0	F. $ 1100 - 1400
B. 100 - 200	G. 1500 - 1900
C. 300 - 400	H. 2000 - 3000
D. 500 - 700	I. 4000 - 5000
E. 800 - 1000	J. 6000 or more

27. Is difference an increase or decrease relative to normal costs?

A. Increase
B. Decrease
C. No difference in this expense category

28. Percentage of <u>difference</u> relative to normal costs

A.	0-4 %	F.	25-29 %
B.	5-9 %	G.	30-34 %
C.	10-14 %	H.	35-39 %
D.	15-19 %	I.	40-44 %
E.	20-24 %	J.	45 % or more

29. Number of FW employees for whom expenditure made

A.	1	F.	6
B.	2	G.	7
C.	3	H.	8
D.	4	I.	9
E.	5	J.	10 or more

AMOUNT SPENT ON OTHER ITEMS (Specify nature of expense).

_____

_____

_____

30. <u>Difference</u> (dollars) in amount spent relative to normal costs

A.	$ 0	F.	$ 1100 - 1400
B.	100 - 200	G.	1500 - 1900
C.	300 - 400	H.	2000 - 3000
D.	500 - 700	I.	4000 - 5000
E.	800 - 1000	J.	6000 or more

31. Is <u>difference</u> an increase or decrease relative to normal costs?

A. Increase
B. Decrease
C. No difference in this expense category

32. Percentage of <u>difference</u> relative to normal costs

A.	0-4 %	F.	25-29 %
B.	5-9 %	G.	30-34 %
C.	10-14 %	H.	35-39 %
D.	15-19 %	I.	40-44 %
E.	20-24 %	J.	45 % or more

33. Number of FW employees for whom expenditure made

A.	1	F.	6
B.	2	G.	7
C.	3	H.	8
D.	4	I.	9
E.	5	J.	10 or more

34. Strictly in terms of supervising FW employees, rate the feasibility of flexiplace arrangements in your organizational unit.

A. Feasible, but flexiplace program requires modifications
B. Feasible, with existing program
C. Not feasible, too difficult to supervise
D. Not sure

Comment _____
_____
_____

35. In terms of meeting your organizational performance objectives, rate the feasibility of flexiplace arrangements.

A. Feasible, but flexiplace program requires modifications
B. Feasible, with existing program
C. Not feasible, can't meet performance objectives
D. Not sure

Comment _____
_____
_____

36. In terms of costs associated with flexiplace arrangements in your organizational unit, rate the feasibility of flexiplace arrangements.

A. Feasible and cost-effective
B. Feasible but not very cost-effective
C. Not feasible, too expensive
D. Not sure

37. Considering feasibility, performance, costs, employee morale, and other relevant factors, rate the overall desirability of further implementation of the flexiplace arrangement.

A. Desirable with substantial refinement
B. Desirable with minimal refinement
C. Desirable as is
D. Undesirable
E. Neither desirable nor undesirable
F. Not sure

ITEMS 38 THROUGH 47 REFER TO THE FLEXIBLE WORKPLACE PARTICIPANT TRAINING YOU RECEIVED AT THE BEGINNING OF THE PROGRAM. BASE YOUR RESPONSES ON YOUR PERSONAL OPINION.

38. To what extent did your FW training help provide a successful transition to the FW arrangement?

A. Very helpful
B. Helpful
C. Slightly helpful
D. Not helpful
E. Did not receive training

If you did not receive Flexiplace training skip items 39-47.

39. Was adequate time allotted for training?

A. Yes
B. No

40. Rate the coverage of the training

A. Training covered too many topics
B. Training covered too few topics
C. Training coverage was adequate

41. Were there topics that you think should be added or should receive greater emphasis?

A. Yes (specify) _____
B. No

_____

_____

_____

42. Were there topics that you think should be omitted or deemphasized?

A. Yes (specify) _____
B. No

_____

_____

_____

43. Were the training materials adequate?

A. Adequate
B. Fair
C. Inadequate

44. Was the training environment adequate?

A. Adequate
B. Fair
C. Inadequate

45. Was the trainer effective?

A. Very Effective
B. Effective
C. Fair
D. Ineffective

46. Was the class size appropriate?

A. Yes
B. Too Large
C. Too Small

47. Was the method of presentation effective?

A. Very Effective
B. Effective
C. Fair
D. Ineffective

ITEMS 48 THROUGH 52 REFER TO THE FLEXIBLE WORKPLACE FOCUS GROUPS WHICH YOU ATTEND.

---

48. To what extent is your FW focus group helpful to your FW participation?

A. Very helpful
B. Helpful
C. Slightly helpful
D. Not helpful
E. Do not belong to a FW focus group

If you do not belong to a flexiplace focus group, skip items 49-52.

49. Rate the frequency of focus group meetings.

A. Unnecessarily frequent
B. Not sufficiently frequent
C. Frequency is appropriate

50. Rate the length of focus group meetings.

A. Too long
B. Too short
C. Just right

51. Rate the effectiveness of the group facilitator.

A. Very effective
B. Effective
C. Slightly effective
D. Ineffective

Comment _____

52. Rate the format of the group meetings (ie., how the group is run).

A. Excellent
B. Good
C. Ineffective

Comment _____

ON YOUR ANSWER SHEET, SKIP TO ITEM #120 AND CODE RESPONSE "C".

APPENDIX E

LIST OF DOCUMENTS PRODUCED IN SUPPORT OF FLEXIPLACE

Guidelines For Pilot Flexible Workplace Arrangements

Flexiplace Focus (newsletter)

Guide For Coordinators

Flexiplace Training Instructor's Guide

Flexiplace Training Participant's Manual

Guide For Conducting Flexiplace Focus Groups

Flexiplace Questions and Answers

Flexiplace Questions and Answers on Computers and Telecommunications Issues

Flexiplace Self-Administered Training Manual

BlueCross BlueShield Association

Federal Employee Program
1615 L Street, N.W.
Washington, D.C. 20036
Telephone 202.862.8600
Fax 202.862.8715

ATTACHMENT #5

June 3, 1992

Curtis J. Smith
Associate Director
Retirement & Insurance Group
U.S. Office of Personnel Management
1900 E Street, N.W., Room 4A10
Washington, D.C. 20415

Dear Mr. Smith:

As a follow up to your recent conversation with Harry Cain, I have enclosed a copy of our Request for Proposal for a Managed Prescription Drug Benefit Program.

Please feel free to call me if you have any questions.

Sincerely,

Alan P. Spielman

Alan P. Spielman
Vice President

cc: Reginald M. Jones (w/enclosure)

Enclosure
APS/jgh

Request for Proposal

for a

Managed Prescription Drug Benefit Program

for

The Blue Cross and Blue Shield Association
Federal Employee Program

April 1, 1992

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SECTION I - GENERAL INFORMATION

A. OBJECTIVES OF THE REQUEST FOR PROPOSAL (RFP)

The Blue Cross and Blue Shield Association (BCBSA) Federal Employee Program (FEP) is developing a nationwide retail pharmacy program for implementation on January 1, 1993. This program is being developed in response to the increasing cost of prescription drugs purchased through retail pharmacies and reimbursed under the FEP's active employee and annuitant (retiree) comprehensive major medical plan. The objectives of the program are to:

- Reduce and control the cost of prescription drugs,
- Provide all FEP subscribers with adequate and convenient access to a national network of preferred community pharmacies.
- Introduce uniform management components designed to decrease inappropriate utilization, increase the quality of therapeutic management and medical outcomes, and the cost-effectiveness of pharmacy dispensing, physician prescribing, and

The objective of this Request for Proposal (RFP) is to solicit proposals from vendors interested in providing support and assistance in developing and managing a state-of-the-art managed prescription drug program for the FEP. It is expected that this proposal process will identify, evaluate, and select a prescription drug management company. This would result in preferential pricing for prescription drugs from selected pharmacy networks, wholesalers, and manufacturers, with proactive and effective value-added services.

The voluntary mail service program currently offered to all subscribers will continue to be made available to subscribers in 1993, but it is not part of this RFP. The new retail pharmacy management program that is addressed in this RFP, and the existing mail service program, will be both presented to subscribers as components of their new managed prescription drug benefit program.

The selected vendor must ultimately be able to coordinate with the mail service vendor for purposes of patient profiling, drug utilization review (DUR), data reporting, and other administrative requirements. This capability will not be a mandatory requirement for the January 1, 1993 effective date.

This RFP provides interested bidders with the information necessary to prepare a proposal.

B. BACKGROUND

The Blue Cross and Blue Shield Association (BCBSA) is an association of the approximately 70 Blue Cross and Blue Shield Plans located throughout the United States. The Association is a not-for-profit corporation.

Since the inception of the Federal Employees Health Benefits Program (FEHBP) in 1960, the Blue Cross and Blue Shield Association has contracted with the United States Office of Personnel Management (OPM) on behalf of the participating Blue Cross and Blue Shield Plans ("Participating Plans") to provide health care benefits to eligible Federal employees, annuitants (retirees) and their dependents. As the largest fee-for-service group health coverage contract in the United States, the BCBSA Government-Wide Service Benefit Plan currently provides insurance to approximately 1.7 million Federal employees and annuitants. This is the largest single segment of the federal employee market. Generally, the Government pays the same amount toward the subscriber's premium, regardless of the plan chosen, and withholds the balance from the subscriber's pay.

The FEHBP is unique compared with most other employer-sponsored health benefit programs in that it is an

"individual choice" program: most employees are free to select from approximately 20 different benefit packages. Within the FEHBP three categories of health benefits packages are available:

- First, there is the Government-wide Service Benefit Plan which is sponsored by the Blue Cross and Blue Shield Plans nation-wide.

- Second, there are 14 Employee Organization plans, which are sponsored by federal employee unions. The majority of these union-sponsored plans are available to all federal employees if they become an affiliate union member for a modest annual fee.

- Finally, there are comprehensive medical care plans (health maintenance organizations and individual practice associations) that are offered at the local or, in some instances, state level. There are over 300 separate prepaid plans currently participating in the FEHBP.

Each year, usually from mid-November to mid-December, the Government holds a four-week "Open Season" when employees are allowed to change their health coverage for the following year (each new plan year begins on or about January 1). Other than when employees are newly hired or at the time of special events (for example, marriage, retirement, Medicare eligibility), this is generally the only time they are free to purchase or change their health benefits package.

The Service Benefit Plan offers two options to federal employees and annuitants: a High Option plan, which has a high level of benefit coverage and is the most expensive plan, and a Standard Option plan, which is competitive in both price and benefits with the plans offered by competing FEHBP carriers.

Approximately 1.7 million subscribers currently obtain their health care benefits through the BCBSA Federal Employee Program's Service Benefit Plan. Including subscribers and their dependents, the FEP covers approximately 3.1 million lives. Nearly 41% of all eligible federal active employees and annuitants (retirees) select the FEP Service Benefit Plan for their health care benefits. Please see Appendix A for additional information.

These 3.1 million individuals utilized approximately 25 million prescription drug services in 1990. Total charges for prescription drugs in 1990 were approximately $753,000,000 (mail service and retail combined). Total prescription drug charges in 1992 are expected to exceed $1 billion. Please see Appendix B for a detailed breakdown of FEP enrollment and utilization.

Current Benefit

Retail Prescription Drug Benefit

Currently, prescription drugs are reimbursed through the major medical component of the Service Benefit Plan. Under this benefit, subscribers submit claim forms to their local Blue Cross and Blue Shield Plan (along with any other charges) and are reimbursed for portions of the cost of their prescriptions, minus the major medical deductible.

Subscribers with the Standard Option are reimbursed for 75% of the cost of their prescription drug charges after an annual deductible of $250 individual/$500 family (the deductible applies to major medical charges, not just prescription drugs). Subscribers with the High Option are reimbursed for 80% of the cost of their eligible prescription drug charges after an annual deductible of $200 individual/$400 family. Subscribers with Medicare Part B coverage are reimbursed for 100% of the costs of their prescription drugs. Reimbursement under these programs are based on the retail prices of prescriptions.

Mail Service Prescription Drug Benefit

Subscribers may choose to use the optional Mail Order Prescription Drug Program administered by National Rx Services, Inc. a subsidiary of Medco Containment Services for their long-term or maintenance medications. Subscribers may receive up to a 90-day supply of most medications obtained through the mail service plan. Under this benefit, subscribers mail their prescriptions to National Rx Services, Inc. along with a $10 copayment (Standard Option) or $5 copayment (High Option). Subscribers with Medicare Part B coverage are not charged a copayment for using the mail service plan. Please refer to Appendix C for a detailed summary of the features and provisions of these programs.

BCBSA reserves the unconditional right to change the above described benefits at any time.

1992 Rx Benefit Design

Retail (major medical)	Standard Option	High Option
Deductible*	Rx claims apply to major medical deductible of $250/$500.	Rx claims apply to major medical deductible of $200/$400.
Coinsurance*	75%	80%
Out-of-Pocket Limit/ Catastrophic Protection	$2,500 of expenses - PPO $3,000 of expenses - Non-PPO	$1,500 of expenses - PPO $2,000 of expenses - Non-PPO
Mail Service (Voluntary)		
Deductible	N/A	N/A
Coinsurance	N/A	N/A
Copayment per Rx	$10*	$5*

* Waived when Medicare Part B is the primary payer.

C. CONTRACT REQUIREMENTS

The contract to result from this RFP will be a subcontract under a federal procurement contract between the United States Government (Office of Personnel Management) and the Blue Cross and Blue Shield Association. The program which is the subject of this RFP as well as the actual contract implementing the program are subject to approval by the government. Therefore, acceptance of any proposals submitted in response to this RFP as well as conditions negotiated related to such proposals are contingent on obtaining these government approvals. Additionally, the resultant contract will include certain required clauses identified in the body of this RFP. Please see Appendix D for a list of Federal Acquisition Regulation clauses which will be incorporated by reference into the vendor contract.

The following will be required provisions of the contract entered into between the selected vendor and the BCBSA.

The FEP Director's Office intends to select one vendor to administer the retail prescription drug program on a nationwide basis. BCBSA recognizes that many vendors responding to this RFP have established national networks of preferred retail pharmacies. At the same time, because the Service Benefit Plan is underwritten by the various participating Plans located throughout the United States, and because many of those plans may have competitively priced retail pharmacy networks, the BCBSA intends to use such local networks if feasible and whenever financially advantageous to do so. Therefore, vendors responding to this RFP will be required to agree to substitute and work with such local Plan networks, and not to use the vendor's existing network in such locations. Consequently, such a provision will be a requirement of this RFP. Furthermore, the BCBSA envisions that the FEP national pharmacy network will be made available, in the future, to Blue Cross and Blue Shield Plans' national accounts -- large employers with locations in many states.

It is not known, as of the date of this RFP, the extent to which local Blue Cross and Blue Shield Plans, if any, would be interested in having their existing pharmacy networks included as part of the FEP national pharmacy network. To determine the extent of such interest, the FEP Director's Office communicated with each of the approximately 70 local plans in late March, and an analysis will be separately conducted concurrently with this RFP.

The selected vendor will be contractually precluded from contracting for new business while this contract is in full force and effect with any other FEHBP offered on a national basis either directly or through a third party administering such program without prior BCBSA approval. (This does not apply to existing arrangements or extension of existing arrangements.) Please see Appendix D for a list of Federal Acquisition Regulation Clauses which will be incorporated by reference into the vendor contract.

D. TIMETABLE

• RFP specifications issued	April 1, 1992
• Bidders Questions to BCBSA	April 8, 1992
• Bidders Conference	April 14, 1992
• Proposals due by 5:00 p.m.	May 15, 1992
• Successful vendor selected	June 30, 1992
• Effective date of program	January 1, 1993

The above timetable may be changed or modified by the FEP at its discretion. It is anticipated that such changes, if any, would be minor ones. In any event, the January 1, 1993, effective date is not subject to any change.

E. KEY FACTORS OF IMPORTANCE TO FEP

The FEP will evaluate the proposal of each vendor in a number of critical areas. The following factors are among those to be considered in the evaluation. Please refer to Section III items A through H for the selection criteria categories.

- Rx reimbursement formula including discounted ingredient cost and dispensing fee
- Administrative costs
- Quality of services
- Cost and performance guarantees
- Adequate geographic fit of pharmacy network
- Claims processing, cost containment and interface capabilities
- Data analysis and reporting abilities including performance measurement
- Experience with similar plans
- Customer and account service
- Financial stability of organization, background, and staffing
- Drug utilization review program
- Wholesaler and manufacturer rebates and formulary
- Effectiveness of patient and provider education
- Implementation program
- Clarity and completeness of proposal
- References

F. INDEMNIFICATION AND INSURANCE

The following clause will be included in the contract between the BCBSA FEP and the selected vendor.

The vendor must release and agree to defend, indemnify, and hold harmless the BCBSA, its subsidiaries and the participating Plans, their directors, trustees, officers, agents, and employees from and against any and all fines, penalties, losses, liabilities, claims, suits, judgements, damages, costs and expenses, including reasonable attorneys' fees and costs associated therewith, which may accrue against, be charged, incurred by or recovered from BCBSA or the Participating Plans, their trustees, directors, trustees, officers, agents or employees which arise, or is alleged to arise, as a result of acts or omissions (i.e., not limited to gross negligence, willful misconduct or fraud) of the vendors, its directors, officers, members, contract providers, or agents under the terms and conditions of the contract.

The vendor's obligation under this section shall not be affected by the passive or active negligence of the BCBSA, its subsidiaries, the Participating Plans, the subscribers or non-network providers in connection with any such claim, demand, damages, or legal action.

The vendor is responsible for maintaining, during the life of this agreement, appropriate general and professional liability insurance in the amount of at least $2,000,000 per occurrence and its contracting providers shall at all times maintain professional liability and/or malpractice insurance to cover all program activities. Within 30 days of execution of this agreement, effective on January 1, 1993, the Plan shall be provided a Certificate of Insurance by the vendor for its professional and liability insurance which includes the BCBSA, its subsidiaries, and the Participating Plans, their directors, trustees, officers, employees, agents, as additional named insured. (If at any time liability insurance is canceled, the vendor will notify each company within 48 hours of the cancellation notice.)

Governing Law

The FEHBP is a federal program of insurance for federal employees and annuitants. The governing statute is the Federal Employees Health Benefits Act, 5 U.S.C. § 8901 et seq. A detailed summary of the statutory scheme is provided in Appendix A.

The FEHBP and the health benefits plan contracts are governed solely by federal law. The FEHBP Act has a preemption provision at section § 8902(m) (1) that provides that the FEHB contracts, including the statements of benefits, preempt conflicting state law. The preemption provision was enacted to ensure that the FEHB plans have uniform benefits and uniform administration nationwide.

We are not able at this time to definitively state whether all state laws that would govern this pharmacy program will be preempted. A series of questions is included in this RFP at Section III (I) that are designed to give us sufficient data to evaluate the preemption question. Therefore, for the purposes of answers to the general pricing and operational questions, you should assume that state law applies to this retail pharmacy program. If at any point, however, you find that you cannot comply with a specification in this proposal because of a state law restriction, please so indicate with a specific reference to the state law to complete the answer. We will specifically elicit from you in Section III (I) a series of comparisons of prices and operating functions if it is assumed that state law is preempted.

G. BIDDER'S CONFERENCE

On Tuesday, April 14, 1992, the BCBSA FEP will hold a Bidder's Conference for interested vendors. The purpose of the conference will be to answer questions. The conference will be held at the Washington Vista Hotel, 1400 M Street, N.W. Washington, D.C. at 1:00 p.m. EST.

Vendors are requested to submit questions for the Bidder's Conference in writing **on or before April 8, 1992**. Questions should be sent to the attention of:

Mr. James Schroeder
Manager, FEP Procurement
Blue Cross and Blue Shield Association
Federal Employee Program
1615 L. Street, N.W.
Washington, DC 20036
Phone: (202) 862-8768
Fax: (202) 862-8775

It is highly recommended that a **FAX copy be sent to Mr. Schroeder's attention** due to any inadvertent delay by regular mail.

Any questions sent to Mr. Schroeder must be written in a clear and concise manner. Please identify page number and question number in the RFP to which your question pertains.

H. COMPREHENSIVE OR COMPONENT PROPOSALS

Although the FEP prefers to contract with a sole vendor to provide all services, the FEP is open to considering stand-alone proposals for carved-out components of the program, such as Drug Utilization Review or rebate programs. Some vendors, therefore, may wish to provide proposals only for certain carved-out components. Others may choose to present proposals which offer a choice of either a comprehensive package or specific components which could be selected by FEP on a stand-alone basis.

Joint proposals are permitted provided the proposal clearly designates one of the parties as the prime contractor and the other party (or parties) as subcontractor(s).

I. OTHER INFORMATION/REQUIREMENTS

1. Award or Rejection

All qualified proposals will be evaluated and the award will be made to that vendor whose combination of cost and services are deemed to be in the best interest of the FEP and its subscribers. The BCBSA may enter into negotiations with more than one vendor simultaneously. The final vendor will be selected based on best value as determined by the BCBSA. The BCBSA reserves the right to accept or reject any subcontractor the vendor may include in their proposal. The BCBSA also reserves the unqualified right to reject any or all proposals.

2. Decline to Offer

Any vendor who receives a copy of this RFP but declines to make an offer is requested to send a formal "Decline to Offer" notice to the name listed under item #6 below.

3. Cost for Proposal Preparation

Any costs incurred by vendors in preparing or submitting proposals are the vendor's sole responsibility; BCBSA will not reimburse any vendor for these costs.

4. Time for Acceptance

The vendor(s) agrees to be bound by its proposal until the effective date of December 31, 1992, during which time BCBSA may request clarification or correction of the proposal for the purpose of evaluation. Amendments or clarifications shall affect only that portion of the proposal so amended or clarified.

5. Proposal Deadline

Proposals must be received no later than **5:00 p.m. on May 15, 1992**. Please provide 14 original copies and three diskette copies (in WordPerfect and Lotus 1-2-3 format as appropriate) of your proposal to:

Mr. James Schroeder
Manager, FEP Procurement
Blue Cross and Blue Shield Association
Federal Employee Program
1615 L. Street, N.W.
Washington, DC 20036
Phone: (202) 862-8768
Fax: (202) 862-8775

6. Questions/Communication

Contact the person shown below should you have any questions.

Mr. James Schroeder
Manager, FEP Procurement
Blue Cross and Blue Shield Association
Federal Employee Program
1615 L. Street, N.W.
Washington, DC 20036
Phone: (202) 862-8768
Fax: (202) 862-8775

7. Confidentiality

The BCBSA has retained the firm of William M. Mercer, Incorporated as consultant related to this RFP. The BCBSA and William M. Mercer, Inc. and any other consultants will maintain the confidentiality of all information received from each vendor. The resulting contract between BCBSA and the selected vendor will require a confidentiality provision regarding data and other information.

8. Statement of Understanding/Deviations

Your RFP Response/Proposal must include a statement indicating that you understand the requirements of the RFP and accept the terms and conditions under which the RFP was issued to you.

If your proposal deviates in any respect from the requirements of this RFP, you must include a section in the front of your proposal clearly specifying all such deviations. It is not sufficient to merely note such deviations in the body of your proposal.

9. Acknowledgement/Proposals Binding

Each proposal shall be signed by a duly authorized officer of the bidder, and the completed proposal shall be without interlineations, alterations, or erasures.

It will be assumed that all representations made in your proposal will be binding and that your organization has agreed to all the requirements of the RFP unless specifically stated otherwise in the section on Deviations in the front of your proposal.

10. Reservation of Rights

Even though your RFP Response/Proposal may be rejected, the BCBSA reserves the right to use any of the concepts or ideas contained therein without incurring any liability.

SECTION II
PROPOSAL INSTRUCTIONS AND PROGRAM INFORMATION

A. PROPOSAL FORMAT AND VENDOR QUESTIONS

To assure that proposals are evaluated on the same basis, it is required that all proposals conform to the specifications outlined in this document. All questions must be answered sequentially. Please restate the question followed by your response. All proposals must be specific and complete and must meet all the requirements as described in this section. Subcontractors, if any, must be clearly identified and their role and function clearly explained.

Vendors may provide additional information as part of their proposals that, in the vendor's opinion, might serve to provide clearer understanding of their services and capabilities.

Any modifications or additions to the requirements of this proposal shall be made only with the written prior agreement of the BCBSA. Any variations or suggestions that a vendor feels will enhance desired cost management results must be discussed and approved in advance.

B. SELECTION CRITERIA

The following factors should be stressed as part of each vendor's response to Section III of this RFP, the Managed Prescription Drug Questionnaire.

1. Network Match

The FEP expects to achieve a unit price discount through the use of a pharmacy PPO network in which selected pharmacies will offer discounts in exchange for an increased volume of business. At the same time, the network must include a sufficient number of pharmacies to ensure reasonable access for all subscribers across the country, wherever located. We contemplate that in order to meet these two objectives, discount prices and arrangements will vary by geographic location within a state or region. A network in the 50 states must contain (a) a minimum of 30% of the available retail pharmacies in each FEP 5-digit zip code location (who have agreed to the FEP's targeted Rx reimbursement formula), and must have (b) a minimum of one network pharmacy located within a convenient 3-5 mile distance of each subscriber's residence. The latter requirement is the more important. For zip codes that do not contain any pharmacies, one or more network pharmacies must be within a convenient distance of subscriber residences. If each five-digit zip code area that surrounds the five-digit zip code area without any pharmacies meets the FEP access requirements, then the zip code area without any pharmacies will be deemed to meet the FEP access requirements. To maximize cost savings, the FEP would agree to certain exclusive provider contracts in areas where the exclusive pharmacy provider can meet the desired access standard described in this RFP.

2. Prescription Drug Reimbursement Formula

Because the proposed benefit design requires the subscriber to pay the full (discounted) price of the drug, up front at point-of-sale (POS), the vendor must demonstrate its ability to deliver the best discounted pricing formula under this type of plan. Vendors that have discount agreements currently in place and can operate under this type of plan may be favored over those that do not. It is expected, however, that recontracting may be required to secure the FEP desired Rx reimbursement formula and discounts.

The desired community pharmacy reimbursement formula is the lesser of: the pharmacy's usual, customary or prevailing retail price (including any special discounts offered by the pharmacy to general customers) or a significant discounted average wholesale price (AWP) (based on the dispensed package size) pricing formula. If the vendor can demonstrate that its discounted AWP pricing formula or acquisition cost formula is equivalent to "lesser of" formulas, then consideration will be given to other reimbursement formulas.

3. Superior Service

The FEP requires a fully dedicated service unit.

Vendors should demonstrate, in as much detail as possible, how their services will result in superior performance relative to FEP subscribers, pharmacies, physicians, and the BCBSA. Identify in detail how the scope and quality of your services differentiates you from the services of competitors.

4. Drug Utilization Review, Quality Assurance, and Data Reporting

The FEP wishes to include a uniform drug utilization review (DUR) for the purpose of managing and evaluating the medical necessity and appropriateness of prescription drug therapy. FEP expects to establish and phase in uniform standards and criteria for medical necessity reviews. Describe your DUR program and the effectiveness of its components:

- Concurrent
- Retrospective
- Prospective

In responding to the questions in Section III, explain how data reports would be used to monitor performance and pinpoint problems. Describe how your program targets patient and provider education efforts in response to problems identified via DUR.

5. Claims Processing

The vendor should clearly demonstrate its experience in adjudicating and processing both paper and electronic claims.

6. Performance Standards and Guarantees

The BCBSA will give serious consideration to vendors who will agree to financial penalties/incentives as well as agreeing to putting their administrative fees at risk based on achieving cost, service and performance standards and guarantees.

7. Right to Audit

The FEP will require the unencumbered right to audit upon reasonable written notice, the vendor's claim processing records to verify payment and data accuracy.

8. Implementation

Comprehensive implementation services will be required with a predetermined timetable for service deliverables assuming a January 1, 1993, effective date.

C. DESCRIPTION OF MANAGED PRESCRIPTION DRUG PROGRAM

The BCBSA-FEP is interested in a freestanding managed prescription drug plan. Prescription drug benefits will be carved out of both the High Option and Standard Option major medical plans, and a separate plan will be established for drug benefits. The proposed Managed Prescription Drugs Benefit Program is designed to integrate the Point-of-Sale (POS) features of a traditional prescription drug card program with the subscriber claims submission features of a major medical program. Under the new program, prescription drug expenses will be reimbursed subject to an annual deductible and coinsurance. See the flow chart in Section V, Appendix F for a schematic illustration of the program.

1993 Benefit Design

The 1993 benefit design has not yet been finalized. The following concepts are likely to be incorporated in the 1993 benefit design which will be finalized in August 1992 by the Office of Personnel Management:

1. Separate drug deductible (consideration may be given to two separate levels for preferred and non-preferred pharmacies).

2. Difference in copayment between preferred and non-preferred pharmacies; 20% difference in High and Standard Option at a minimum.

3. Different benefit levels for subscribers with Medicare, maintaining an incentive to use the preferred providers.

4. Transmission by the vendor to BCBSA's FEP Operations Center of the managed prescription drug benefit program expenditures toward the Service Benefit Plan's major medical lifetime maximum amount and catastrophic protection benefit.

Future Benefit Design

BCBSA-FEP reserves the right to make changes in the benefit design for future years, including copays, deductibles and coinsurance levels. All benefit designs are subject to approval by the Office of Personnel Management.

The retail pharmacy program will also contain the following plan features:

Pharmacy Network - A national network of preferred community pharmacies will offer all FEP subscribers prescription drugs at the lower of negotiated prices or usual, customary or prevailing retail charges (including any discounts offered by the pharmacy to general customers). The preferred network will contain (a) a minimum of 30% of all available pharmacies in each five-digit zip codes of FEP subscribers and (b) at least one or more network pharmacies located within a convenient 3 to 5 mile distance of FEP subscriber residences. The FEP would agree to certain exclusive pharmacy contracting provided the exclusive provider can meet the desired access standard described in this RFP.

All retail pharmacies will be linked electronically to the selected vendor to facilitate POS edits, eligibility, administration of benefit design, capture of full-detail utilization and cost data, including the pharmacy's usual and customary retail prices for the dispensed prescription drugs.

Rx Reimbursement Formula - The desired pharmacy Rx reimbursement for prescription drugs will be based on the lower of: the pharmacy's usual, customary or prevailing retail price (including any special discounts offered by the pharmacy to general customers) or the average wholesale price (AWP) based on the dispensed package size minus a significant discount (for example, 15% or better) plus a low/competitive dispensing fee.

Drug Utilization Review (DUR) - Prospective, concurrent, and retrospective DUR will be phased-in and incorporated to decrease unnecessary and inappropriate drug use and to improve the medical outcomes of drug therapies.

Wholesaler/Manufacturer Rebates - The BCBSA is interested in incorporating a wholesaler/manufacturer rebate program into the program. Initially, the plan design will not rely on subscriber incentives for increasing the use of formulary drugs. A focused educational and/or counter-detailing program to physicians and pharmacists is expected to be used as the initial steerage incentive.

MAC Pricing - The plan intends to encourage appropriate generic drug usage and control generic costs through a Maximum Allowable Cost (MAC) program that provides incentives for the pharmacist to substitute generic drugs. Initially, the plan will not penalize the subscriber for using a brand drug.

The plan will pay up to the cost of the MAC price for a generic drug in those cases where a generic drug is purchased. The FEP is interested in a MAC program in which the pharmacist is required to dispense a generic drug when a generic drug is available and substitution is medically permissible. Your proposal should describe incentives/methods you would use to effect aggressive generic substitution by pharmacists and educational programs for influencing the patient and prescribing physician. You will be expected to indicate the generic substitution rate you expect the pharmacies to attain and specify any guarantees.

Member Claim Submission - A paper claim form will be required to be submitted by the member in order to receive reimbursement. Under this approach, the member will pay the pharmacist the full (discounted) price, up front at POS, and then submit a claim form for reimbursement. The Rx vendor will perform all appropriate edits and reimburse subscribers in accordance with the plan design. Your proposal should describe your current experience, if any, with such methodology. Your proposal should also describe how this approach can be efficiently and effectively administered for the FEP program. In particular, your proposal should specify how you will handle overpayments, for example, situations where the Rx amount charged at POS exceeds Rx program limits.

Coordination of Benefits - The drug benefits plan is expected to include a coordination of benefits (COB) provision. Your proposal should describe how you would administer COB.

Data Reporting - Comprehensive data reporting services must be provided to the FEP including reports that document and measure the performance of the program against targeted standards and guarantees. A daily electronic transmission of all claims administration data will be required.

Performance Standards and Guarantees - The FEP expects the selected vendor to provide performance standards and guarantees as requested in this RFP. It is a requirement that each standard and performance guarantee be accompanied by explicit performance measurement criteria and reporting.

D. SCOPE OF SERVICES

The services to be provided by the vendor or vendors are as follows:

- A local "participating" point-of-sale (POS) pharmacy network that contains at least 30% of the total number of available pharmacies in all subscriber five-digit zip code areas and that will provide FEP subscribers with convenient access to pharmacy services.

- At least one or more network pharmacies within a convenient distance of 3 to 5 miles from all subscriber residences.

- An Rx reimbursement formula equal to the lower of the pharmacy's usual and customary or prevailing retail price (including any discounts offered by the pharmacy to the general customers) or a significantly discounted prescription drug average wholesale price (AWP) formula plus a low and competitive dispensing fee.

- A comprehensive maximum allowable cost program for generic drugs with the incentive for substituting generic drugs directed toward the pharmacist.

- A contracted fixed claims/administrative fee for each individual prescription transaction handled by the proposing vendor.

- A POS computerized administrative and claims payment system that provides:

  - electronic collection and recording of retail charges
  - calculation of Rx charge (lower of retail or contracted formula)
  - timely and accurate claims payment
  - records of individual patient prescription drug purchases (based upon the Comprehensive Claim Format Published by the National Council for Prescription Drug Programs, Inc.) to include, but not limited to:

    * patient name, sex, Social Security number, relationship to subscriber/annuitant, subscriber ID number
    * medication name, strength, dosage, and days supply
    * NDC number
    * Rx number, new fill or refill
    * date filled
    * pharmacy NABP/NCPDP number
    * pharmacy name
    * dispensing MD and DEA number
    * if compound prescription, list ingredients and quantities

  - a detailed Explanation of Benefits (EOB) and check to patient for the paper claim submit plan

- Confidentiality of all data by the vendor.

- Supplying claim forms to subscribers.

- Customer service activities to include but not limited to a toll free 800 telephone number for member services to respond to:
  - Requests for locations of FEP participating pharmacies
  - Inquiries on claims
  - Complaints about pharmacist practices and services
- Initial credentialing, monitoring, and re-credentialing of network pharmacies
- Transmission of all claims administration data to FEP on a daily basis electronically - See Section V, Appendix E for Data Processing Technical Requirements.
- Eventual coordination with the current Mail Service Prescription Drug Vendor with respect to patient profiling, comprehensive drug utilization review, drug interaction checks and the preparation of data management reports.
- Periodic audits of participating pharmacies.
- Adjudication and payment of claims subject to appropriate edits in accordance with the policies and administrative guidance provided by FEP. The policies and guidance information will be provided by the FEP to the selected vendor.
- A phased-in Drug Utilization Review system (concurrent, retrospective, and prospective DUR including prior authorization for selected drugs), providing maximum protection against abuse, misuse, and benefit fraud by analyzing all drug claims; providing drug-to-drug and drug-to-disease contraindication screening and control and uniform medical necessity criteria to be established by FEP.
- Maintenance records for management information reporting and analysis.
- Use of existing FEP ID cards (or OPM's Form 2809, or annuitant letter, prior to receipt of ID card) as identification necessary to receive the stated benefit. The FEP ID card does not contain a magnetic strip.
- Submission of comprehensive data management reports quarterly and annually for the entire managed prescription drug program (eventually including Mail Order Service).
- Comprehensive patient and provider education services.

The prescription drug benefits are to be provided only if medically necessary and only if prescribed by a licensed professional. The proposal must contain statements describing the steps that will be taken by the vendor to ensure accuracy, quality control, timeliness, and drug benefit cost effectiveness.

E. DRUGS COVERED

- Federal Legend Drugs -- any medicinal substance that bears the label "Caution: Federal Law prohibits dispensing without a prescription."

- State Restricted Drugs -- any medicinal substance that may be dispensed by prescription only, according to state law.

- Compound Medications -- a compound prescription in an extemporaneously prepared dosage form. If liquid, it must include the weighing of at least one solid or the measuring and mixing of at least three liquid ingredients. It also must contain at least one Federal Legend Drug in a therapeutic amount or a combination of ingredients that require a prescription by law when compounded into a specific dosage form for an individual patient at the direction of the prescriber and which is also in therapeutic amount.

- Insulin is covered, but only if it is dispensed by a written prescription. Please note that for insulin only a single prescription can be refilled over a 12-month period.

F. DRUGS AND ITEMS NOT COVERED (in 1992; subject to future change)

- Contraceptive diaphragms, jellies, ointments, foams, or devices

- Therapeutic devices or appliances, (e.g., support garments, or other non-medical substances) regardless of their intended use

- Vitamins and minerals except if prescribed by physicians for medically necessary purposes

- Drugs labeled: "Caution-limited by federal law to investigational use" or experimental drugs, even though a charge is made to the individual (drugs which have not been approved for marketing by the FDA fall under this exclusion)

- Medication to be taken or administered to the individual, in whole or in part, while he or she is a patient in a licensed hospital

- Medicines used primarily for smoking addiction unless for a specific treatment term

- Medicine used primarily for cosmetic purposes

- Medicine not medically necessary for treatment of a disease or an injury

SECTION III
MANAGED PRESCRIPTION DRUG QUESTIONNAIRE

This questionnaire applies to the managed prescription drug program under consideration by the Blue Cross and Blue Shield Association (BCBSA) - Federal Employee Program (FEP). The program that this questionnaire addresses is a freestanding Rx carve-out plan with a paper claim submission feature and point-of sale (POS) electronic front-end controls.

Eight specific categories will be evaluated. Each category is comprised of a series of questions. When responding to each question, reference and restate the question, then answer each question, clearly, concisely, and in proper sequence. For questions that have multiple sub-questions, please be sure to structure your answers accordingly.

Each vendor will be point-scored on each answer. Consequently, answering each question precisely and comprehensively is very important. Generalized stock answers that do not answer the question specifically and accurately will receive a poor rating. If you cannot answer a question, indicate why you cannot. **When answering questions, make every effort to demonstrate why your organization's services are superior to those of competing organizations.**

If you cannot disclose information, please indicate why not.

A. BACKGROUND AND ORGANIZATION

1. Provide a summary describing your Organization, its history, structure, and ownership.

2. Provide on Exhibit I and Exhibit II of Section IV, information regarding your five largest clients for paper claim submission Rx programs as well as electronic point-of-sale card Rx plans.

3. Please provide the following information:

   - Total number of Rx paper claims processed in 1991 _____
   - Total number of employees enrolled in a 1991 paper claim plan _____
   - Total number of Rx electronic card claims processed in 1991 _____
   - Total number of employees enrolled in a 1991 electronic card plan _____

4. When did your company first begin processing member paper claim submission prescription drug plans similar to the program described in this RFP (not out-of-network paper claims under traditional card plans)?

5. Where is the claims office and administration facility located that would service the BCBSA FEP?

6. Provide 1990 and 1991 audited financial statements for your organization and or parent firm or both if available (including auditors opinion and footnotes.)

7. List the three largest paper claim Rx clients that terminated your services in 1991 and 1992. List the three largest electronic card plan clients that terminated your services in 1991 or 1992. Please explain circumstances.

8. Please list the three largest paper claim Rx clients and the three largest electronic card plan clients that purchased your services in 1991 and 1992. Briefly describe the type of plan and scope of services purchased.

9. Please provide the following information:

   - Current annual electronic card claim processing capacity (expressed in millions of Rx claims): _____
   - Current annual electronic card claim processing activity (expressed in millions of Rx claims processed): _____
   - Current annual paper claim processing capacity (expressed in millions of Rx claims at current staffing levels and electronic hardware): _____
   - Current annual paper claim processing activity (expressed in millions of Rx claims processed): _____
   - Current number of annual customer service telephone calls _____
   - Current annual number of written customer correspondence _____
   - Current number of customer service staff _____
   - Number of customer service telephone calls _____ and written correspondence _____ for peak months during last 12 months

10. The FEP Rx program is expected to generate 20 to 25 million prescriptions in 1993. Because this represents significant additional paper and electronic claims volume to any vendor, the responses to the following questions will be very important:

    (a) Please provide a detailed explanation of the additional facility/space needed, the size and type of additional computer hardware and software required, the estimated capital investment required, the number and type of additional employees required, and any other significant additional resources that may be necessary.

    (b) Clearly describe the steps you intend to take in addressing identified needs and additional resources for a January 1, 1993 effective date.

    (c) Please describe your organization's demonstrated ability to secure the financial and technical resources to meet the commitments and services as described in this RFP.

11. Describe the recruiting effort that will be required to meet the additional staffing requirements.

    (a) How many experienced and entry level personnel will be required, and what training will be necessary?

12. What lead time do you require to meet the commitments described in this RFP? What problems do you expect to be the most challenging in meeting the 1/1/93 effective date?

13. The BCBSA FEP would be willing to enter into a three-year contract with the selected vendor. The BCBSA FEP would reserve the right to terminate the contract, with appropriate notice, in the event (1) that the vendor does not provide satisfactory services per the terms and conditions of the contract; (2) the contract between OPM and BCBSA is terminated for any reason; (3) OPM determines to eliminate the retail drug PPO program from the Service Benefit Plan; (4) OPM requires BCBSA to reduce the value of the benefits in the Service Benefit Plan for a particular contract year and the retail pharmacy program is eliminated by BCBSA for that same term.

    - Is this acceptable to your organization? If not, why not?

    - What contract provisions would you require if awarded this business?

14. Describe any past (last five years) or pending legal actions brought against your organization and parent company and their resolution.

15. What financial ratings have your organization and parent company received for each six month period in 1990 and 1991. Describe any actions that any financial institution, local, state, or federal agency, or private organization has made or taken with respect to your organization or parent organization.

16. Describe your liability coverage, including issues or events covered, limits, and carrier(s).

17. Provide three electronic and three paper claim Rx client references, including name of organization, name, title, and telephone number of contact person, number of employees covered, and annual Rx's processed.

18. Is your organization currently providing service to any FEHB programs offered on a national basis - either directly or through a third party responsible for administering such programs? If so please identify and describe the nature and content with any such program and/or third party.

B. CLAIMS PROCESSING

1. Please describe the location and organization of the dedicated claims processing unit you propose using, indicating staff, titles, experience, and responsibilities. Include number of full-time and part-time equivalents.

2. Describe your organization's experience and demonstrated ability to administer 20-25 million additional electronic POS prescription transactions, and 20-25 million prescriptions and the number of paper claims this will generate.

3. Describe your current paper claim processing flow from receipt of paper claim to the mailing of the EOB and check. Please be specific in describing each major task or procedure as well as identifying what are the manual and automated functions. **When describing each task performed, please explain the type of electronic/automated hardware and software used by your organization and how it increases efficiency, decreases processing errors, and consolidates tasks.** Please provide a flow chart.

4. Describe briefly the process and transactional procedures for the subscriber and pharmacist at point-of-sale (POS) relative to the FEP paper claim Rx plan. Be sure to address:

   - What specific information does the pharmacy enter into the POS equipment?

   - Since the Rx reimbursement formula will be the lower of the usual, customary or prevailing retail price or the discounted AWP formula price, is the pharmacist required to enter the usual, customary or prevailing retail price before the POS program determines the contractual price? How do you monitor and measure compliance by pharmacies to report the correct retail price outside of an audit?

   - What information does the subscriber receive at POS in order for the subscriber to submit a paper claim form for reimbursement (e.g., receipt with reference number and price paid for drug)? Distinguish between in-network and out-of-network claims.

5. If the pharmacist charges the employee more than the contracted price, the FEP Rx vendor will pay the normal or contractual benefit plus the overpayment to the subscriber. The FEP will only pay the vendor the contractual amount. It will be the responsibility of the vendor to collect the overpayment from the pharmacy. Can you administer this procedure? What alternative procedures would you recommend?

6. ID cards will be issued by the FEP. These ID cards will be used for both medical and Rx eligibility. However, during Open Season processing it can take up to three months for new enrollees to receive ID cards.

   - What alternative eligibility procedures can be developed so the pharmacist can determine eligibility at POS if the subscriber does not have an ID card? For example, could your system enable the pharmacist at POS to conduct an alpha search to determine eligibility in the absence of an ID card? Alternatively, would you be willing to set up a toll-free 800 number to verify eligibility? How could you use the subscriber's enrollment registration form (Form 2809 or annuitant letter) as temporary ID cards/information at POS? How would this work? How would it affect the negotiated dispensing fee? (See Section V, Appendix G for an example of the ID card).

7. The vendor will be required to maintain an eligibility file and receive daily eligibility transactions daily electronically from the FEP Operations Center in Washington, D.C. (a tape will not be provided to the vendor). Can your system accommodate this requirement? Describe any system, data, or procedural constraints that may cause problems.

8. Describe what action is taken if a paper claim is received with all the information recorded on the claim form but no match is found on the electronic system (pharmacist did not use POS equipment). If a pharmacy overcharges a subscriber, how can the cause of overpayment be determined and resolved (e.g., did the pharmacy deliberately not use the POS equipment or did the subscriber not have or present an ID card)?

9. What is the average number of paper claims processed per day per processor? (If your definition of a claim is not "per prescription," please define your claim count.) Please define a claim count, i.e., a claim equals a prescription or some other definition.

10. What is the average turnaround time for processing paper claims (from date received by vendor to date payment is mailed to member)? What is the percentage of paper claims processed by selected time

periods (5 days, 10 days, 15 days, etc.)? How often are EOB and checks sent out? If EOB's are not mailed daily, define the average turnaround time for claims handling (from date received by vendor to date claim is ready for payment). Be explicit when answering this question.

11. Will you send denied claims with explanations back to subscribers? If so, explain the process.

12. What information (or lack of information) on a paper claim form would delay payment? What percent of paper claims are delayed because of missing information? What claim forms must the subscriber complete? Distinguish between the use of an abbreviated claim form with essential information and reference number and a full paper claim form including all Rx information and pharmacist's signature. Include a sample claim form.

13. If a claim is received with missing information, explain how such a claim will be handled. What steps do you take to obtain missing information?

14. Provide a sample of the currently used forms or form letters mailed to the subscriber eliciting additional information when information is incomplete for claim adjudication.

15. Describe the method of tracking, controlling, and retrieving claims throughout the paper claim adjudication process. Do you have computer-generated listings of and/or on-line retrieval of pending inventory?

16. Explain how the pended paper claims are accessed to complete processing when information that has been requested is received. Will the input of the received information automatically complete processing of all pended claims for that individual when that information, (COB, a dependent update, etc.) is entered?

17. Describe various methods your organization uses in administering a coordination of benefits (COB) provision. For how many large organizations do you administer a COB provision? Please provide samples of reports you expect to deliver to the FEP on COB results.

18. What eligibility data elements does your system require, use, and maintain?

19. List the data elements maintained in your computer system. Specify your willingness to provide electronic claims information daily to the FEP Operations Center for claims administration.

20. How will you coordinate data with the mail service vendor so that a complete history of patient information can be maintained and accessed? Will your system edits include both mail service and network pharmacy drug usage?

21. Where is your central computer hardware located? Describe your disaster recovery plan. Is there an existing contractual arrangement for processing at another site in the event of a disaster at this site?

22. Describe the process you would use if the FEP Operations Center were to cut the EOB and checks.

    - Would complete EOB information and customized messages be passed on-line to the FEP Operations Center?
    - Would this procedure complicate or ease administration of the Rx plan?
    - What are the advantages and disadvantages of this approach?

23. With respect to EOB information:

    - Will the EOB and check be combined on one form?
    - Can customized messages be printed on the EOB form. If so, supply standard and customized messages.
    - Describe any limitations with respect to customized EOB messages.
    - Please refer to Section V, Appendix E for required EOB fields.

24. Describe your procedures to address POS downtime (POS equipment goes down). What happens to the subscriber claims process at POS in these circumstances?

C. COST AND QUALITY CONTROL

1. Describe the edits your electronic system uses in controlling Rx costs. Indicate the applicability of the following categories and include any additional categories.

   - Ineligible subscriber (includes family members)
   - Ineligible drug
   - Incorrect AWP or contracted price
   - Incorrect usual, and customary retail price
   - Duplicate prescriptions
   - Refills too soon
   - Incorrect dosage
   - Excessive or questionable average days supply
   - Prescription splitting
   - Drug interactions
   - High utilization of medication
   - Fraud
   - Duplicate or concomitant therapy
   - Other drug abuse controls (explain)

   For each of the above edit categories, please be specific as to:

   (a) The specific algorithm used that identifies a possible problem (specific formula, procedure or logic used to identify problem)

   (b) The percent of total prescriptions processed in 1991 that were flagged as possible problems (list top five types denied and percentage of total each represents)

   (c) The percent of total prescriptions processed in 1991 that were ultimately denied (list top five types denied and percentage of total each represents)

   (d) The percent of 1991 total Rx ingredient costs that represented denied claims due to edits (list top five types denied and percentages of the total each represents), and

   (e) How possible problem claims or denials are handled.

2. What specific quality control procedures or edits do you feel sets you apart from your competitors? Explain.

3. The FEP is interested in the following types of DUR services:

   - Concurrent DUR
   - Retrospective DUR
   - Prospective DUR (targeted proactive intervention with specific patients, pharmacists, or physicians
   - Catastrophic/High Cost Therapies including prior-authorization

   For each of these please describe:

   (a) The problems or issues addressed (interactions, contraindications, abuse, fraud etc.)

   (b) How the DUR service works to identify high-risk issues and control problems through specific interventions

   (c) The savings achieved in 1991 or 1992 with respect to each level of DUR service

   (d) The cost of providing the DUR service (on per prescription basis)

   (e) How long each level of DUR service been operational

   (f) What enhancements to each DUR service have been made in the past 12 to 24 months

   (g) The follow-up protocols used for monitoring and resolving issues

   (h) The credentials of clinically trained personnel used to carry out the DUR program; percent of physicians contacted and identification of changed prescribing

   (i) How performance is monitored, measured, and reported

   How you would implement uniform medical necessity criteria to be established by FEP?

   Provide examples of the problem identification process, intervention process, letters, success rate of intervention process, and data reporting and performance measurement.

4. How do you guard against the filling of separate prescriptions for the same or similar drug at different pharmacies on:

   - The same day
   - Five days later
   - 10 days later?

   Describe the editing logic used to control this type of abuse.

5. Will you permit procedural audits of your operation?

6. Do you audit network pharmacies? Describe the process you will use to identify pharmacies to audit on behalf of the FEP.

- What is the percent of total network pharmacies audited in 1991? Provide copy of your typical audit program plan used for these audits.

- What is average savings generated through your pharmacy audit process in 1991 (expressed as a percentage of total ingredient costs)?

- How will savings be credited to the FEP?

- How will you determine compliance by pharmacies in reporting the correct usual, customary and prevailing retail price?

7. Please describe the internal auditing process of your claims department. How often is internal auditing performed? What problems were identified and improvements made in 1991?

8. How are non-network claims processed; i.e., receipt through subscriber reimbursement? Do they go through the same edits as other claims? If not, what are the differences?

9. Describe your MAC program, including how and why specific drugs are selected for the MAC list, number of generic drugs on list, percent that MAC drugs represent of total generic drugs, method used to update list and drugs added and dropped from list over past 24 months.

10. For each MAC drug, please provide on diskette (Lotus 3.0 or higher):

    (a) Name and dosage of MAC drug
    (b) NDC #
    (c) Average wholesale price (AWP) per 100 as of 4/1/92 used as maximum reimbursement for ingredient costs, and
    (d) Weighted average AWP per 100 as of 4/1/92 per Red Book for all generic manufactures of particular drug.

11. Is your maximum MAC reimbursement the lower of:

    (a) The contracted or submitted price or
    (b) The MAC price?

    Is the maximum MAC price for generics based on a specific package size? Explain.

12. How does your organization track and measure the cost-effectiveness of the MAC program for

    (a) Internal research and analysis and
    (b) For clients who adopt the MAC program? Please describe documented results.

13. What is the estimated percentage savings in total ingredient costs that the FEP would likely experience by adopting your MAC program? Explain your calculation and your assumptions. Will you guarantee such savings? How would savings differ if incentive is on (a) the subscriber or (b) the pharmacist?

14. Describe how your MAC program works from a reimbursement standpoint for the subscriber, pharmacist, and employer.

    Some MAC programs require the network pharmacy to dispense generics when medically permissible. The penalty is on the pharmacy, not the subscriber. Does your program work this way? If not, can you administer such a program? Describe any contractual or operational issues with this approach in a paper claim program. Describe any pharmacist-based incentives used in your MAC program. How would a pharmacist-based incentive MAC program work?

15. Describe fully any wholesaler and manufacturer rebate arrangements you can offer to the BCBSA FEP. Please specify:

    (a) How long has program been operational?

    (b) If subscriber steerage incentives (e.g., higher reimbursement) for formulary drugs must be part of the plan.

    (c) How the program would work if the Rx plan design were voluntary or passive as to any subscriber steerage incentive or reimbursement (no formal incentive or penalty).

    (d) How it would work with incentives.

    (e) How the formulary would be used and how the rebate arrangement would be structured. Does the client receive 100% of the rebate? If not, explain.

    (f) The estimated savings from both a passive and incentive-based plan design standpoint. Clearly identify assumptions and how much of the expected total ingredient cost savings is in the form of the rebate or discount and how much is derived from adherence to the formulary.

    (g) How performance is measured.

16. Describe your organization's most leading-edge proactive educational program for

    (a) The patient
    (b) The prescriber, and
    (c) The pharmacist.

    Specify the objective of the program and how the educational campaign focuses on improving patient outcomes, and how it promotes efficient physician prescribing and cost-effective pharmacist dispensing. Also specify the cost of the educational program and the expected value. Describe the nature and scope of performance measurement and reporting to the BCBSA FEP.

17. Please describe how your services can increase patient compliance with therapy. How would you control underutilization? Specify edit logic to identify problems; describe the method used to influence better compliance.

18. Please describe any special cost and quality control program or service your organization can offer that has not been addressed.

D. PHARMACY NETWORK

1. Complete Section IV of Exhibit III (provide tape or diskettes -- no paper copies, please) showing the number of your current network pharmacies that match the five-digit zip codes of FEP subscriber/employees and annuitants/retirees. A computer tape and file layout with FEP enrollment data by five-digit zip code area will be provided upon return of a full executed confidentiality agreement.

2. The FEP requires a contracted pharmacy network with (a) at least 30% of available pharmacies participating in each five-digit zip code area and (b) at least one or more network pharmacies located within a convenient 3 to 5 mile distance from 100% of subscriber residences. The FEP expects that the successful Rx vendor will be able to contract for an Rx reimbursement formula equal to the lower of (a) the usual, customary or prevailing retail price (including any discounts the pharmacy offers to general customers) and (b) the average wholesale price (AWP) based on the dispensed package size minus a significant discount (for example, 15% or better) plus a low/competitive dispensing fee. The AWP must be based on the dispensed package size. Acquisition cost formulas will be considered. The FEP also recognizes that AWP discounts and dispensing fees will vary by geographic market.

   For a member paper claim submit plan, what guarantees can you make in terms of having this type of network in place for a January 1, 1993, implementation date? Be specific as to the Rx reimbursement formula. Denote the AWP discounts at the estimated (a) weighted average package size (e.g. per 1,000's) and (b) on a per 100's package size basis and dispensing fee that you will guarantee to achieve for the FEP. Identify those five digit zip codes, by state, where you will be unable to guarantee the FEP's access standard. See Section II B (1) for access standard. Specify the percentage of total available retail pharmacies that will include in the network at the guaranteed Rx reimbursement formula. Please provide guarantees by state and composite national total. Also, where applicable, specify how the guarantees might be based on designating a chain as an exclusive provider (in areas where the FEP access targets can be met by a sole chain), or under a multiple chain approach in sharing of network business.

3. How will your quoted guarantees differ if the network were expanded to include an additional 10% of total pharmacies? An additional 20% of total pharmacies?

4. What weighted average discount from retail charges do you expect to achieve based on your contracting? (Use the discount you are willing to guarantee).

5. Would your network pharmacies need to be resolicited for their willingness to participate in the paper claim program (payment by subscriber up front at point-of-sale) based on (a) your current reimbursement agreements and (b) the proposed plan and reimbursement formula? Discuss any problems associated with contracting for a "lower of" formula -- the usual, customary or prevailing retail price (including any discounts offered by pharmacy to general customer) or the discounted AWP formula.

6. Describe your organization's experience and demonstrated ability in soliciting, contracting, and implementing a national Rx network of the size and geographical spread of FEP subscribers.

7. The purpose of the following question is to determine what your organization can deliver based on your current contractual arrangements versus re-contracting.

Based on your current network and contractual reimbursement agreements, what would be the weighted average AWP discount and dispensing fee by state and composite national total that you would expect to deliver on 1/1/93? (Assume network access to be defined as 30% of pharmacies in each five-digit zip code area and at least one convenient pharmacy for all subscribers.) How would your stated discounted AWP formula and dispensing fee change if the "lower of" requirement was used? Please answer specifically. For example, *"A lower of U&C retail price formula cannot be offered based on our current contracts. The "lower of" provision would necessitate recontracting. The following is the average Rx reimbursement formula by state and the expected composite total based on the distribution of FEP subscribers..."*

8. Please describe your pharmacy network enrollment process in detail.

9. Describe your criteria or standards used for pharmacy selection. Describer the process by which you initially credential, monitor and periodically recredential network pharmacies.

10. With respect to your answer to question D(2), please provide by state and composite national total the:

    (a) Percent of chain and independent pharmacies expected to make up the network

    (b) Breakdown of the number of chain stores by traditional chain, food/drug combo and discounter (if possible), and

    (c) A listing of the names of the major chains by state.

11. Have your participating network pharmacies agreed to MAC pricing? How is it administered, and what is the percentage of network pharmacies participating by state and nationally?

12. Describe how you would contract or recontract pharmacies and the method used to secure the maximum levels of discounts for the FEP.

13. Describe the retail pharmacy communication, training and awareness program you would provide in connection with the FEP Rx program.

14. Will your network pharmacies accept the BCBSA FEP ID card as sufficient identification to access your computer POS equipment? Because this is a requirement, how will this be accomplished?

15. Please confirm that you will provide an on-going toll-free telephone line for FEP subscribers to use (a) to determine where the nearest network pharmacy is located, (b) to inquire about claims and (c) to discuss complaints about pharmacists practices and services. Can you provide automated interactive telephone communications for network pharmacy names and locations in subscriber five digit zip code areas?

16. Where there are no pharmacies in a five-digit zip code area, how do you intend to achieve the required pharmacy access targets?

17. Describe your pharmacy relations and management program with respect to:

    (a) Resolving problems
    (b) Compliance with program requirements

(c) Auditing
(d) Professional and community relations
(e) Method of communications, and
(f) Monitoring and surveying pharmacy satisfaction with your services.

18. What is the current percentage of POS pharmacies in your networks, by state, that use the POS equipment under a cash-up-front, paper claim Rx plan?

19. What is the anticipated percentage of network pharmacy non-compliance by state under a national paper claim Rx network?

20. How will you resolve issues such as pharmacy non-compliance with using the POS equipment?

21. What would be the cost to provide individual letters to subscribers, at time of initial plan implementation date, listing the names and addresses of all network pharmacies in their five digit zip codes.

22. Describe other options that are available to provide FEP subscribers with directories of pharmacies.

E. CUSTOMER AND ACCOUNT SERVICE

1. The BCBSA FEP requires the successful vendor to develop a comprehensive dedicated servicing unit whose sole responsibility is the FEP. The dedicated account servicing unit must consist of claims processing, customer service, programming/systems, account service, network contracting and pharmacy relations, technical, data management, and other necessary personnel in order to optimize the entire client servicing process. Will you agree to establish this type of dedicated servicing system? Explain/describe how you will accomplish the transaction from implementation to ongoing operations during the initial months of operation. Will the implementation team become part of the ongoing operating unit?

2. Describe the changes, if any, you expect to make to the dedicated account servicing unit after the first year of operation (e.g., network contracting personnel will be 100% dedicated to the FEP the first year but share other client responsibilities thereafter).

3. Describe the service, responsibilities, and account personnel that will be assigned on an on-going basis as the dedicated FEP servicing team.

   (a) Describe how the total servicing team will be organized and how communications, information, and accountability will be handled.

   (b) Describe account servicing, periodic meetings to discuss performance and other account servicing responsibilities.

4. Describe any customer service activities currently performed. Describe what programs you already have in place to track and evaluate customer service. What specific information does the vendor need from the BCBSA to conduct customer service?

5. Describe how problems and issues will be resolved, and identify the protocol involving complaints and for responding to dissatisfaction with service.

6. Describe how customer service will be handled. Your description of services should address the following issues:

   (a) Foreign language subscriber.

   (b) Hearing or visually impaired.

   (c) The elderly.

   (d) Days and times of operation (are you willing to provide 24-hour live coverage)?

   (e) Information regarding the Rx plan provisions, claims procedure, or name and location of nearest convenient network pharmacies, and

   (f) Status of claims, explanation of benefit payment or denials.

   (g) Staffing for peak times.

7. What type of equipment and procedures do you use to monitor telephone service calls?

   (a) What are your standards and operational performance with respect to answering time, abandoned calls, blocked call rate, etc.?

   (b) What changes to your current system will be required to administer the FEP Rx program?

   (c) What are procedures for monitoring the performance of line telephone customer service/subscriber interactions?

   (d) Do you intend to use any voice response servicing procedures/systems? Include security procedures, i.e., preclusion of access by someone other than the subscriber. If so, please explain.

8. What are your current response time standards with respect to:

   (a) Questions requiring written communication?

   (b) Questions that may involve referral to another professional department or person?

   Describe your procedures for responding to questions.

9. What personnel procedures and guarantees can your organization make with respect to limiting turnover in the dedicated servicing unit established for exclusively servicing the FEP account?

10. Describe the system for pharmacist phone inquiry and professional staff availability to respond to questions and problems.

11. Describe scope and frequency of general communications with network pharmacies (e.g., newsletter, etc.).

12. Describe your pharmacy relations department.

(a) Describe its role and function and efforts used to maintain positive relations with network pharmacies.

(b) How will contractual disputes be handled?

(c) Under what circumstances will an in-person meeting be necessary with pharmacies or state pharmacy associations?

F. DATA REPORTING

1. Describe your data management report capability:

   (a) Include sample reports.
   (b) Define each field on the report.
   (c) Provide a narrative on how each report is used for pinpointing problems, analysis and monitoring plan performance.
   (d) "Savings" reports should include an explanation/formula describing how savings are determined.
   (e) To track difference between electronically POS claims capture and submitted claims in order to monitor, measure and analyze the "shoebox" effect, i.e., provide suggested report you recommend to address this issue.

2. Are reports available on electronic daily transfer basis? Can a daily update to the total claims administration data base be transferred electronically on a daily basis to FEP?

3. Please describe ad hoc report capability. Will you provide the capability for the FEP to interface with your data base in order to generate ad-hoc reports and extract specific information? What is the charge for this service, if any?

4. Describe your ability to:

   (a) Track drugs for manufacturer rebates.
   (b) Track and identify claimants for high cost catastrophic case management.

5. Describe the data reporting package you recommend providing to the FEP.

6. What is the reporting cycle for these reports?

7. List the drug, physician, and pharmacy data elements captured for reporting purposes.

G. FINANCIAL AND COST INFORMATION

1. Please complete Section IV, Exhibit IV. This reflects two breakdowns of the total claims/administration fee on a per prescription for the proposed FEP paper claims prescription drug program. What is your administrative fee quote if claims payment to subscribers is on

   (a) a two-week payment cycle
   (b) a weekly payment cycle
   (c) a daily payment cycle

2. Describe all the services covered by the fee quoted in Section IV, Exhibit IV. What services are not included for this fee? If your quoted fee in Section IV, Exhibit IV covers basic services, please describe all other supplemental services and associated fees.

3. What is your fee quotation on a two-year and three-year rate guarantee basis?

4. Vendors must absorb and pay for telecommunications cost. Please consider this requirement when answering question Section III(G)1.

5. Does the fee include employee communication materials (installation kit)? If not, what is the charge for this service? Show samples of any materials you would expect to be appropriate.

6. Does your fee include data reports? If not, what is the charge? Please provide samples of the types of data reports covered by the fee.

7. What additional reports can you provide, and what is the cost? Please provide samples.

8. What is the cost for customized reports? Will the standard data reporting fee quoted provide for the option of substituting customized reports for standard reports at no additional charge?

9. What is the source document that will be used to establish the AWP? What are the advantages and disadvantages in using Red Book, First Data Bank (Blue Book), or Medi Span as a source for the AWP? How often do you update your AWP file?

10. Please restate the Rx reimbursement formula you will guarantee for the FEP by state and composite national total (e.g., the lower of the usual, customary or prevailing retail price (including any discounts offered by pharmacy to general customers) or the AWP based on the dispensed package size minus discount plus fixed dispensing fee). Restate the percentage of pharmacies in each five-digit zip code area that will accept this reimbursement formula. Specify the reimbursement formula on the estimated weighted package size basis (e.g. per 1,000's) and also on a per 100's basis. Restate what is the expected composite discount from total retail charges you expect that your guaranteed Rx reimbursement formula will achieve for the FEP? Explain your calculations and assumptions.

11. Describe your administrative billing process (frequency, due dates, grace period, late payment procedures, interest penalties, etc).

12. Can the BCBSA funding of the bank account used by the vendor for claims payment be handled on a daily checks cleared basis?

13. Please restate the difference between your MAC price per 100s and the weighted AWP for generic drugs on the MAC list. This should be supported by the financial information requested regarding your MAC program in Section III(C). Restate expected savings in total ingredient cost for the FEP. Explain your calculations and assumptions.

14. Are standard or customized claim forms provided as part of your administrative fee? If not, please specify the cost.

15. Are there any other charges or fees that have not been accounted for in this RFP? Explain.

16. Please complete Section IV, Exhibit V regarding performance standards/guarantees and penalties you are prepared to offer the FEP. The expected performance standard is stated as a guide for each vendor. Penalties can be expressed as a dollar amount and/or as a percentage of your administrative fees placed at risk based on performance. Please define terms of offer clearly and specify precisely how the performance standard and guarantee will be measured and reported to FEP.

17. What is the expected percentage increase in total annual number of prescriptions per subscriber that you expect the FEP to experience under this paper carve-out Rx program in 1993? In 1994? Explain your calculations, assumptions, rationale and experiences with similar plans.

18. What is charged for customized EOB messages?

19. Describe your recommended reconciliation process with respect to number of claims, eligibility, total amount paid, claims reaching catastrophic limit, incorrect and adjusted claims.

H. IMPLEMENTATION

1. Provide an implementation work plan detailing steps, time frames, and responsibilities assuming on January 1, 1993, effective date. Denote any type of service (e.g., formulary, enhanced DUR, concurrent DUR, etc.) that will be implemented after January 1, 1993.

2. Please describe your specific role and FEP's role in the implementation process.

3. Provide examples of the descriptive materials you will provide FEP employees and annuitants prior to the start of the Program. Describe the total employee and pharmacy network communications campaign you intend to conduct to ensure a successful and trouble-free implementation and education plan.

4. What other printed educational materials do you intend to use on an on-going basis to improve plan performance and satisfaction?

I. PREEMPTION ISSUES

The following questions must be answered in order to enable our legal counsel to determine the impact of state laws on this pharmacy program and whether the state laws are preempted.

1. Identify the specific so-called "willing provider" laws in each state that affect a pharmacy PPO.

   (a) For each law, specify the impact of the law on the operation and pricing of the proposed FEP network as designed in these specifications, particularly discuss the impact on uniform administration, ensuring geographic access and securing the best possible volume discounts.

   (b) Assuming that the prices quoted above are in networks that comply with state law, specify for each applicable state what additional savings for administration and drugs, if any, could be obtained if each state law in each state specified were preempted. Explain the basis of your calculations and be specific.

2. Identify the specific utilization review laws in each state that affect a pharmacy PPO.

   (a) For each law specify the impact of the law on the operation and pricing of the proposed FEP network as designed in these specifications, particularly with respect to the proposed phased-in medical necessity type review program. Describe the scope of the activities regulated.

   (b) Assess the impact of such requirements on administering a uniform national PPO.

   (c) Be specific about the various components of such laws, such as licensing, regulation of and disclosure of review criteria, operational requirements, etc.

   (d) Assuming that the prices quoted above are in networks that comply with state law, specify for each applicable state what additional savings for administration and drugs, if any, could be obtained if each state law in each state specified were preempted. Explain the basis of your calculations and be specific.

3. Identify the specific so-called "price differential" laws in each state that affect a pharmacy PPO.

   (a) For each law, specify the impact of the law on the operation and pricing of the proposed FEP network as designed in these specifications.

   (b) Assuming that the prices quoted above are in networks that comply with state law, specify for each applicable state what additional savings for administration and drugs, if any, could be obtained if each state law in each state specified were preempted. Explain the basis of your calculations and be specific.

4. Identify any other state statutes that affect a pharmacy PPO.

   (a) For each law, specify the impact of the law on the operation and pricing of the proposed FEP network as designed in these specifications.

   (b) Assuming that the prices quoted above are in networks that comply with state law, specify for each applicable state what additional savings for administration and drugs, if any, could be obtained if each state law in each state specified were preempted. Explain the basis of your calculations and be specific.

SECTION IV - RFP EXHIBITS

EXHIBIT I

MEMBER PAPER CLAIM SUBMISSION
RX PLAN CLIENT LIST

	Client Name and Address Contact Person, Title, and Phone	Date of Contract	Number of Employees Covered	Number of Paper Claims Prescriptions Processed* in 1991
1				
2				
3				
4				
5				

* A claim processed corresponds to one prescription fill.

EXHIBIT II

ELECTRONIC CLAIM SUBMISSION
RX CARD PLAN CLIENT LIST

Client Name and Address Contact Person, Title, and Phone	Date of Contract	Number of Employees Covered	Number of Prescriptions Processed in 1991
1			
2			
3			
4			
5			

EXHIBIT III

NETWORK PHARMACY PROFILE
(Sub-Total by State)

State/City	FEP Zip Code*	Subscribers*	Number of Pharmacies: Total in FEP Five-Digit Zip Code Area	Number of Pharmacies: Total in Network	Number of Pharmacies: Number with POS	Number of Pharmacies With Contracted AWP Discounts By Amount of Discount**: 0%	1-5%	6-9%	10-11%	12%	13%	14%	15+%	Average Dispensing Fee***	Weighted Average Discount
	Total														

* This information provided on tape supplied by FEP upon return of a signed confidentiality statement.

** Denote number or percent of network pharmacies. Also separately specify the number or percent of network pharmacies that agreed to a lower of: U&C retail and a discounted AWP formula.

*** Explain if dispensing fee varies by AWP discount formula.

EXHIBIT IV

PRESCRIPTION DRUG BENEFIT PRICE PROPOSAL

Show 1993, 1994 and 1995 Prices Separately

ITEM	Paper Rx Claims Administration Fee Per Prescription	
	Comprehensive Proposal	Stand-alone Component Proposal
• Claims Processing		
- Preprocessing		
- EOB and check processing		
• DUR		
- Concurrent		
- Retrospective		
- Prospective		
• Data Reporting		
- Standard Reports		
- Customized Reports		
- On line access to data		
• MAC Program		
• Manufacturer Rebate Program		

EXHIBIT IV (Continued)

PRESCRIPTION DRUG BENEFIT PRICE PROPOSAL

Show 1993, 1994 and 1995 Prices Separately

	----------Paper Rx Claims Administration Fee Per Prescription----------	
	Comprehensive Proposal	**Stand-alone Component Proposal**
• Customer Service		
• Toll Free 800 Number		
• Other Services		
• Subscriber letter listing Network Pharmacies		
• Counter-detailing		
• Subscriber Communication Materials		
• On-going Patient/Provider Education Program		
• Claims Forms		
• Other Services (specify)		

EXHIBIT V
COST AND PERFORMANCE GUARANTEES

Item	Performance Standard or Guarantee	Measurement and Performance Penalty
1. Network Fit	Dual criteria: (a) Minimum 30% of available pharmacies in network for every five-digit zip code area of FEP subscribers and, (b) At least one convenient network pharmacy within 3-5 miles of 100% of FEP subscriber residences.	
2. Rx Reimbursement Formula	(a) Lower of: usual, customary or prevailing retail price (including any discounts offered by pharmacy to general customers) or the AWP (based on the dispensed package size) minus ___% plus $____ dispensing fee. Guarantee should be expressed by state and guaranteed composite national weighted average total. (b) Rx reimbursement formula will result in a weighted national average savings below retail equal to ____%.	

EXHIBIT V (Continued)

Item	Performance Standard or Guarantee	Measurement and Performance Penalty
3. Ingredient Cost Inflation Protection	(a) Total annual average net ingredient cost per subscriber not to increase more than ___% between 1993, 1994, and 1995. Net ingredient cost defined as discounted AWP.	
4. Total Program Costs	(a) A maximum annual amount (fixed dollar amount or expressed on a per subscriber basis) that would be FEP's maximum liability in 1993.	
5. Generic Dispensing Rate	(a) A minimum guaranteed rate of generic dispensing achieved through your MAC program.	
	(b) A guaranteed level of savings between the MAC price and the generic drug price (based on the negotiated network reimbursement formula without the MAC provision).	
6. POS Compliance	(a) Percent of total network pharmacies that will use the POS equipment expressed as percent of total pharmacies and percent of total Rx's.	

EXHIBIT V (Continued)

Item	Performance Standard or Guarantee	Measurement and Performance Penalty
7. Data Reporting	(a) Required data reports delivered to FEP within 45 days of the close of each reporting cycle.	
	(b) Daily electronic transfer of claims administration data 99% of time.	
8. DUR and Edits	(a) State levels of DUR service that will be implemented 1/1/93 (concurrent, retrospective, prospective)	
	(b) Level of DUR savings guaranteed.	
	(c) Level of savings due to electronic edits.	
9. Wholesaler and Manufacturer Rebates	(a) Minimum level of wholesaler and manufacturer rebates based on a passive plan design (provider incentives only) and alternatively based on a patient and provider incentive driven plan design.	
10. Employee Satisfaction	(a) At least 90% of subscribers and annuitants will rate services satisfactory or better based on annual or bi-annual employee survey. Survey content to be jointly agreed to by vendor and the FEP.	

EXHIBIT V (Continued)

Item	Performance Standard or Guarantee	Measurement and Performance Penalty
11. Turnaround Time	(a) 90% of claims processed and sent within ____ days. (b) 99% of claims processed and sent within ____ days.	
12. Customer Service	(a) 90% of calls answered within _____ seconds or _____ rings. (b) Less than ____% abandonment rate. (c) Less than ____% blocked calls. (d) Written inquiries complaints resolved within ____ days. (e) ___% of inquiries will be resolved accurately.	
13. Pharmacy Audits	(a) ___% savings through pharmacy audits in 1993, 1994, and 1995. (b) ___% of pharmacies audited in 1993, 1994, and 1995.	
14. Administrative Fees	(a) Three-year rate guarantee (b) Percent of fee at risk based on performance standards.	
15. Patient/Provider Education/Counter -Detailing	(a) Guaranteed annual savings expressed as percentage of total ingredient costs. (b) Specify type and frequency of interventions/letters/ telephone calls to patients, pharmacists and physicians regarding specific issues such as generic alternatives, mail service for maintenance drugs, alternative brand drugs etc.	

EXHIBIT V (Continued)

Item	Performance Standard or Guarantee	Measurement and Performance Penalty
16. Implementation	(a) Adherence with project timetable and service deliverables. Penalty for delay expressed as a dollar amount per day or per week of delayed implementation of specific deliverables.	
17. Claims Payment Accuracy	(a) At least _% Monthly Claims are paid accurately. (No Errors)	
	(b) Monthly Total dollars of errors. (overall monthly payments) will no greater than _% of total dollars paid.	
18. Data System Availability	(a) _% POS Systems availability based on 24 hours/ days a week.	
	(b) _% POS Response time.	

SECTION V

RFP APPENDICES

APPENDIX A:

FACTS ON FEHB PROGRAM

FACTS ON FEHB PROGRAM

The following discussion is designed to give you a complete background on the FEHB Program and its statute and regulations.

Statutory Scheme

Congress established the Federal Employees Health Benefits ("FEHB") Program in 1959 to provide health benefits for federal employees and retired federal employees ("annuitants") as a benefit of their employment with the federal government. Federal Employees Health Benefits Act ("FEHBA" or "Act"), 5 U.S.C. §§ 8901-8914. The Act established a unique health benefits program. Instead of selecting one insurer to cover all federal employees and annuitants -- the most common practice for employers -- Congress decided to establish a competitive system in which the government would contract with many insurers to provide health benefits to individual employees and annuitants.

Congress established this free choice program to enable "each employee to exercise independent judgment and obtain the plan which best suits his or her individual needs or family circumstances." H.R. Rep. No. 957, 86th Cong., 1st Sess. 4, reprinted in 1959 U.S. Code Cong. & Ad. News 2913, 2916.

The FEHB Program is the largest privately insured health benefits program in the world. It covers approximately nine million federal employees and annuitants and their dependents in all the 50 states. The annual cost of the Program is over 11 billion dollars of which the government pays approximately 60 percent. In 1991 there were more than 300 plans offered under the FEHB Program, including eight that are open to all employees and annuitants regardless of where they live. The Program includes one government-wide plan -- a service benefit plan sponsored by the Blue Cross and Blue Shield Association; 23 employee organization plans, sponsored on a nationwide basis by federal employee unions; and hundreds of health maintenance organizations.

Under a complex formula set forth in the FEHBA, the government pays approximately sixty percent of the annual premium cost.[1] 5 U.S.C. § 8906(b). The government withholds the remaining portion of the premium from the pay of each enrolled employee and from the annuity of each enrolled annuitant. Id. § 8906(d).

Administration by the Office of Personnel Management

Congress vested "[r]esponsibility and authority for administration of the health benefits program" in the United States Office of Personnel Management ("OPM").[2] H.R. Rep. No. 957, supra, at 3, reprinted in 1959 U.S. Code Cong. & Ad. News at 2916. OPM is charged with managing the Program "in the interest of both the employees and the Government." Id. The Act requires OPM to fulfill various contractual, regulatory, and other supervisory duties.

The FEHB Act establishes a comprehensive framework within which OPM is to regulate the FEHB Program. 5 U.S.C. §§ 8902-8913. In addition, it specifically authorizes OPM to promulgate FEHB Program regulations. Id. § 8913. It prescribes basic qualifications for FEHBP carriers. Id. § 8901(7), (8). It authorizes OPM to establish minimum standards for participating plans. Id. § 8902(e). It sets forth general standards for the premium rates to be negotiated for plans, id. § 8902(i), as well as the government/employee contribution formula, id. § 8906. It establishes certain FEHB Program reserves. Id. § 8909. It also sets forth standards for an employee's eligibility for coverage and for termination of coverage. Id. §§ 8902(f)(g), (h), 8905, 8908. OPM has implemented the statutory provisions in two comprehensive sets of regulations. 5 C.F.R. Part 890; 48 C.F.R. Ch. 16.

OPM's Contracts with FEHB Carriers

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[1] The government's contribution will be more or less than 60% of the premium for a particular plan, depending on whether the premium rate for that plan is more or less than the big six average. The government contribution cannot exceed 75% of a plan's premium rate. 5 U.S.C. §8906(b)(2).

[2] OPM has succeeded to the authority and responsibility of the U.S. Civil Service Commission to administer the FEHB Program.

The Act authorizes OPM to contract with qualified health benefits plan carriers for the provision of health benefits. 5 U.S.C. § 8902(a). OPM's contracts with carriers are federal government procurement contracts, subject to the government's procurement regulations as supplemented by OPM. 48 C.F.R. §§ 1601.101, 103, 301. National Treasury Employees Union v. Campbell, No. 75-2173, slip op. (D.D.C. Sept. 18, 1980); 46 Fed. Reg. 51,566 (Oct. 20, 1981) (promulgation by OPM of specific procurement regulations for FEHBP contracts).

OPM takes the position that FEHB contracts are subject exclusively to federal law. This has been affirmed by the courts. See Tackitt v. Prudential Ins. Co. of America, 758 F.2d 1572 (11th Cir. 1985). Beginning in 1987, OPM has included in all FEHBP carriers' contracts a provision informing enrollees that, in suits to recover contract benefits that have been denied, their claims for relief will be governed by federal law.

In negotiating these contracts with the carriers, OPM is responsible for balancing several competing Congressional purposes embodied in the FEHBA. Congress gave OPM wide latitude to negotiate the contracts to secure "the best possible basic health and major medical benefits . . . at the lowest possible cost to [employees] and to the Government." H.R. Rep. No. 957, supra, at 4, reprinted in 1959 U.S. Code Cong. & Ad. News at 2916. Other Congressional purposes include holding the costs to a minimum for employees and the government, id., and establishing nationwide uniformity in the benefits and administration of each plan, S. Rep. No. 903, 95th Cong., 2d Sess. 7-8 (1978); H.R. Rep. No. 282, 95th Cong., 1st Sess. 6-7 (1977); see also Uniformity in Federal Employee Health Benefits and Coverage: Hearing Before the Subcomm. on Civil Service and General Services of the Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess. 6 (1977) [hereinafter cited as Senate Hearings].[3]

OPM and each carrier engage in annual contract negotiations to establish the benefits and premiums for that carrier's plan for the following year. 5 U.S.C. § 8902(a); 5 C.F.R. § 890.203(b). See generally Doe v. Devine, 703 F.2d 1319, 1329-30 (D.C. Cir. 1983); National Federation of Federal Employees ("NFFE") v. Devine,

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[3] Other purposes of the statute include protecting federal employees against the high and unpredictable costs of medical care and making Program benefits equivalent to those in the private sector so that the government can compete in recruiting and retaining qualified personnel. American Federation of Government Employees v. Devine, 525 F. Supp. 250, 252 (D.D.C. 1981).

679 F.2d 907, 909 (D.C. Cir. 1981). The benefits and subscription charges (premiums) in each of these plans can and usually do change yearly. 5 U.S.C. §§ 8902(a), (i). "[V]arying levels of benefits at varying subscription charges" are provided in the Program "so that every employee [and annuitant] will have an unrestricted choice" between benefits and subscription charges that best suits his family circumstances and ability to pay. H.R. Rep. No. 957, supra, at 8, reprinted in 1959 U.S. Code Cong. & Ad. News at 2920-21.

OPM Authority Over Benefit Design

As the agent of the employees and annuitants, OPM is empowered to contract for such benefits, maximums, limitations, and exclusions as OPM "considers necessary or desirable." 5 U.S.C. § 8902(d); see also Tackitt v. Prudential Ins. Co. of America, 758 F.2d 1572; NFFE v. Devine, 679 F.2d at 912. OPM also must establish premiums for participating plans that "reasonably and equitably reflect the cost of the benefits provided." 5 U.S.C. § 8902(i); see National Treasury Employees Union ("NTEU") v. Campbell, 589 F.2d 669, 678 (D.C. Cir. 1978).

While negotiations between OPM and the carriers are vigorous, OPM makes the final decision to approve the benefits, the limitations on benefits, and the premiums of each contract.[4] 5 U.S.C. §§ 8902(d), (i), 8903; see also Doe v. Devine, 703 F.2d at 1321, 1326; NFFE v. Devine, 679 F.2d at 912. Once final agreement is reached, the contract terms bind the federal employees and annuitants as well as OPM and the carriers. See 5 U.S.C. § 8902(d). The employees and annuitants are third party beneficiaries of the contracts. Christiansen v. National Savings and Trust Co., 683 F.2d 520, 530-31 (D.C. Cir. 1982).

Over the past thirty years, OPM has negotiated many restrictions and reductions (and increases) in a variety of benefits offered by FEHB Program carriers. OPM applies such changes to all individuals enrolled in the plan affected, including those remaining enrolled in the plan who are continuing a course of medical treatment

[4] Benefit changes and other additions to OPM's contract with the Association are proposed by OPM in its "call letter" that outlines OPM's benefit policies and goals for the upcoming contract period. In addition, the Association develops proposals for benefit changes to present to OPM. OPM evaluates the benefit proposals in light of OPM's goals and policies for the FEHB Program. 5 C.F.R. § 890.203(b).

affected by the changed benefits.[5] See Doe v. Devine, 703 F.2d 1319 (D.C. Cir. 1983) (affirming OPM's authority to reduce benefits from year to year); Hayes v. Prudential Ins. Co. of America, 819 F.2d 921 (9th Cir. 1987), cert. denied, 484 U.S. 1060 (1988).[6] OPM has adopted a contract provision reflecting this policy, set forth in all FEHBP carriers' contracts (the modification/termination clause), that specifies that no enrolled individual acquires a "vested" legal right to benefits he or she has used under one annual plan if a new contract for that plan reduces or eliminates such benefits. See e.g., Service Benefit Plan Brochure, p. 2.

Brochures/Open Enrollment

When OPM has approved the benefits and premiums for each plan, OPM is required under the FEHBA to publish and disseminate information on the health plans to enable employees and annuitants to exercise an informed choice among the various FEHB Program plans available.[7] 5 U.S.C. § 8907(a). In accordance with section 8907, OPM each year publishes and distributes the annual statement of contract benefits and exclusions for each plan (the "Brochure"). OPM also publishes and distributes instructions and enrollment change forms for open season and booklets comparing the benefits and premiums of various plans.

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[5] On a few occasions, because of unique hardships, OPM and the carrier have extended the prior level of benefits to those enrollees in the plan who were engaged in a course of treatment for which benefits were reduced.

[6] Congress has exercised oversight of OPM's administration of the Program since its inception. In some instances, it has held hearings on particular benefit changes, and it is clearly aware of the impact of reductions in benefits on individual subscribers. Federal Employee Health Benefits Program: Hearings Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service, 97th Cong., 1st Sess. (1981); Utilization of Mental Health Benefits Under the Federal Employees' Program: Hearings Before the Subcomm. on Retirement and Employee Benefits of the House Comm. on Post Office and Civil Service, 93d Cong., 2d Sess. (1974). For example, in hearings in 1974 on benefit reductions in the Aetna Government-wide Indemnity Benefit Plan, the impact was explicitly recognized: "if you reduce what is covered in the contract next year you have damaged those patients who were receiving what was covered in last year's contract." At 13. In no case has Congress taken any action to change this policy.

[7] Section 8907 does not by its terms include annuitants in this requirement. This appears to be a technical omission in the statute. In any event, OPM has always treated its obligations under section 8907 to include annuitants.

Each year there is an open enrollment period ("open season") during which federal employees and annuitants can, if they desire, change from one benefits plan to another regardless of any preexisting health problem. 5 U.S.C. §§ 8902(f), 8905(e); 5 C.F.R. § 890.301(d).

Program Finances

The cost of paying claims under an FEHB plan has a direct impact on the federal Treasury. The national plans in the Program, including the Blue Cross and Blue Shield Government-wide Service Benefit Plan, are experience-rated, i.e., the ensuing year's premiums for a plan are based on the costs incurred under the plan in the current year. See 48 C.F.R. § 1602.170-6; 1615.802(c).[8] Thus, the greater the costs incurred in a plan year, the higher the premiums must be in the ensuing plan year, and the higher the government's payments from the U.S. Treasury must be. See 5 U.S.C. §§ 8906(a), 8909(a).

The funds expended by the carriers are federal funds. Carriers draw funds to pay claims through letters of credit directly from the federal Treasury. 5 U.S.C. § 8909(a); 5 C.F.R. § 890.505(b). Thus, as the Congressional Budget Office has observed, FEHB carriers "serve mainly as claims processors -- managing money that is essentially federal." Reducing the Reserves of the Federal Employees Health Benefits Program, Congressional Budget Office Report at 1 (June 1981). See United States v. Littriello, 866 F.2d 713 (4th Cir. 1989) (holding that FEHB funds held by the carriers are federal monies for purposes of the federal embezzlement statute).

In light of the federal nature of the FEHB funds, OPM exercises comprehensive control over all financial aspects of the Program. See generally 5 C.F.R. Part 890 and 48 C.F.R. Ch. 16. OPM administers the Employees Health Benefits Fund maintained in the United States Treasury. The Fund is a trust fund and is the depository for the premium contributions of employees, annuitants, and the government. The assets in this Fund are held

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[8] Under OPM regulations and all FEHBP contracts, FEHBA funds paid to carriers can be used only for the purpose of paying legitimate claims and administrative expenses allowed by federal law, and any excess of currently unneeded funds for such purposes must be invested solely for the benefit of the government contract. See 5 C.F.R. §890.201(a)(8).

exclusively for the benefit of federal employees and annuitants enrolled in the FEHB Program. 5 U.S.C. § 8909(a).

OPM has established two reserves for the FEHB Program, which are held by OPM in the U.S. Treasury. The contingency reserve is funded by OPM by adding a factor of three percent to the premium rates established for each carrier. 5 U.S.C. § 8909; 5 C.F.R. § 890.503(c)(1). The special reserve represents the difference between subscription charges and investment income received for each plan and the claims and other costs paid and incurred by the plan. OPM sets the premium rates with the general target of maintaining an amount in both reserves equal to 3-1/2 times the sum of an average month's paid claims. 5 C.F.R. § 890.503(c)(3). However, the amount of the reserves has fluctuated greatly over the years. In some years the special reserve may be negative; in others, it may substantially exceed the goal. When the reserve is too high, OPM generally draws it down by reducing the premium rates, as provided in the statute. 5 U.S.C. § 8909(b); 5 C.F.R. § 890.503(c)(2). When it is too low, rates will be increased to replenish it. 5 U.S.C. § 8909(b). If a health plan is terminated, the special reserve is returned to the Employees Health Benefits Fund. 5 C.F.R. § 890.201(a)(8).

OPM has promulgated a comprehensive set of regulations and required various contract provisions to monitor and control the disposition of the subscription charges by the carriers. The regulations specify that the carriers may only make expenditures from subscription charges for specific items detailed in the regulations and in the contracts. See 48 C.F.R. Pt. 1631. Certain expenditures are not permitted. Certain specific costs exacted by the states are permitted, such as contributions to mandatory state reserves. See 48 C.F.R. § 1631.205-79.

Expenditures are subject to audit by OPM and the United States General Accounting Office, and carriers must keep detailed accounting records and submit annual accounting statements. 5 U.S.C. § 8910; 5 C.F.R. § 890.202(c), (d); 48 C.F.R. § 1652.216-71.

Congressional Cost Containment Policies Under the FEHBA

OPM has a substantial interest in ensuring that benefits are paid only for eligible expenses and covered subscribers. The importance to the federal government of cost controls in the FEHB Program is illustrated by the fact that one of the first principles enunciated by Congress in passing the FEHBA was the need to "discourage

unnecessary use of expensive facilities and services." S. Rep. No. 468, 86th Cong., 1st Sess. 4 (1959), S. Rep. No. 957 (1959) p. 33. In fact, one of the purposes of section 8910 of the Act, according to the legislative history, is to permit, in part, investigations by OPM into possible misuse or overuse of benefits. S. Rep. No. 468 at 19. Moreover, cost containment under the FEHB Program has been the subject of three reports to Congress by the Comptroller General of the United States, and all three reports identify payments for services outside the scope of the FEHBP contracts as contributing to rising costs under the FEHB Program.[9]

The reports especially concentrate on payments made by FEHBP carriers for services not deemed medically necessary. The reports urged that OPM require FEHBP carriers to institute medical necessity programs to help contain costs under the FEHB Program.[10]

Congress has recognized that payments by FEHBP carriers for services not covered by the terms of their contracts result in higher premium costs to federal employees and the federal government alike; it thus has exerted substantial pressure on OPM and the carriers to employ procedures to ensure that health insurance benefits are limited only to those benefits allowed under the contracts.[11] The Chair of the House Subcommittee responsible for oversight of the FEHB Program has admonished OPM and the carriers not to ignore their "responsibility in containing cost and adhering to the strict letter of [their] contract[s]."[12]

In 1990 Congress acted to include specific cost containment mandates in the Program. It amended section 8902 to require contracts with carriers to include measures to (1) verify the medical necessity of any proposed treatment; (2) determine whether outpatient services were appropriate; and (3) concurrently review

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[9] See supra, note 14.

[10] See generally 1980 Report, supra, note 11.

[11] Oversight Hearing on Federal Employee Health Benefits Program - Health Care Costs: Hearings Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service, 95th Cong., 1st Sess. (1977).

[12] Id. at 55.

inpatient lengths of stay. 5 U.S.C. § 8902(n). Congress also added provisions that require FEHB carriers to comply with Medicare limitations on provider charges. 5 U.S.C. §§ 8904(b), 8910(d).

Another specific cost constraint on the FEHB Program is the federal budget. The concern over the budget has intensified in recent years, as both the federal deficit and nationwide health care costs have climbed. The most dramatic example of the FEHB Program's budget difficulties occurred in 1981. To meet the FEHB Program's federal budget appropriation, OPM required all carriers to make substantial reductions in their proposed 1982 benefits. Substantial litigation ensued, in which the federal courts upheld OPM's actions. See generally NFFE v. Devine, 679 F.2d 907; Doe v. Devine, 703 F.2d 1319. Since 1982, OPM has contained costs by refusing to approve any new increases in benefits in carriers' contracts unless they were offset by reductions in other benefits. OPM has also approved various benefit reductions in plans to control costs. For example, one plan reduced its private duty nursing benefit to achieve an annual savings of about $300,000. See Tackitt v. Prudential Ins. Co. of America, 595 F. Supp 887, 893 (N.D. Ga. 1984), aff'd, 758 F.2d 1572 (11th Cir. 1985).

OPM Oversight Over Claims Payments

Congress has recognized and protected the federal employee's interest in receiving all the benefits properly due when he or she files a claim under a plan.

Under the FEHBA, each carrier's contract must require the carrier to agree to pay for a health service in an individual case if OPM finds that the terms of the carrier's contract entitle an individual to such payment. 5 U.S.C. § 8902(j).[13] Pursuant to this statutory provision, OPM has established by regulation an administrative mechanism that furnishes a remedy for any individual subscriber who believes that his or her carrier has improperly denied a claim for benefits. 5 C.F.R. § 890.105. The legislative history of the FEHBA demonstrates that Congress considered that OPM's administrative review process would provide an "adequate administrative

[13] Thus, while OPM cannot unilaterally order the payment of monies that were not negotiated for in the contracting process (cf. Doe v. Devine, 703 F.2d at 1333 n.62, and Hayes v. Prudential Ins. Co., 819 F.2d 921, cert. denied, 484 U.S. 1060 (1988)), OPM has full authority to order a carrier to pay any benefits due under its contract.

remedy" for federal employees and would spare them from being "forced into the courts" to recover benefits due them. H.R. Rep. No. 459, 93d Cong., 1st Sess. 2, 7 (1973).

OPM's regulations provide a multi-step approach to resolving claims disputes. A subscriber who is dissatisfied with a carrier's decision regarding a claim is entitled to a reconsideration of that claim by the carrier upon request. If the carrier, after reconsideration, affirms its decision, the subscriber may request OPM to review the matter. If OPM determines upon review that the carrier's decision was incorrect, then the carrier is bound to pay the claim. 5 C.F.R. § 890.105.

The OPM review process for individual claims is only one of the mechanisms that enables OPM to supervise each carrier's claims handling practices. OPM also monitors and practices through periodic audits. OPM performs audits routinely on each carrier in the FEHB Program, under the authority of 5 U.S.C. § 8910 and 5 C.F.R. § 890.202(d). The General Accounting Office, the investigative arm of Congress, also has been active in auditing and investigating carriers' claims handling practices and reporting its findings to Congress.[14]

Under the FEHBA, OPM is authorized to prescribe minimum standards of conduct for FEHBP carriers and to withdraw approval of their plans if the carriers do not properly discharge their contract obligations. 5 U.S.C. § 8902(e); 5 C.F.R. §§ 890.202-204. Accordingly, OPM may withdraw approval of a carrier that has improperly failed to pay or unreasonably delayed in paying claims under its contract.

Lawsuits for Benefits

If OPM upholds the denial of benefits by the carrier, the subscriber may bring a lawsuit against the carrier, not OPM. 5 C.F.R. § 890.107. Subscribers must exhaust their OPM appeal before filing a lawsuit. OPM

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[14] Report by the Comptroller General of the United States, "More Civil Service Commission Supervision Needed to Control Health Insurance Costs for Federal Employees," (No. HRD-76-174, Jan. 14, 1977); Report by the Comptroller General of the United States, "Stronger Management Needed to Improve Employee Organization Health Plans' Payment Practices," (No. HRD-79-87, Sept. 7, 1979); Report by the Comptroller General of the United States, "OPM Should Promote Medical Necessity Programs for Federal Employees' Health Insurance," (No. HRD 80-79, July 29, 1980) [hereinafter cited as 1980 Report].

recently revised its regulations and reiterated its intention that federal employees should exhaust their administrative remedies and not go directly to court. 51 Fed. Reg. 18562, 18563 (1986).

All FEHBP carriers' brochures contain language informing subscribers of the contractual limitations period for bringing suit to recover contract benefits that have been denied. Additionally, beginning in 1987, the language notifies enrollees that their claims for relief will be governed by federal law and any recovery will be limited to the contract benefits in dispute plus simple interest and court costs.

Preservation of Competition Under the FEHBA

The preservation of competition among FEHB carriers is another important Congressional policy embodied in the FEHBA. S. Rep. No. 468, supra, at 8; 105 Cong. Rec. H17,556 (1959) (remarks of Rep. Broyhill). OPM must therefore take into account the financial viability and competitiveness of each carrier. For example, in negotiating FEHBP contracts, OPM tries to minimize "adverse selection" of particular carriers to maintain a competitive balance among all the carriers. Doe v. Devine, 703 F.2d at 1325, 1332; Garvey v. Prudential Ins. Co. of America, 596 F. Supp. 1119, 1120-21 (E.D. Penn. 1984).

Adverse selection is a continuing problem in the FEHB Program. It occurs when individuals who expect to be healthy choose a less comprehensive, less expensive health benefits plan and individuals in ill health choose a more expensive plan with the greater benefits they need. Because premiums are based on each plan's claims experience, the cost disparity between such plans mounts as time passes. Experts agree that uncontrolled adverse selection can make a plan's cost prohibitive and lead to its financial collapse. Doe v. Devine, 703 F.2d at 1325.

A single costly benefit that attracts heavy users of the benefit can trigger the adverse selection process. This is precisely what happened to the Postmasters' Plan with its "rich" private duty nursing benefit, as described in Garvey v. Prudential Ins. Co. of America, 596 F. Supp. at 1120-21.[15] That benefit cost the Plan $9,000 to $13,000 per month ($108,000 to $156,000 per year) for Mrs. Garvey alone. Id. at 1120.

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[15] Blue Cross and Blue Shield experienced a similar adverse selection problem with mental health benefits. Doe v. Devine, 703 F.2d at 1325, 1332.

Because the financial instability caused by adverse selection harms not only a plan's enrollees but the competitive choice aspect of the FEHB Program for all federal employees as well, OPM has taken measures to control it. In the cases cited above, OPM approved contractual reductions in the particular benefits that were encouraging adverse selection, premium inflation, and potential destabilization of the individual plans. The federal courts uniformly have upheld the reductions.

Purpose and Intent of the Preemption Provision in the FEHBA

In 1978, Congress amended the FEHBA to ensure nationwide uniformity in the health benefit plans and to supersede certain state regulation of the FEHBP plans. The amendment provides that the coverage, benefit, and payment provisions of any contract between OPM and an insurance carrier under the FEHB Program supersede and preempt any state or local law or regulation that is inconsistent with such contractual provisions. 5 U.S.C. § 8902(m)(1). The amendment reads as follows:

> The provisions of any contract under this chapter which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans to the extent that such law or regulation is inconsistent with such contractual provisions.

The original impetus for the amendment came from a report to Congress issued by the U.S. Comptroller General that identified various attempts by states to require the inclusion of certain state-mandated provisions in FEHBP plans. Report of the Comptroller General of the United States, Conflicts Between State Health Insurance Requirements and Contracts of the Federal Employees Health Benefits Carriers (No. B-164562 Oct. 17, 1975). For example, some states mandated recognition of the services of chiropractors, id. at 7-8, 10; others required benefits for treatment of drug abuse, id. at 11. The Comptroller General advised Congress that the states were becoming increasingly "active in establishing and enforcing health insurance requirements" and recommended that Congress "clarify whether State requirements should be permitted to alter terms of contracts negotiated pursuant to the [FEHBA]." S. Rep. No. 903, 95th Cong., 2d Sess. 9 (1978).

The House Committee on Post Office and Civil Service accepted the recommendation, and a bill to preempt state law was introduced. H.R. 2931, 95th Cong., 1st Sess. (1977).[16] OPM favored the House bill, as drafted (and as later enacted), and testified it would give the agency the preemptive relief it needed in terms of Program "administrative matters, and in terms of benefit matters." Senate Hearings, supra, at 6.

Testifying on behalf of OPM, Thomas A. Tinsley, Director of the Bureau of Retirement, Insurance and Occupational Health, stated that OPM was concerned about the impact on the Program of state laws mandating specific health benefits. Id. at 9. Tinsley pointed out that the effect of varying provisions of state law on the Program was growing "chaotic" and that "[t]he State the individual resides in . . . has a great deal to do with what benefits he will receive." Id. at 2. There was also concern about state laws affecting eligibility and administrative questions that would destroy the uniformity of benefits among federal employees. Id. at 2-3, 10. Tinsley cited, as examples, certain state procedural and administrative requirements concerning the age of dependents, the conversion of contracts after termination of employment, the types of information furnished to an employee or the actual words used in a contract or brochure describing the Program. Id. Tinsley stated that state enforcement of such requirements created "considerable administrative difficulties on top of the ones we already have which at the present time involve over 70 different carriers and worldwide coverage for employees." Id. at 3.

In letters to the House and Senate Committees, OPM told the Committees that all state laws that interfered with administration of the plans caused an impossible situation in which FEHBP carriers were exposed to varying requirements from state to state and caught by conflicts between the states' and the Program's requirements. The agency emphasized that the lack of uniformity was intolerable from the standpoint of administering a nationwide insurance program. OPM stated that it had concluded that the FEHBA superseded state laws that interfered with the "free hand it need[ed] to administer the [FEHBA]." S. Rep. No. 903, supra,

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[16] The original bill was introduced during the 94th Congress, H.R. 12114, 94th Cong., 2d Sess. (1976), and passed the House on the Consent Calendar, but it was not enacted into law during that session. See H.R. Rep. No. 282, 95th Cong., 1st Sess. 1 (1977). H.R. 2931, introduced during the 95th Congress, was identical to H.R. 12114. See id.

at 8 (1978). But, without the bill, the only remedy it could foresee was "time-consuming and costly litigation with the States" as to the preemption of state laws under the Supremacy Clause of the U.S. Constitution. S. Rep. No. 903, supra, at 7-8 (1978); H.R. Rep. No. 282, 95th Cong., 1st Sess. 6-7 (1977).

The House Committee Report noted that the Committee "concurred" in the view of the Administration (OPM) that the FEHB Program -- "a program established by an Act of Congress -- should not be subject to alteration or regulation by State legislatures or State insurance boards." H.R. Rep. No. 282, supra, at 4.

Congress focused its concern on the fact that imposition of state law requirements on FEHBP contracts "can be expected to result in":

> Increased premium costs to both the Government and enrollees, and
>
> A lack of uniformity of benefits for enrollees in the same plan which would result in enrollees in some States paying a premium based, in part, on the cost of benefits provided only to enrollees in other States,

H.R. Rep. No. 282, supra, at 4 (1977); see also S. Rep. No. 903, supra, at 2-4, 9.[17] Thus, Congress enacted 5 U.S.C. § 8902(m)(1) for "[t]he sole purpose of . . . establish[ing] uniformity in benefits [including payments with respect to benefits] and coverage under the Federal employees' health benefits program." H.R. Rep. No. 282, supra, at 1; S. Rep. No. 903, supra, at 2.

The House Report[18] defined the scope of the preemptive effect of 5 U.S.C. § 8902(m)(1) as follows:

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[17] This increased premium cost to the government and to enrollees, and the payment of premiums by enrollees in one state for benefits provided to enrollees in other states, clearly would be present in the situation presented by a claim for damages under state law based on the manner in which payment with respect to a claim was or was not made. Not all states recognize the tort of insurer bad faith. See e.g., Tweet v. Webster, 614 F. Supp. 1190 (D. Nev. 1985); Tufts v. Madesco Inv. Co., 524 F. Supp. 484, 486-87 (E.D. Mo. 1981); Spencer v. Aetna Life & Casualty Ins. Co., 611 P.2d 149, 155-56 (Kan. 1980); D'Ambrosio v. Pennsylvania Nat'l Mutual Casualty Co., 431 A.2d 966 (Pa. 1981); Va. Code Ann. §38.2-510B (1986) (disallowing any private right of action under the insurance claim settlement practice provision); see also W. Shernoff, S. Gage & H. Levine, Insurance Bad Faith Litigation, Ch. 1 (1990). However, if certain states can impose them on FEHBP plans, the resultant cost is a cost of doing business that will be reflected in the premium rates of experience-rated plans such as the Service Benefit Plan, and those costs will be spread to the government and to enrollees in other states. See Appeal of Hirsch Tyler Co., ASBCA No. 20962, 76-2 B.C.A. (CCH) ¶12,075 (1976).

[18] That House Report, No. 282, 95th Cong., 1st Sess. (May 10, 1977) is superior to the parallel Senate Report, No. 903, 95th Cong., 2d Sess. (May 18, 1978), as an aid for the determination of the legislative intent underlying 5 U.S.C. §8902(m)(1) because (1)it was authored by Congresswoman Spellman who also sponsored

> The effect of this amendment is to preempt the application of State laws or regulations which specify types of medical care, providers of care, extent of benefits, coverage of family members, age limits for family members, or other matters relating to health benefits or coverage when such laws or regulations conflict with the provisions of contracts under the Federal employees' health benefits program. However, the amendment is not intended to apply to State or local laws relating to the taxation of health insurance carriers or to the maintenance of special reserves.

H.R. Rep. 282, supra, at 4-5 (emphasis supplied).

OPM agreed with the scope of the preemption in the bill and urged enactment. The preemption was limited to matters in the FEHBP contracts and, as the House and Senate Reports stated, the Act would not preempt state insurance laws regulating such things as premium taxes[19] and mandatory reserves.[20] S. Rep. No. 903, supra, at 4. H.R. Rep. No. 282, supra, at 5. But it was sufficiently broad to "establish uniformity of benefits and coverage . . . as well as solve the other problems encountered in recent years in the administration of the program." S. Rep. No. 903, supra, at 7. H.R. Rep. No. 282, supra, at 6; see also Senate Hearings, supra at 3.

The Blue Cross and Blue Shield Government-wide Service Benefit Plan

OPM contracted with the Blue Cross and Blue Shield Association in 1960 to establish the Government-wide Service Benefit Plan. That plan by regulation has two options -- High Option and Standard Option. See 5 C.F.R. § 890.201(b)(3). High Option benefits historically have been more comprehensive than Standard Option benefits.

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the bill, see National Woodwork Manufacturers Ass'n v. N.L.R.B., 386 U.S. 612, 640 (1967) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt," quoting Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951)); and (2) it is the House and the Senate, see Stokes v. Brennan, 476 F.2d 699, 703 (5th Cir. 1973) ("[T]he greater weight should be given to the report of the house which acted first. . . .").

[19] Congress amended the statute in 1980 to also preempt state premium taxes. 5 U.S.C. § 8909(f).

[20] The Senate, believing that states' authority to license health practitioners should be preserved, amended the bill to include a provision permitting certain states to mandate certain providers of health care on an experimental basis. S. Rep. No. 903, 95th Cong., 2d Sess. 4 (1978).

The Service Benefit Plan has the largest enrollment in the FEHB Program. In 1991, 3.1 million employees and annuitants and dependents were enrolled in the Service Benefit Plan. The Plan has enrollees in every state and many foreign countries. In 1991, the premium cost of the Service Benefit Plan was $4.8 billion.

APPENDIX B:

FEP ENROLLMENT AND UTILIZATION DATA

Note: This information, which is in the form of hard copy tabular data and a magnetic tape of enrollment statistics by zip code, will be provided immediately upon FEP's receipt of the properly executed confidentiality agreement described in the RFP cover letter.

APPENDIX C:

SERVICE BENEFIT PLAN BROCHURE

Service Benefit Plan

A Government-wide Plan Administered by Blue Cross® and Blue Shield® Federal Employee Program (FEP)

1992

Who may enroll in this Plan:
All Federal employees and annuitants who are eligible to enroll in the FEHBP.

This brochure is the official statement of benefits available to FEHB members and is the sole document you should rely upon. However, the benefits shown on page 34 are non-FEHB benefits and are not part of the FEHB contract and are not offered or guaranteed under the FEHB contract.

ATTENTION ALL SUBSCRIBERS
All fee-for-service plans in the FEHB Program require precertification of each hospital admission and reduce benefits by $500 if you fail to obtain it. Look for details inside!

ACTUAL COPY WAS SENT WITH RFP

Type of Enrollment	Enrollment Code	Biweekly Premium Gov't Share	Biweekly Premium Your Share	Monthly Premium Gov't Share	Monthly Premium Your Share	Postal Biweekly Gov't Share	Postal Biweekly Your Share
High Option Self Only	101	$60.50	$81.45	$131.08	$176.48	$75.62	$66.33
High Option Self and Family ...	102	$130.58	$169.09	$282.92	$366.37	$163.22	$136.45
Standard Option Self Only	104	$56.86	$18.95	$123.20	$41.06	$71.07	$4.74
Standard Option Self and Family ...	105	$119.47	$39.82	$258.85	$86.28	$149.33	$9.96

These rates do not apply to all enrollees. If you are in a special enrollment category, please refer to your special Enrollment Information Guide and Plan Comparison Chart or contact the agency that maintains your health benefits enrollment.

FEHB
Federal Employees Health Benefits Program

Authorized for Distribution by the
United States Office of Personnel Management

Is Revised January 1992 ● See Back Cover for Summary of Benefits

RI 71-5

APPENDIX D:

FEDERAL ACQUISITION REGULATION CLAUSES

FEDERAL ACQUISITION REGULATION CLAUSES

The Contract to result from this RFP will be a subcontract under a federal procurement contract between the United States Government and the Blue Cross and Blue Shield Association. The subcontract will incorporate the following FAR clauses by reference, with the same force and effect as if they were given in the full text:

Federal Acquisition Regulation (48 CFR Chapter 1)

52.203-7	Anti-Kickback Procedures
52.215-1	Examination of Records by Comptroller General
52.215-2	Audit-Negotiation
52.215-24	Subcontractor Cost or Pricing Data
52.215-25	Subcontractor Cost or Pricing Data-Modifications
52.219-8	Utilization of Small Business Concerns and Small Disadvantaged Business Concerns (April 1984)
52.219-9	Small Business and Small Disadvantaged Business Subcontracting Plan (April 1984)
52.219-13	Utilization of Women-Owned Small Businesses (April 1984)
52.220-3	Utilization of Labor Surplus Area Concerns (April 1984)
52.220-4	Labor Surplus Area Subcontracting Program (April 1984)
52.222-21	Certification of Nonsegregated Facilities (April 1984)
52.222-26	Equal Opportunity
52.222-35	Affirmative Action for Special Disabled and Vietnam Era Veterans
52.222-36	Affirmative Action for Handicapped Workers

Federal Employee Health Benefits Acquisition Regulation (48 CFR Chapter 16) Clauses

1652.246-70 FEHBP Inspection

APPENDIX E:

DATA PROCESSING TECHNICAL REQUIREMENTS

DATA PROCESSING TECHNICAL REQUIREMENTS

A. TELECOMMUNICATIONS LINK BETWEEN THE VENDOR AND THE FEP OPERATIONS CENTER

The vendor shall support a telecommunications link between it and the FEP Operations Center or one of its remote nodes. This link shall be used to exchange data on both a batch and an interactive basis. The vendor will supply the utility software, Network DataMover (NDM) that will be used to facilitate the batch transmission process, unless the vendor already has the product. The vendor will order and instal a dedicated communications line and associated equipment. All installation and usage charges will be paid by the vendor.

1. Required ADP Hardware/Software Operating Environment

   (a) An IBM or compatible mainframe processor operating MVS operating system software, and having channel access to an IBM37xx or equivalent front-end processor.

   (b) ACF/VTAM version 2 communication software operating on the mainframe processor.

   (c) ACF/NCP version 5.X network operating software on the 3745 front-end processor and a 4.3 on a 3725 front-end processor or equivalent.

2. ADP Resource Requirements

   (a) Approximately 100 MB of DASD space to store NDM distribution software.

   (b) Capacity on the IBM 37XX (or equivalent) communications front-end processor capable of supporting a 56 kbps or higher communications line.

   (c) CPU resources (minimal) necessary to install the NDM product and validate the resulting software.

   (d) Changes to ACF/VTAM and ACF/NCP in-house communications software to define the NDM and interactive facilities communications link and the characteristics link of the remote destination of NDM traffic.

3. Technical Personnel Requirements

   (a) Technical personnel at the site shall configure the ACF/VTAM communications software and ACF/NCP communications front-end processor software to address the FEP Operations Center telecommunications network. Other communication software changes may be required to enable connectivity to the vendor's or the FEP Operations Center's facility.

   The IBM SNA Network Interconnection (SNI) environment must be established between the FEP Operations Center or one of its remote nodes and the vendor to facilitate operation of the CPU-to-CPU batch and interactive data transmission facilities. FEP Operations Center systems programming personnel will work with technical personnel at the vendor to coordinate communications software changes and assist in establishing the SNI connection.

(b) The most recent version of NDM software must be in place and updates applied in coordination with the FEP Operations Center.

4. Testing Requirements

Testing will consist of transmissions from the FEP Operations Center to the vendor and return for comparison.

(a) Files described in the Data Exchange Section portion of this appendix as originating from the vendor will be transmitted from the vendor to the FEP Operations Center and retransmitted from the FEP Operations Center to the vendor. The original vendor file and the file obtained from the retransmission will be compared using a standard utility such as IEBCOMPR.

(b) Files described in the Data Exchange Section portion of this appendix as originating from the FEP Operations Center will be transmitted from the FEP Operations Center to the vendor and retransmitted from the vendor to the FEP Operations Center. The original vendor file and the file obtained from the retransmission will be compared using a standard utility such as IEBCOMPR.

(c) The vendor will adhere to hardware and software systems installation criteria as defined by SNI and NDM documentation.

B. VENDOR / FEP OPERATIONS CENTER INTERFACE CONTROL DOCUMENT

1. Scope

This portion describes the computer data interface used for communications between the vendor and the FEP Operations Center.

2. Applicable Documents

The following documents are incorporated by reference:

(a) Network DataMover Product Specifications may be obtained from System Center.

(b) The NCPDP Telecommunication Standard Format, Version 3, Release 2 may be obtained from The National Council for Prescription Drug Program, Inc.

3. Interface Requirements - Batch

(a) FEP Operations Center to Vendor Communications

The following files will be transferred to the vendor in a batch environment on a scheduled basis:

- Enrollment Eligibility Batch Control Records
- Enrollment Eligibility Records
- Claims Input Batch Acknowledgement Records

(a) FEP Operations Center to Vendor Communications (Continued)

- Claims Response Batch Start Records
- Claims Response Records
- Claims Response Batch Total Records
- Claims Disbursement Records

(b) Vendor to FEP Operations Center Communications

The following files will be transferred to the FEP Operations Center in a batch environment on a scheduled basis:

- Input Claim Batch Control Records
- Input Claim Batch Total Records
- Input Claim Transaction Records
- Corrections to Non-approved Transactions
- Transactions for which no claim has been filed
- Any reports requested by the FEP

4. Interface Requirements - On-line

On-line retrieval of data for subscribers will be required by the FEP. The vendor will be able to retrieve applicable data from the FEP Operations Center's files.

C. TRANSFER OF ENROLLMENT ELIGIBILITY DATE - FEP OPERATIONS CENTER TO VENDOR

The vendor shall receive and record enrollment updates a minimum of five working days per week, excluding those weeks where a 'national' holiday occurs, i.e., New Year's Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day and Christmas Day.

The Eligibility Record will contain contract information as well as information regarding specific members who are currently listed on our files as being covered and others who may have recently lost coverage. Verification of actual covered members will begin and end in 1993.

The exact criteria for determining eligibility will be provided to the vendor within 60 days of the contract award.

The Eligibility File will be include a Batch Control Record indicating the number of unique contracts, i.e., unique Identification Numbers, and the total number of member records included on the file. (There will be one unique record for Self-only contracts; multiples for Family contracts.)

The Enrollment Eligibility Batch Control Record and the Enrollment Eligibility Record will be similar to those described in the Data Exchange Section.

D. SUBMISSION OF CLAIMS ADMINISTRATION DATA FROM VENDOR TO THE FEP OPERATIONS CENTER / RESPONSES FROM THE FEP OPERATIONS CENTER TO VENDOR

1. Submission of Claims Administration Data - Vendor to the FEP Operations Center

The vendor shall submit claims administration data to the FEP Operations Center daily, i.e., Monday through Friday excluding 'national' holidays, e.g., New Year's Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day and Christmas Day. (It is recognized that subscribers will not be filing claims to the vendor during the first week of January. This is to point out that as claims are processed by the vendor, a daily submission of claims administration data to the FEP Operations Center is required.)

The file of claims administration data must be received at the FEP Operations Center by 6:45 P.M. in order to be included with that night's claims processing cycle.

The vendor will prepare claims administration data for transmission to the FEP Operations Center which is based on information completed by the subscriber and included on the drug claim form. Data captured from the pharmacy at the time of claim entry must be retrieved from the vendor's Database Management System (DBMS) and included on the claims administration data record to be transmitted to the FEP Operations Center.

While it is anticipated that the record format will be similar to the Comprehensive Claim Format, published by the National Council for Prescription Drug Program, Inc. Telecommunication Standard Format, Version 3, Release 2 which was drafted 11/91, additional data elements may be included.

One such data element will be the claim Disposition Code. The Disposition Code for an original claim submission is a 1; an adjustment is a Disposition Code 2 and a void is a Disposition Code 4. It is probable that the prescription number will be used as the claim number. Members may only have one unique claim number on their claims history. The use of the new/refill code as a part of the claim number would resolve this situation.

Claim transactions sent to the FEP Operations Center are grouped into batches of 50-99 claims to preclude loss of an entire day's submission in the event of an out-of-balance condition. Each batch includes a batch header (control) record and batch total record. The FEP Operations Center will supply prototype software to perform the batching. Suggested record formats for these are described in the Data Exchange Section.

2. Responses to Claims Administration Data - FEP Operations Center to the Vendor

The FEP Operations Center will prepare an acknowledgement record for all batches received by 6:45 P.M. This acknowledgement will indicate whether the batch was received in balance or whether an out-of-balance condition exists. These acknowledgements will be transmitted to the vendor by 10:00 P.M.

Individual claim responses and total records should be transmitted to the vendor no later than 5:00 A.M. Tuesday through Saturday mornings, i.e., data processed Monday through Friday evenings.

The types of Claims Administration Data include:

- Claim Input Batch Acknowledgement Records
- Claim Batch Response Start Records
- Claim Response Records

The types of Claims Administration Data include:
- Claim Response Batch Total Records
- Claim Disbursement Records

The FEP Claims Administration Data Response record has not been developed, but will include a positive response to each submitted transaction. The transaction may have a status of approved, deferred, rejected or bypassed (due to a system problem). Appropriate information needed to prepare an Explanation of Benefits and Check will be included.

The other records are described in the Data Exchange Section.

EXPLANATION OF BENEFITS (EOB)

Required Explanation of Benefits Fields

The Explanation of Federal Employee Benefits has been designed to have the capability of explaining all FEP covered services. The following EOB elements are required.

- Contract Holder Name
- Contract Holder Address
- Identification Number
- Claim Number
- Member Name
- Provider Name
- Place of Service
- Type of Service
- Date of Service
- Paid Date
- Total Charges
- Eligible Charges
- Charges Not Allowed
- Explanation of Rejection (Verbiage)
- Explanation Code (a Code)
- Deductible (Calendar Year)
- Coinsurance/Copay
- Amount Paid
- Total Subscriber Responsibility
- COB/Other Carrier Responsibility (would be waived since COB will be incorporated at a later time)

A sample of the Explanation of Benefits form supplied by the FEP Operations Center may be obtained. Other forms, including one with the check attached to the Explanation of Benefits are acceptable with prior approval from BCBSA.

DATA EXCHANGE SECTION

ENROLLMENT ELIGIBILITY BATCH CONTROL RECORD -
FEP OPERATIONS CENTER TO VENDOR

ENROLLMENT ELIGIBILITY BATCH CONTROL RECORD
PROPOSED RECORD LAYOUT

Field	Number of Characters
Record Identifier	1
Total Contract ID Count	8
Total Record (Member) Count	8
File Creation Date	8

All numeric fields are unsigned.

ENROLLMENT ELIGIBILITY BATCH CONTROL RECORD
DESCRIPTION OF FIELDS

FILE CREATION DATE - The date the file was created.

RECORD IDENTIFIER - An alphabetic code used in batch output to indicate the type of record transmitted. The letter 'N' will be used.

TOTAL CONTRACT ID COUNT - The number of unique FEP Identification Numbers contained on this file.

TOTAL RECORD (MEMBER) COUNT - The total number of Member Records contained on this file. If the entire file contains Self-only enrollments, the Total Contract ID Count and the Total Record (Member) Count will be equal. This, however, will probably never occur.

ENROLLMENT ELIGIBILITY RECORD -
FEP OPERATIONS CENTER TO VENDOR

ENROLLMENT ELIGIBILITY RECORD
PROPOSED RECORD LAYOUT

Field	Number of Characters
Record Identifier	1
Contract Identification Number	9
Contract Holder Social Security No.	9
Member Data	
Member Last Name	25
Member First Name	10
Member Middle Initial	1
Member Nickname	10
Member Sex	1
Member Date of Birth	8
Member Social Security Number	9
Member Code	1
Member Previous Name	36
Current Enrollment Period	
Enrollment Code-1	1
Enrollment Effective Date-1	8
Enrollment Effective Code-1	3
Enrollment Termination Date-1	8
Enrollment Termination Code-1	3
Member Type-1	1
Member Relationship-1	1
1st Prior Enrollment Period	
Enrollment Code-2	1
Enrollment Effective Date-2	8
Enrollment Effective Code-2	3
Enrollment Termination Date-2	8
Enrollment Termination Code-2	3
Member Type-2	1
Member Relationship-2	1
2nd Prior Enrollment Period	
Enrollment Code-3	1
Enrollment Effective Date-3	8
Enrollment Effective Code-3	3
Enrollment Termination Date-3	8
Enrollment Termination Code-3	3
Member Type-3	1
Member Relationship-3	1

ENROLLMENT ELIGIBILITY RECORD -
FEP OPERATIONS CENTER TO VENDOR

ENROLLMENT ELIGIBILITY RECORD
DESCRIPTION OF FIELDS

CONTRACT HOLDER IDENTIFICATION NUMBER - The FEP Identification Number. The first position is an 'R' followed by 8 digits.

CONTRACT HOLDER SOCIAL SECURITY NO - The Social Security Number of the Contract Holder.

ENROLLMENT CODE-1 - The most recent level of coverage in effect.
1 = High Option Single
2 = High Option Family
4 = Standard Option Single
5 = Standard Option Family

ENROLLMENT CODE-2,3 - The two previous enrollment codes, if applicable.

ENROLLMENT EFFECTIVE CODE-1 - The reason the Member is covered on ENROLLMENT EFFECTIVE DATE-1, e.g., the effective date of the contract, the Member's birth date.

ENROLLMENT EFFECTIVE CODE-2,3 - The reason the Member is covered on ENROLLMENT EFFECTIVE DATE-2,3.

ENROLLMENT EFFECTIVE DATE-1 - The beginning (effective) date for ENROLLMENT CODE-1.

ENROLLMENT EFFECTIVE DATE-2,3 - The beginning (effective) date for ENROLLMENT CODE-2,3.

ENROLLMENT TERMINATION CODE-1 - The reason the Member was terminated on ENROLLMENT TERMINATION-DATE-1, e.g., termination date of the contract, divorce, death.

ENROLLMENT TERMINATION CODE-2,3 - The reason the Member was terminated on ENROLLMENT TERMINATION-DATE-2,3.

ENROLLMENT TERMINATION DATE-1 - The ending (termination) date for ENROLLMENT CODE-1. If the contract is still active, this field contains all 9's.

ENROLLMENT TERMINATION DATE-2,3 - The ending (termination) date for ENROLLMENT CODE-2,3. If the contract is still active, this field contains all 9's.

MEMBER PREVIOUS NAME - The Previous last and first names and middle initial for a member whose name has changed, e.g., marriage.

ENROLLMENT ELIGIBILITY RECORD -
FEP OPERATIONS CENTER TO VENDOR

ENROLLMENT ELIGIBILITY RECORD
DESCRIPTION OF FIELDS

MEMBER CODE - A unique code used to identify Members. Possible values are 'A' through 'Y'.

MEMBER DATE OF BIRTH - The birth date of the Member.

MEMBER FIRST NAME - The first ten characters of the Member's first name.

MEMBER LAST NAME - The surname of the Member.

MEMBER MIDDLE INITIAL - The middle initial of the Member.

MEMBER NICKNAME - The first ten characters of the Member's nickname.

MEMBER RELATIONSHIP - The Member's relationship to the Contract Holder.
O - Original Contract Holder
C - Child
S - Spouse

MEMBER SEX - The sex of the Member.
M = Male
F = Female
U = Unknown

MEMBER SOCIAL SECURITY NUMBER - The Member's Social Security Number.

MEMBER TYPE-1 - Indicates whether the Member is the Contract Holder or a dependent.
C - Contract Holder
D - Dependent

MEMBER TYPE-2,3 -Indicates the Member's previous type as defined above.

RECORD IDENTIFIER - This field indicates the type of record.
E = Eligibility Record

FEP CLAIM INPUT BATCH ACKNOWLEDGEMENT RECORDS -
FEP OPERATIONS CENTER TO VENDOR

FEP CLAIM INPUT BATCH ACKNOWLEDGEMENT RECORD
PROPOSED RECORD LAYOUT

Field	Number of Characters
Reporting Plan Code	3
Batch Creation Date	6
Batch Date	6
Batch Sequence Number	5
Record Identifier	1 (I,K,P,W)
Processing Code	2
Original Batch Sequence Number	5
Operations Center Processed Date	6

FEP CLAIM INPUT BATCH ACKNOWLEDGEMENT RECORD
DESCRIPTION OF FIELDS

BATCH CREATION DATE - The date the file was created.

BATCH DATE - The date the file is being transmitted.

BATCH SEQUENCE NUMBER - The five-position code assigned to this batch. When duplicate batches are received, the Operations Center may reassign a new number to the batch. If no duplicates are received, this number will be equal to the original batch sequence number.

OPERATIONS CENTER PROCESSED DATE - The date the FEP Operations Center will process the batch.

ORIGINAL BATCH SEQUENCE NUMBER - The five-position code submitted by the vendor for this batch of claims.

RECORD IDENTIFIER - The letter will vary depending on the status of batch.

REPORTING PLAN CODE - A 3-digit code which will identify the vendor.

FEP CLAIMS ADMINISTRATION DATA RESPONSE BATCH START RECORD -
FEP OPERATIONS CENTER TO VENDOR

FEP CLAIMS ADMINISTRATION DATA RESPONSE BATCH START RECORD
PROPOSED RECORD LAYOUT

Field	Number of Characters
Reporting Plan Code	3
Batch Creation Date	6
Batch Date	6
Batch Sequence Number	5
Record Identifier	1 (F)
Processing Code	2
Operations Center Processed Date	6

FEP CLAIMS ADMINISTRATION DATA RESPONSE BATCH START RECORD
DESCRIPTION OF FIELDS

BATCH CREATION DATE - The date reported by the vendor.

BATCH DATE - The date reported by the vendor.

BATCH SEQUENCE NUMBER - A five-position number to indicate the sequence number assigned to this batch. This number may begin with 00001 each day or may be rolled over until the number is equal to 99998.

OPERATIONS CENTER PROCESSED DATE - The date in MMDDYY format that the batch was processed at the FEP Operations Center.

POSITIVE-NEGATIVE INDICATOR - Indicates whether the net item count is a positive or negative count.

PROCESSING CODE - The value '1A' will be used.

RECORD IDENTIFIER - The letter 'F' will identify this as a total record.

REPORTING PLAN CODE - A 3-digit code which will identify the vendor.

FEP CLAIMS ADMINISTRATION BATCH TOTAL RESPONSE RECORD -
FEP OPERATIONS CENTER TO VENDOR

FEP CLAIMS ADMINISTRATION BATCH TOTAL RESPONSE RECORD
PROPOSED RECORD LAYOUT

Field	Number of Characters	
Reporting Plan Code	3	
Batch Creation Date	6	
Batch Date	6	
Batch Sequence Number	5	
Record Identifier	1	(R)
Batch Gross Covered Charges	10	
Batch Gross Covered Charges Submitted	10	
Net Item Count	2	
Positive/Negative Indicator	1	
Gross Line Count	4	
Rejected Gross Covered Charges	10	
Rejected Net Item Count	2	
Positive/Negative Indicator	1	
Rejected Gross Line Count	4	
Deferred Gross Covered Charges	10	
Deferred Net Item Count	2	
Positive/Negative Indicator	1	
Deferred Gross Line Count	4	
Answer Lines Created	6	
Batch Check Writing Amount	10	
Positive/Negative Indicator	1	
Operations Center Disbursement Date	6	

FEP CLAIM ADMINISTRATION RESPONSE BATCH TOTAL RECORD -
FEP OPERATIONS CENTER TO VENDOR

FEP CLAIM ADMINISTRATION RESPONSE BATCH TOTAL RECORD DESCRIPTION OF FIELDS

ANSWER LINES CREATED - A control total in batch out put from which a determination can be made if all batch output transmitted was actually received.

BATCH CHECK WRITING AMOUNT - The total amount (dollars and cents) for which checks will be written as a result of payment of approved claims in each batch. If there are voids or negative adjustments in the batch, this amount will be the same as the Batch Net Amount Paid.

BATCH NET AMOUNT PAID - The amount (dollars and cents) which is payable as a result of the processing of approved claims in a batch.

BATCH DATE - The date the file is being transmitted.

BATCH GROSS COVERED CHARGES - The total amount (dollars and cents) is the accumulation of the covered charges amounts of all claims in a batch irrespective of Disposition Code.

BATCH GROSS SUBMITTED COVERED CHARGES - The total amount (dollars and cents) is the accumulation of the covered charges amounts of all claims in a batch irrespective of Disposition Code.

BATCH SEQUENCE NUMBER - A five-position number to indicate the sequence number assigned to this batch. This number may begin with 00001 each day or may be rolled over until the number is equal to 99998.

DEFERRED GROSS LINE COUNT - The total number of charge lines in a batch of claims transactions, irrespective of the Disposition Code, which were deferred for resolution of actual or potential errors.

DEFERRED GROSS SUBMITTED COVERED CHARGES - The total covered charges (eligible charges), dollars and cents, of all claims transactions in a batch which were deferred for resolution of actual or potential errors.

DEFERRED NET ITEM COUNT - The net total of deferred claims included in the batch, i.e., original submissions = +1; adjustments = +0; voids = -1.

GROSS LINE COUNT - The total number of individual drug charges contained in a batch of claims transactions, irrespective of Disposition Code.

FEP CLAIM ADMINISTRATION RESPONSE BATCH TOTAL RECORD -
FEP OPERATIONS CENTER TO VENDOR

FEP CLAIM ADMINISTRATION RESPONSE BATCH TOTAL RECORD DESCRIPTION OF FIELDS

NET ITEM COUNT - The net total of claims included in the batch, i.e., original submissions = +1; adjustments = +0; voids = -1.

OPERATIONS CENTER DISBURSEMENT DATE - (R1) - The date the Operations Center will give final approval to items submitted in a batch, and release reimbursement funds to the vendor's account.

POSITIVE-NEGATIVE INDICATOR - Indicates whether the net item count is a positive or negative count.

RECORD IDENTIFIER - The letter 'R' will identify this as a total record.

REJECTED GROSS LINE COUNT - The total number of charge lines in a batch of claims transactions, irrespective of the Disposition Code, which were rejected for resolution of actual or potential errors.

REJECTED GROSS SUBMITTED COVERED CHARGES - The total covered charges (eligible charges), dollars and cents, of all claims transactions in a batch which were rejected for resolution of actual or potential errors.

REJECTED NET ITEM COUNT - The net total of rejected claims included in the batch, i.e., original submissions = +1; adjustments = +0; voids = -1.

REPORTING PLAN CODE - A 3-digit code which will identify the vendor.

FEP CLAIM DISBURSEMENT RECORDS -
FEP OPERATIONS CENTER TO VENDOR

FEP CLAIM DISBURSEMENT RECORD PROPOSED RECORD LAYOUT

Field	Number of Characters
Attention Line	
Line Code	2 (R1)
Identifier	5
Vendor Name	46
Person to Receive Information	46
Reporting Plan Code	3
Processing Plan Code	3
Remittance Number	7
Disbursement Date	6
Batch Information Lines (1 per Batch)	
Line Code	2 (R2)
Batch Creation Date	6
Batch Sequence Number	5
Batch Date	6
Submitted Items Sign	1
Submitted Items	2
Submitted Amount Sign	1
Submitted Amount	9
Submitted Covered Sign	1
Submitted Covered	9
Disallowed Items Sign	1
Disallowed Items	9
Disallowed Amount Sign	1
Disallowed Sign	9
Disallowed Covered Sign	1
Disallowed Covered	9
Allowed Items Sign	1
Allowed Items	9
Allowed Amount Sign	1
Allowed Sign	9
Allowed Covered Sign	1
Allowed Covered	9
Subtotal Lines	
Line Code	2 (R3)
Submitted Items Sign	1
Submitted Items	4
Submitted Amount Sign	1
Submitted Amount	10
Submitted Covered Sign	1
Submitted Covered	10
Disallowed Items Sign	1
Disallowed Items	10
Disallowed Amount Sign	1
Disallowed Sign	10

FEP CLAIM DISBURSEMENT RECORDS -
FEP OPERATIONS CENTER TO VENDOR

FEP CLAIM DISBURSEMENT RECORD PROPOSED RECORD LAYOUT (Continued)

Disallowed Covered Sign	1
Disallowed Covered	10
Allowed Items Sign	1

FEP CLAIM DISBURSEMENT RECORDS -
FEP OPERATIONS CENTER TO VENDOR

FEP CLAIM DISBURSEMENT RECORD PROPOSED RECORD LAYOUT

Field	Number of Characters
Allowed Items	10
Allowed Amount Sign	1
Allowed Sign	10
Allowed Covered Sign	1
Allowed Covered	10
Payment Lines	
Line Code	2 (R4)
Payment Code	2
Contract Year	2
Explanation	30
Payment Items Sign	1
Payment Items	5
Payment Amount Sign	1
Payment Amount	11
Operations Center Processed Date	6
Summary Information Line	
Line Code	2 (R5)
Identifier	5
Amount Refund Sign	1
Amount Refund	11
Charge Line Sign	1
Charge Lines	5
Gross Covered Sign	1
Gross Covered Amount	11
Net Covered Sign	1
Net Covered Amount	11

FEP CLAIM DISBURSEMENT RECORDS -
FEP OPERATIONS CENTER TO VENDOR

FEP CLAIM DISBURSEMENT RECORD DESCRIPTION OF FIELDS

ALLOWED AMOUNT - (R2) - The total dollar amount of all submitted items in the batch which was allowed.

ALLOWED AMOUNT SIGN - (R1) - The sign (+) or minus (-) indicating the value of the entry.

ALLOWED COVERED- (R2) - The total dollar amount of covered charges for all submitted items in the batch which were allowed.

ALLOWED COVERED SIGN - (R2) -The sign (+) or minus (-) indicating the value of the entry.

ALLOWED ITEMS - (R2) - The number of claims in the batch which were allowed.

ALLOWED ITEMS SIGN - (R2) -The sign (+) or minus (-) indicating the value of the entry.

AMOUNT REFUND - (R5) - The total dollar amount of refunds applied from Special Information Records on file.

AMOUNT REFUND SIGN (R5) -The sign (+) or minus (-) indicating the value of the entry.

ATTENTION - The name of the person at the vendor who is intended to be the receiver.

CHARGE LINES - (R5) - The total number of charge lines for each batch included in the Remittance Schedule.

CHARGE LINES SIGN - (R5) -The sign (+) or minus (-) indicating the value of the entry.

CONTRACT YEAR - (R4) - A number indicating the last two digits of the incurred benefit year for which reimbursement is applicable.

DISALLOWED AMOUNT - (R3) - The total dollar amount of all submitted items in the batch which were not allowed.

DISALLOWED COVERED- (R3) - The total dollar amount of covered charges for all submitted items in the batch which were not allowed.

DISALLOWED COVERED SIGN (R3)-The sign (+) or minus (-) indicating the value of the entry.

FEP CLAIM DISBURSEMENT RECORDS - FEP OPERATIONS CENTER TO VENDOR

FEP CLAIM DISBURSEMENT RECORDS -
FEP OPERATIONS CENTER TO VENDOR

FEP CLAIM DISBURSEMENT RECORD DESCRIPTION OF FIELDS (Continued)

DISALLOWED ITEM - The number of claims in the batch which were not allowed.

DISALLOWED ITEM SIGN - (R3) -The sign (+) or minus (-) indicating the value of the entry.

DISBURSEMENT DATE - (R1) - The date on which wire transfer messages are sent for reimbursement in connection with claims, administrative cost, etc.

EXPLANATION - (R4) - A narrative description of the type of claims included in the batch. This will always indicate prescription drugs.

GROSS COVERED - (R5) - The total dollar amount of covered charges for all submitted items in all batches included in the remittance schedule.

GROSS COVERED SIGN - (R5) - The sign (+) or minus (-) indicating the value of the entry.

IDENTIFIER - (R1) - An alphabetic field for indicating the beginning of the remittance schedule.

NET COVERED - (R5) - The total net dollar amount of covered charges for all submitted items in all batches included in the remittance schedule.

NET COVERED SIGN - (R5) - The sign (+) or minus (-) indicating the value of the entry.

OPERATIONS CENTER DISBURSEMENT DATE - (R1) - The date the Operations Center gave final approval to items submitted in a batch, and released reimbursement funds to the vendor's account.

PAYMENT AMOUNT - (R4) - The total dollar amount of all submitted items in the batch for which payment is made for a contract year.

PAYMENT AMOUNT SIGN - (R4) - The sign (+) or minus (-) indicating the value of the entry.

PAYMENT CODE - (R4) - A number indicating the type of reimbursement. For the vendor, this code will always be the same.

FEP CLAIM DISBURSEMENT RECORDS -
FEP OPERATIONS CENTER TO VENDOR

FEP CLAIM DISBURSEMENT CONTROL RECORD DESCRIPTION OF FIELDS

PAYMENT ITEM - (R4) - The total number of submitted items in the batch for which payment is made for a contract year.

PAYMENT ITEM SIGN - (R4) - The sign (+) or minus (-) indicating the value of the entry.

PROCESSING PLAN CODE - (R1) - The code assigned to the vendor processing this transaction.

REMITTANCE NUMBER - (R1) - A system-generated number prefixed with the last two digits of the year assigned to each remittance schedule.

SUBMIT AMOUNT - (R2) - The total dollar amount of all submitted items in the batch.

SUBMIT AMOUNT SIGN - (R2) - The sign (+) or minus (-) indicating the value of the entry.

SUBMIT COVERED - (R2) - The total dollar amount of covered charges for all submitted items included in the batch.

SUBMIT COVERED SIGN - (R2) - The sign (+) or minus (-) indicating the value of the entry.

SUBMIT ITEM - (R2) - The total number of submitted items in the batch.

SUBMIT ITEM SIGN - (R4) - The sign (+) or minus (-) indicating the value of the entry.

VENDOR NAME - (R1) - The name of the vendor to which the remittance schedule is directed.

FEP INPUT CLAIMS ADMINISTRATION DATA BATCH TOTAL RECORD - VENDOR TO FEP OPERATIONS CENTER

FEP INPUT CLAIMS ADMINISTRATION DATA BATCH TOTAL RECORD PROPOSED RECORD LAYOUT

Field	Number of Characters
Batch Creation Date	6
Batch Date	6
Batch Sequence Number	5
Record Identifier	1 (T)
Batch Gross Covered Charges	10
Net Item Count	2
Positive-Negative Indicator	1
Gross Line Count	4

FEP INPUT CLAIMS ADMINISTRATION DATA BATCH TOTAL RECORD DESCRIPTION OF FIELDS

BATCH CREATION DATE - The date the file was created.

BATCH DATE - The date the file is being transmitted.

BATCH GROSS COVERED CHARGES - The total amount of the covered charges (billed) charges.

BATCH SEQUENCE NUMBER - A five-position number to indicate the sequence number assigned to this batch. This number may begin with 00001 each day or may be rolled over until the number is equal to 99998.

GROSS LINE COUNT - The total number of individual drug charges included in this batch.

NET ITEM COUNT - The net total of claims included in the batch, i.e., original submissions = +1; adjustments = +0; voids = -1.

POSITIVE-NEGATIVE INDICATOR - Indicates whether the net item count is a positive or negative count.

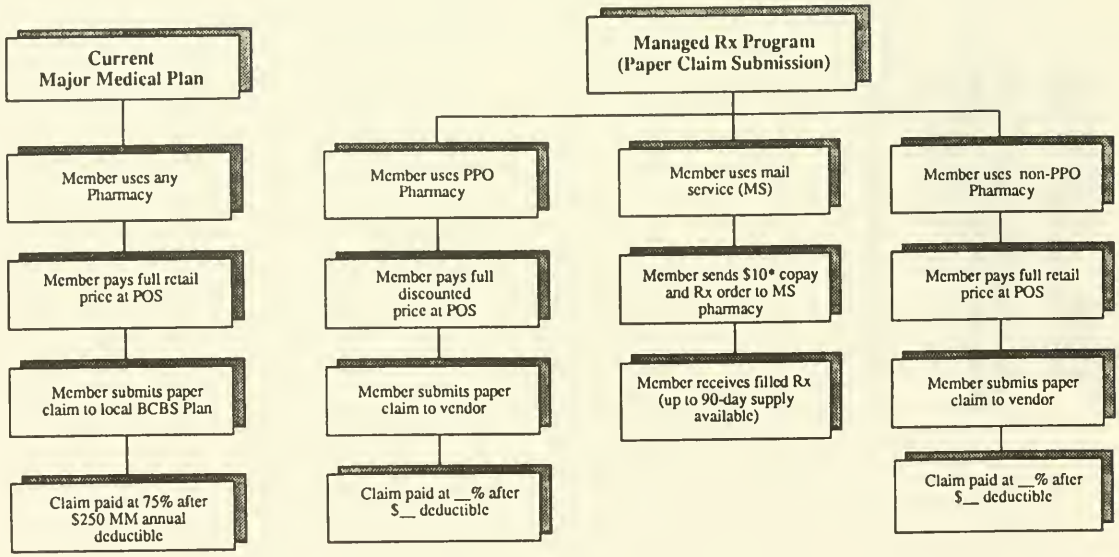
RECORD IDENTIFIER - The letter 'T' will identify this as a total record.

APPENDIX F:

PROPOSED RX PLAN FLOW CHART

Current vs. Paper Claim Rx Carveout Plan

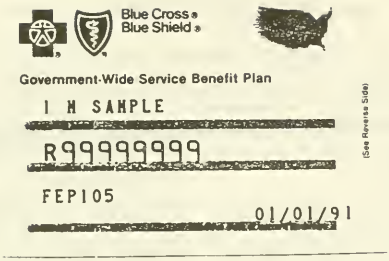
(This is an example of Standard Option with no Medicare involvement and is for illustrative purposes only)



* 1992 copay

APPENDIX G:

FEP IDENTIFICATION CARD
OPM 2809/ANNUITANT LETTER


Blue Cross®
Blue Shield®
Government-Wide Service Benefit Plan
I M SAMPLE
R99999999
FEP105
01/01/91
(See Reverse Side)

FEHB
Federal Employees Health Benefits Program

HEALTH BENEFITS REGISTRATION FORM

FEDERAL EMPLOYEES HEALTH BENEFITS PROG

FOR USE BY ANNUITANTS AND FORMER SPOUSES OF ANNUITANTS

Form Approved: OMB No. 3206-0141

- Use typewriter or print with ball-point pen, bearing down to make legible copies.
- Complete Part A and Parts B, C, and D as applicable.
- Sign and date in Part E.
- Read Instructions on back of Copy 1.

PART A - All who register must fill in this part.

1. Name *(Last, first, middle initial)*	2. Date of birth *(Use numbers for mo, day, yr)*	3. Are you now married? ☐ Yes ☐ No
4. Your mailing address *(Number and street)*	5. Social security number	6. Sex ☐ Female ☐ Male
7. City, state and ZIP code	8. Home phone number *(include area code)*	

IMPORTANT—It is illegal for an enrollee or a family member to be covered under more than one FEHB enrollment. If you are already covered through the family enrollment of another Federal or District of Columbia employee or annuitant, you cannot enroll unless the other enrollment is cancelled or changed to Self Only. Similarly, if a family member is covered through his or her own enrollment, you cannot elect a family enrollment unless the family member cancels his or her enrollment. Also see back of copies 1 and 2.

PART B - Fill in this part if you wish to enroll or change your enrollment in the Federal Employees Health Benefits (FEHB) Program.

I elect to enroll in a health benefits plan as shown below. I authorize deductions from my annuity to cover my cost of the enrollment, if deductions are required *(Copy the information requested below from front cover of brochure of the plan you select.)*

Name of plan you want	New Enrollment Code

If you are changing your enrollment, also fill in Part C below.

PART C - Fill in this part, as well as PART B, to change your registration.

1. Present plan name	2. Present plan enrollment code	3. Number of event that permits change *(See Table on Back of Copy 2)*	4. Date of event that permits change: Month	Day	Year

PART D - Fill in this part if you wish to CANCEL your enrollment.

I elect to cancel my health benefits enrollment. (Place an "X" in the box below.)

		Present Enrollment Code
☐	My signature in Part E certifies that I have read "Cancellation of Enrollment" on the back of Copy 1 and I am currently enrolled under the code shown. →	

PART E - All who register must fill in this part.

WARNING: Any intentional false statement in this application or willful misrepresentation relative thereto is a violation of the law punishable by a fine of not more than $10,000 or imprisonment of not more than 5 years, or both. (18 U.S.C. 1001.)

1. Your signature *(Do not print)*	2. Date
3. Retirement claim number	4. Phone number *(including area code)*

(SAMPLE COPY ONLY)

PART F - To be completed by OPM.

1. Name and address *(including ZIP code)*	2. Date received in OPM.	3. Effective date of election of enrollment shown in Part B or cancellation shown in Part D.
U.S. Office of Personnel Management Office of Retirement Programs Washington, D.C. 20415	4. Effective date of termination of enrollment shown in Part C	5. RI 75-3 report number
6. Signature of authorized agency official	7. Payroll office number 24 00 0002	

REMARKS - For use only by OPM.

Office of Personnel Management
FPM Supplement 890-1
Previous editions are usable.

OPM Form 2809
Rev. August 1989

Copy 1-Enrollee

GENERAL INFORMATION

The information provided on this form is needed to document your enrollment in the Federal Employees Health Benefits Program under Chapter 89, title 5, U.S. Code. This information will be shared with the health insurance carrier you select so that they may (1) identify your enrollment in their plan, (2) verify your and/or your family's eligibility for payment of a claim for health benefits services or supplies, and (3) coordinate payment of claims with other carriers with whom you might also make a claim for payment of benefits. This information may be disclosed to other Federal agencies or Congressional offices which may have a need to know it in connection with your application for a job, license, grant or other benefit. It may also be shared and is subject to verification, via paper, electronic media, or through the use of computer matching programs, with national, state, local or other charitable or social security administrative agencies to determine and issue benefits under their programs or to obtain information necessary for determination or continuation of benefits under this program. In addition, to the extent this information indicates a possible violation of civil or criminal law, it may be shared and verified, as noted above, with an appropriate Federal, state, or local law enforcement agency. While the law does not require you to supply all the information requested on this form, doing so will assist in the prompt processing of your enrollment.

We also request that you provide your Social Security Number so that it may be used as your individual identifier in the Federal Employees Health Benefits Program, Executive Order 9397, dated November 22, 1943, allows agencies to use the Social Security Number as an identifier to distinguish between people with the same or similar names.

We think this form takes an average 30 minutes to complete, including the time for reviewing instructions, getting the needed data, and reviewing the completed form. Send comments regarding our time estimate or any other aspect of this form, including suggestions for reducing completion time, to the Office of Management and Budget, Paperwork Reduction Project (3206-0141), Washington, D.C. 20503.

Dual Enrollment Prohibited

You cannot be covered as an annuitant under your own enrollment and as a family member under someone else's enrollment in the Federal Employees Health Benefits (FEHB) Program. Likewise, a member of your family cannot be covered under more than one enrollment in the Program.

Enrollment in a Prepaid Plan

To enroll in a prepaid plan (comprehensive medical plan/health maintenance organization), you must live in the plan's enrollment area as stated in the plan brochure.

Enrollment in a Fee-for-Service Plan

If you enroll in a fee-for-service plan sponsored by an employee organization, you must be (or become) a member of the organization that sponsors the plan. Your membership will be verified.

Self Only Enrollment

A Self Only enrollment provides benefits just for you.

Self and Family Enrollment

A Self and Family enrollment provides benefits for you, your spouse (unless you are a remarried survivor annuitant or a former spouse), and any unmarried dependent children under 22 years old, including your legally adopted children, recognized children born out of wedlock, and stepchildren or foster children if they live with you in a regular parent-child relationship. Children whose marriage ends before they reach age 22 become eligible for coverage from the date the marriage ends until they reach age 22. NOTE: Eligible children under a former spouse's self and family enrollment are limited to the natural or adopted children of both the former spouse and the Federal employee.

An unmarried dependent child 22 years old or older who is incapable of self-support because of a mental or physical disability that existed before the child's 22nd birthday may also be eligible for coverage.

For more information write to:

Office of Personnel Management
P.O. Box 14172
Washington, D.C. 20044

Other relatives (your parents, for example) are not eligible for coverage even though they may live with you and be dependent upon you.

If your present enrollment is Self Only, you must change to a Self and Family enrollment if you want to provide coverage for a new eligible family member. See back of Copy 2 for events which allow you to change to a self and family enrollment.

Future Changes in Address Or Family Status

When your home or mailing address changes, you must notify the Office of Personnel Management immediately. Write to the Change-of-Address Section, P.O. Box 686, Washington, D.C. 20044. Be sure to include your new address, your name, and your retirement claim number. You must also notify your carrier. If the family member(s) covered by your health benefits enrollment change, you must inform your health benefits carrier. You must notify the Office of Personnel Management immediately if you become the only person covered by a Self and Family enrollment so that your enrollment can be changed to Self Only. You must also inform the Office of Personnel Management if you change your name or add family members.

Changes in Enrollment

After OPM processes your request to enroll or change your enrollment, copy 1 of this form will be returned to you. The effective date of the enrollment or enrollment change will be shown in item 3 of Part F. A new identification card will be mailed to you as soon as possible by your plan. (The Office of Personnel Management does not issue I.D. cards.) If you should need health services before you receive your new I.D. card, show this form to the doctor or hospital. They can then verify your new coverage with the plan.

Cancellation of Enrollment

You may cancel your enrollment at any time. However, if you cancel, you cannot reenroll as an annuitant (unless you are continuously covered as a family member under another person's FEHB enrollment during the period between your cancellation and reenrollment; see events 6a, 7, and 17 in the table shown on the reverse side of copy 2). If you cancel, neither you nor any family member covered by your enrollment will be entitled to a temporary extension of coverage or conversion to individual coverage. Former spouses who cancel can never reenroll as former spouses.

1. Open Season changes take effect January 1.

2. Non-Open Season changes (except cancellations) take effect the first day of the month following the month in which OPM receives your OPM Form 2809. NOTE: A change from Self Only to Self and Family due to the birth of a child or addition of a child as a new family member is effective the first day of the month in which the child is born or becomes an eligible family member.

3. Cancellations: If OPM receives your OPM Form 2809 on or before the the 15th of the month, cancellation of your FEHB Program enrollment will take effect at the end of the month. If OPM receives the form after the 15th, your cancellation will take effect at the end of the following month.

Notice of Change in Health Benefits Enrollment

FEHB

Part A - Identifying Information

1. Name (*Last, first, middle initial*)	2. Annuity Claim CSA	3. Survivor Annuity Claim CSF
	4. Date of Birth	5. Social Security Number
6. Address (*including Zip Code*)	7. Payroll Office Number 24 00 0002	8. Enrollment Code
	9. Enrollment I.D.	10. Date this action becomes effective

Only the items checked below affect your enrollment. Read carefully and follow any pertinent instructions. Keep this form for your records.

Part B - Termination

☐ Your enrollment terminates on the date in Part A, item 10, above. However, your coverage is extended for 31 days after that date.
Important Notice: You have the right to convert to an individual (nongroup) contract with the carrier of your plan. See Part B - Termination on the back of this form for information about 31-day extension of coverage and conversion.

Part C - Transfer In

☐ Your Federal retirement system has accepted transfer of this enrollment and will continue it.

Part D - Transfer Out

☐ This enrollment continues but is transferred to the new payroll office shown below. See Part D on the back of this form for more information.

Name

Address (*including Zip Code*)

Part E - Reinstatement

☐ Your enrollment has been reinstated effective on the date in Part A, item 10, above.

Part F - Change in Name of Enrollee

☐ The name under which this enrollment is carried has been changed to:
(Note: The Pl- will send you a new identification card.)

Name

Date of Birth: Month / Day / Year

Address (*including Zip Code*) if different from Part A, item 6, above.

Social Security Number

Sex ☐ Male ☐ Female

(SAMPLE COPY ONLY)

Part G - Change in Enrollment - Survivor Annuitant

☐ Your enrollment has been changed from Family coverage to Self-Only coverage.
Your Plan will send you a new identification card.

New Enrollment Code

Part H - Remarks

Date of Death (*if applicable*): Month / Day / Year

Part I - Date of Notice

Name and address of agency	U.S. Office of Personnel Management Retirement Programs Washington, D.C. 20415	(For agency use only)
Signature of authorized agency official		Date

Part B - Termination

If Part B on the other side of this form is checked, read the following instructions carefully.

31-Day Extension Of Coverage

Your enrollment terminates on the date shown in Part A, item 10, on the front of this form. Coverage under your enrollment continues for 31 days from the date shown. If you, or any covered member of your family, are a patient in a hospital on the 31st day of this extension, benefits of the plan may continue for the rest of that confinement, but not beyond 60 more days.

Conversion To Nongroup Contract

You may convert your enrollment to a nongroup contract, without evidence of good health. The nongroup contract to which you may convert is one regularly offered by your plan. It may differ from your group plan in benefits or cost, or both, and you will have to pay the entire cost of the nongroup contract directly to the plan. The nongroup contract is effective on the day after your 31-day extension of coverage ends.

If you are interested in converting to a nongroup contract, write for information to the nearest office of the plan in which you have been enrolled (see the plan's brochure or ask the Office of Personnel Management for the address of the plan's nearest office). The plan will promptly send you an application form and details concerning benefits and rates of the nongroup contract to which you may convert.

Time Limit On Conversion

Normally, to be eligible for conversion, you must send your written request for information to your plan within 31 days after the date shown in Part I. However, if the date shown in Part I is more than 60 days after the date your enrollment terminates (Part A, item 10), you must forward it to your plan within 91 days after the date shown in Part A, item 10.

If you are prevented by causes beyond your control from submitting a timely request for information about conversion to a nongroup contract, you should write to your plan as soon as possible asking approval of a belated conversion opportunity. Explain fully the circumstances that prevented earlier action and attach a copy of this form or other proof of the loss of group coverage. A plan may consider requests filed within 6 months after group eligibility ends. If your plan needs assistance in processing your request, it should contact OPM.

Entry On Active Military Duty

If you elected to terminate your enrollment because you are entering military service, you may convert to a nongroup contract even though your family members are entitled to care under the Uniformed Services Health Benefits Program. Your enrollment will be reinstated on the day you are separated from military service. You must notify your retirement system of this event by furnishing a copy of your separation papers.

If Part C, D, E, F, or G on the other side of this form is checked, read carefully whichever of the following instructions applies.

Part C - Transfer In

Retirement - Your enrollment continues automatically during retirement because you met certain eligibility requirements.

Death - If the deceased employee or annuitant was enrolled for self and family at the time of death, and if at least one of the covered family members is entitled to survivor annuity (or the surviving spouse is eligible for FERS lump sum benefit), eligible family members who were covered by the enrollment of the deceased may continue the coverage. The health benefits plan identification number generally is the deceased's social security number.

Part D - Transfer Out

Reemployment - If you are reemployed by a Federal agency, your health benefits enrollment continues. Show this form to your new employing office as evidence of your enrollment. Your new employing office should give you another form similar to this one to show that your health benefits coverage has been continued through their payroll office.

Employees' Compensation - Your enrollment continues automatically while you receive monthly compensation from the Office of Workers' Compensation Programs if the Secretary of Labor has held that you are unable to return to duty and if you have been enrolled under the Federal Employees Health Benefits Program for the lesser of (1) all your service since your first opportunity to enroll or (2) the 5 years of service immediately preceding the start of your compensation. Enrollment of covered family members of a deceased employee or compensationer also continues automatically while they receive monthly compensation, if (1) the deceased employee or compensationer was enrolled for self and family at the time of death and (2) at least one of the covered family members is entitled to compensation as a surviving beneficiary under the Federal Employees' Compensation Act. The compensationer's or survivor's share of the cost of the enrollment will be deducted from the compensation payments.

Part E - Reinstatement

If your health benefits enrollment was erroneously terminated, this form is used to reinstate your enrollment. If your annuity is terminated and is later restored, this form is used to reinstate your health benefits enrollment.

Part F - Change in Name of Enrollee

At the time a Federal retirement system survivor annuity is approved, this form is used to show that the retirement system has continued the health benefits enrollment in the survivor's name. If an eligible spouse survives, the enrollment will be changed to his/her name. Otherwise, the enrollment will be continued in the name of the youngest child.

Part G - Change In Enrollment - Survivor Annuitant

The enrollment will remain in the family option unless there is only one eligible family member. In that event, the enrollment will be changed to the self-only option. The family plan covers all eligible family members. Any time the person who is paying for the family enrollment elects to change to self-only, all other eligible family members will be given an opportunity to enroll in an FEHB plan.

KEEP THIS FORM FOR YOUR RECORDS.

WEDNESDAY, FEBRUARY 24, 1993.

INSPECTOR GENERAL

WITNESSES

PATRICK E. McFARLAND, INSPECTOR GENERAL
JOSEPH R. WILLEVER, DEPUTY INSPECTOR GENERAL
CAROL STILTNER, CHIEF, MANAGEMENT RESOURCES AND ADMINISTRATION BRANCH
DAN MARELLA, BUDGET OFFICER

Mr. HOYER. How are you, sir?

Mr. MCFARLAND. Fine, sir.

Mr. HOYER. Mr. McFarland, we welcome you. You are the Inspector General of the Office of Personnel Management. We appreciate you being here.

You can introduce your colleagues at the table and then proceed. We will include your full statement for the record.

Mr. MCFARLAND. Thank you, Mr. Chairman.

On my left is Joseph Willever. He is the Deputy Inspector General. Directly behind me is Carol Stiltner, the Chief of the Management Resources and Administration Branch, and Dan Marella, the Budget Officer.

Mr. HOYER. Mr. McFarland.

Mr. MCFARLAND. Mr. Chairman and members of the subcommittee, my name is Patrick McFarland. I became the Inspector General at the Office of Personnel Management in August of 1990. I appreciate this opportunity to discuss the mission and major program issues of my organization.

In testifying today, I want to emphasize at the outset that the administration is currently formulating the President's fiscal 1994 budget. Accordingly, I am not in a position to provide you with the administration's position on funding for specific programs or activities. As soon as the President's 1994 budget is released, I would be pleased to answer any questions you may have on our request.

The Office of the Inspector General conducts and coordinates audits and investigations of Office of Personnel Management activities to promote economy, efficiency and integrity in the agency's operations. In addition, Inspector General operations are designed to detect fraud, waste, and abuse of authority and funds.

To ensure that this mission is accomplished, the Office of the Inspector General is organized into three major program areas. These areas are audits, investigations and administrative sanctions.

The audits program continues to be very successful. In fiscal years 1991 and 1992, audits of insurance carriers in the Federal Employees Health Benefits Program identified recommended recoveries of $49 million. In addition, a limited scope audit of the Office of Personnel Management's financial statements for the period end-

ing September 30, 1991, was conducted during fiscal year 1992 and it identified many deficiencies in internal controls and accounts.

We also continue to audit the local campaign organizations involved with the Combined Federal Campaign. The Combined Federal Campaign is the largest employer-sponsored charitable drive in the United States, with over 500 participating local campaigns, collecting $190 million in pledges.

The investigations program made great strides in fiscal year 1992. A total of 90 investigation cases were worked and 460 investigation complaints were handled last year. We fully anticipate that this program will continue to expand during the long-term future and that financial recoveries due to investigative findings will continue to be significant.

As an example, a recent investigation of an issue identified in a routine health carrier audit resulted in the carrier reimbursing the trust fund a total of $3,190,995.

The administrative sanctions program, which I have assumed responsibility for, is nearing its operational stage. When fully implemented, the Office of the Inspector General, on behalf of the Office of Personnel Management, will issue administrative sanctions against health care providers who act improperly against the Federal Employees Health Benefits Program. These administrative sanctions include suspension and debarment from participation in the Federal Employees Health Benefits Program, double damages, and penalties of up to $10,000 per false claim.

A notice of proposed rulemaking, which announces the Office of Personnel Management's intention to adopt the Nonprocurement Debarment and Suspension Common Rule, was approved for publication in the Federal Register on January 29, 1993. After a 30-day public comment period, we will proceed to issue the common rule as a final agency regulation.

This concludes my prepared testimony. I would be happy to answer any questions that you might have.

Mr. HOYER. Thank you, Inspector General.

[The statement follows:]

PATRICK MCFARLAND
Inspector General
Office of Personnel Management

Patrick E. McFarland was appointed Inspector General of the Office of Personnel Management on April 11, 1990, confirmed by the United States Senate on August 6, 1990, and was sworn in on August 9, 1990.

As Inspector General, Mr. McFarland is responsible for providing leadership that is dedicated to identifying fraud, waste, abuse, and mismanagement in programs administered by the Office of Personnel Management. Audits and investigations are conducted of the largest retirement and employee health insurance programs in the world. Mr. McFarland is a member of the President's Council on Integrity and Efficiency which is the organization of presidentially appointed inspectors general and other federal officials established by executive order. The purpose of the council is to provide a government-wide forum for identifying and addressing issues related to fraud, waste, and abuse and to promote economy and efficiency in government programs and operations. Mr. McFarland serves as chairman of the Council's Executive Development Committee. The committee provides a focal point for education, training, and career development activities for executive and senior management staff of Inspector General offices. Mr. McFarland also serves on five other committees of the President's Council on Integrity and Efficiency.

Mr. McFarland's law enforcement career spans over 30 years. He served with the United States Secret Service for 22 years, providing line and staff management oversight for protective activities involving six presidents of the United States and many chiefs of state and heads of government. He was a police officer and detective with the St. Louis Metropolitan Police Department for five years, and was a special agent with the Federal Bureau of Narcotics for one year.

Mr. McFarland is a member of the Federal Investigators Association, the International Association of Chiefs of Police, and the Association of Government Accountants.

Mr. McFarland was born and raised in St. Louis, Missouri. He attended St. Louis University, graduating in 1965 with a Bachelor of Science degree. He earned his Master of Public Administration degree from The American University in 1986. Mr. McFarland and his wife have four children and reside in Vienna, Virginia.

JOSEPH R. WILLEVER
Deputy Inspector General
Office of Personnel Management

Joseph R. Willever has served as Deputy Inspector General of the Office of Personnel Management since March 1987. He began his auditing career with the Potomac Electric Power Company in Washington, D. C. in 1966, and first entered public service as an auditor with the District of Columbia in 1968. In 1971, he joined the Office of Personnel Management holding a variety of increasingly responsible positions in the Office of the Inspector General and its predecessor organizations, and was appointed Deputy Inspector General for Audit in 1984.

Mr. Willever is active in the audit and investigations professional communities. He served on the Steering Committee of the Coordinating Conference of the President's Council on Integrity and Efficiency (PCIE). As a Steering Committee member, Mr. Willever represented the inspectors general of thirty-three designated federal entities on various committees of the PCIE. He is a member of the Federal Investigators Association, the American Society for Public Administration, the Association of Government Accountants, the Institute of Internal Auditors, the Federal Executive Institute Alumni Association, and a past member of the Institute of Cost Analysis. Mr. Willever also represents the Office of Personnel Management at the National Inter-governmental Audit Forum and participates in the Mid-Atlantic chapter of the National Forum.

In his present position, he is responsible for managing a comprehensive nationwide audit and investigative program within the Office of Personnel Management, including financial management of the federal retirement, health insurance and life insurance trust funds with approximate balances of $247 billion. Nearly 2.2 million annuitants are served by the retirement systems, 4 million employees and annuitants participate in the health insurance programs, and 4.1 million employees and annuitants participate in the life insurance program.

Mr. Willever has presented training sessions at OPM's Federal Executive Institute and the Washington Training and Development Services Management Development Program on the role of an inspector general and ethics in management.

Mr. Willever served in the U.S. Marine Corps from 1958-1962. He earned a Bachelor of Science degree from Southeastern University. He has completed executive training at OPM's Executive Seminar Centers, and the Federal Executive Institute.

Mr. Willever and his wife Linda and their two children live in Manassas, Virginia.

STATEMENT OF
HONORABLE PATRICK E. MCFARLAND, INSPECTOR GENERAL
OFFICE OF PERSONNEL MANAGEMENT

at a hearing of the

SUBCOMMITTEE ON TREASURY, POSTAL SERVICE, AND
GENERAL GOVERNMENT
COMMITTEE ON APPROPRIATIONS
U.S. HOUSE OF REPRESENTATIVES

on

OVERVIEW
FOR THE OFFICE OF THE INSPECTOR GENERAL
AT THE OFFICE OF PERSONNEL MANAGEMENT

FEBRUARY 25, 1992

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

MY NAME IS PATRICK MCFARLAND. I BECAME THE INSPECTOR GENERAL AT THE OFFICE OF PERSONNEL MANAGEMENT IN AUGUST OF 1990. I APPRECIATE THIS OPPORTUNITY TO DISCUSS THE MISSION AND MAJOR PROGRAM ISSUES OF MY ORGANIZATION.

IN TESTIFYING TODAY, I WANT TO EMPHASIZE AT THE OUTSET THAT THE ADMINISTRATION IS CURRENTLY FORMULATING THE PRESIDENT'S FY 1994 BUDGET. ACCORDINGLY, I AM NOT IN A POSITION TO PROVIDE YOU WITH THE ADMINISTRATION'S POSITION ON FUNDING FOR SPECIFIC PROGRAMS OR ACTIVITIES. AS SOON AS THE PRESIDENT'S 1994 BUDGET IS RELEASED, I WOULD BE PLEASED TO ANSWER ANY QUESTIONS YOU MAY HAVE ON OUR REQUEST.

THE OFFICE OF THE INSPECTOR GENERAL CONDUCTS AND COORDINATES AUDITS AND INVESTIGATIONS OF OFFICE OF PERSONNEL MANAGEMENT ACTIVITIES TO PROMOTE ECONOMY, EFFICIENCY, AND INTEGRITY IN THE AGENCY'S OPERATIONS. IN ADDITION, INSPECTOR GENERAL OPERATIONS

Governing Law

The FEHBP is a federal program of insurance for federal employees and annuitants. The governing statute is the Federal Employees Health Benefits Act, 5 U.S.C. § 8901 et seq. A detailed summary of the statutory scheme is provided in Appendix A.

The FEHBP and the health benefits plan contracts are governed solely by federal law. The FEHBP Act has a preemption provision at section § 8902(m) (1) that provides that the FEHB contracts, including the statements of benefits, preempt conflicting state law. The preemption provision was enacted to ensure that the FEHB plans have uniform benefits and uniform administration nationwide.

We are not able at this time to definitively state whether all state laws that would govern this pharmacy program will be preempted. A series of questions is included in this RFP at Section III (I) that are designed to give us sufficient data to evaluate the preemption question. Therefore, for the purposes of answers to the general pricing and operational questions, you should assume that state law applies to this retail pharmacy program. If at any point, however, you find that you cannot comply with a specification in this proposal because of a state law restriction, please so indicate with a specific reference to the state law to complete the answer. We will specifically elicit from you in Section III (I) a series of comparisons of prices and operating functions if it is assumed that state law is preempted.

G. BIDDER'S CONFERENCE

On Tuesday, April 14, 1992, the BCBSA FEP will hold a Bidder's Conference for interested vendors. The purpose of the conference will be to answer questions. The conference will be held at the Washington Vista Hotel, 1400 M Street, N.W. Washington, D.C. at 1:00 p.m. EST.

Vendors are requested to submit questions for the Bidder's Conference in writing **on or before April 8, 1992**. Questions should be sent to the attention of:

Mr. James Schroeder
Manager, FEP Procurement
Blue Cross and Blue Shield Association
Federal Employee Program
1615 L. Street, N.W.
Washington, DC 20036
Phone: (202) 862-8768
Fax: (202) 862-8775

It is highly recommended that a **FAX copy be sent to Mr. Schroeder's attention** due to any inadvertent delay by regular mail.

Any questions sent to Mr. Schroeder must be written in a clear and concise manner. Please identify page number and question number in the RFP to which your question pertains.

H. COMPREHENSIVE OR COMPONENT PROPOSALS

Although the FEP prefers to contract with a sole vendor to provide all services, the FEP is open to considering stand-alone proposals for carved-out components of the program, such as Drug Utilization Review or rebate programs. Some vendors, therefore, may wish to provide proposals only for certain carved-out components. Others may choose to present proposals which offer a choice of either a comprehensive package or specific components which could be selected by FEP on a stand-alone basis.

Joint proposals are permitted provided the proposal clearly designates one of the parties as the prime contractor and the other party (or parties) as subcontractor(s).

I. OTHER INFORMATION/REQUIREMENTS

1. Award or Rejection

All qualified proposals will be evaluated and the award will be made to that vendor whose combination of cost and services are deemed to be in the best interest of the FEP and its subscribers. The BCBSA may enter into negotiations with more than one vendor simultaneously. The final vendor will be selected based on best value as determined by the BCBSA. The BCBSA reserves the right to accept or reject any subcontractor the vendor may include in their proposal. The BCBSA also reserves the unqualified right to reject any or all proposals.

2. Decline to Offer

Any vendor who receives a copy of this RFP but declines to make an offer is requested to send a formal "Decline to Offer" notice to the name listed under item #6 below.

3. Cost for Proposal Preparation

Any costs incurred by vendors in preparing or submitting proposals are the vendor's sole responsibility; BCBSA will not reimburse any vendor for these costs.

4. Time for Acceptance

The vendor(s) agrees to be bound by its proposal until the effective date of December 31, 1992, during which time BCBSA may request clarification or correction of the proposal for the purpose of evaluation. Amendments or clarifications shall affect only that portion of the proposal so amended or clarified.

5. Proposal Deadline

Proposals must be received no later than **5:00 p.m. on May 15, 1992.** Please provide 14 original copies and three diskette copies (in WordPerfect and Lotus 1-2-3 format as appropriate) of your proposal to:

Mr. James Schroeder
Manager, FEP Procurement
Blue Cross and Blue Shield Association
Federal Employee Program
1615 L. Street, N.W.
Washington, DC 20036
Phone: (202) 862-8768
Fax: (202) 862-8775

STAFF LEVEL

Mr. HOYER. Let me preliminarily ask you, how many employees do you have currently?

Mr. MCFARLAND. We have a ceiling of 122, and we have 121 on board.

Mr. HOYER. Are you contemplating reducing that by five pursuant to—from 122?

Mr. MCFARLAND. That is correct, sir.

Mr. HOYER. So presumably you will be down to 117?

Mr. MCFARLAND. That is correct.

ADMINISTRATIVE REDUCTION

Mr. HOYER. In addition, the 3 percent administrative reduction, 3 percent reduction in administrative costs, are you contemplating that in terms of your fiscal year 1994 budget?

Mr. MCFARLAND. We are contemplating it. As you mentioned before, the personnel issues and rent paid to GSA aren't applicable. But what concerns us is that the travel does count, and, in our organization, the insurance auditors do an inordinate amount of traveling. We are very hopeful that it is not going to be that much of a negative impact on us. But our primary concern would be the travel of our auditors.

TRUST FUND ACCOUNTS

Mr. HOYER. We will keep that in mind.

Do you continue to spend the majority of your time auditing the various OPM trust funds and, if so, have there been any material findings since the last time?

Mr. MCFARLAND. Yes, sir, we do spend the majority of our effort in the insurance area and in FY-1992, there was a total of $16 million recommended for recovery. As I said in my statement, in 1991 and 1992 the total was $49 million.

What wasn't mentioned in the statement but what is also very noteworthy, I believe, is the fact that already this year we recommended recoveries of over $29 million.

Mr. HOYER. $129 million?

Mr. MCFARLAND. $29 million.

Mr. HOYER. What is the total budget for fiscal year 1993?

Mr. MCFARLAND. It is $10.7 million.

Mr. HOYER. So if one assumes that $29 million, for instance, would have been lost to us, we saved by that action two years of-maybe three years of your operations.

Mr. MCFARLAND. At least.

AUDIT CLEARANCE PROCESS

Mr. HOYER. What recommendations has your office made to OPM for improving the audit clearance process in order to assure timely and effective clearance of material?

Mr. MCFARLAND. If that is referring primarily to previous discrepancies between the semiannual report and the management response, then I think it is best explained that we have increased our communication with them. We have determined that without ques-

tion we will look at all figures regarding funds put to better use before they issue their statement.

And we—from our point of view, we will make sure that what we have said is in synch with what they are planning on saying or else we will have an answer as to why not. I think they are already taking their corrective actions regarding that.

Mr. WILLEVER. If I could add something to that.

The agency has recently developed a system. We had a system going where we were capturing our audit findings and recoveries and so on, and the agency has just recently developed a system that would dovetail into it. So we shouldn't have that discrepancy in the future.

ADMINISTRATIVE SANCTIONS

Mr. HOYER. What is your progress on adopting a regulatory program for debarment of unfit health care providers from the FEHBP? I mentioned briefly that that was a sanction.

Mr. MCFARLAND. Well, the progress, without question, has been slow, but I would say without any hesitation that the lack of speed has not been in any way associated with my organization.

By that I am not indicating anyone else. I am simply saying that we have moved expeditiously since I took this responsibility on in June of 1991.

I will be glad to offer to you all here the same thing that I just did recently with Senator Pryor's staff and Congressman Ackerman's staff, and that is to give a very thorough briefing by our people who are running the program as to where we are and where we are going.

But the bottom line on it, Mr. Chairman, is that I took this responsibility on when I was at OPM for only a short period of time knowing full well that prior to my getting there, there had been fighting between my predecessor office and Retirement and Insurance Group as to who should have the responsibility.

Now, there was a choice, of course, of moving back and performing strictly an IG function and pointing the finger at the fact that it is not being done. But because there had been no direction and this law had been on the books since 1988, I felt that I would be much more remiss if I didn't just simply do a quick preliminary study, see if it fit at all in my organization and then move expeditiously toward implementing it.

And that is what I did. I took it as a result of a permission given by Director Newman at the time. At the time I requested that I be given that jurisdiction so that the bickering would stop and that we could move forward on it.

Now, the other side of the coin is that I wouldn't have done that under normal circumstances, move into a program area, because, as you know, that is not what an IG is all about. But, in this particular case, it was much more important for me to get this thing up and running. I didn't want to be remiss in allowing this to just stay as a law that nobody was paying attention to.

So I took it. The intervening process that took place was simply that OMB did not give us any funding. We have not received one penny to date and, consequently—from the committee, we have not received one penny to date or resources to implement this, and that

part is alright—I am not complaining about that. The point I am trying to make is that we took this and we ran with it as best we could, but we had the overarching emphasis and suggestion from OMB that we incorporate the common rule, the nonprocurement common rule, which, just by way of information, OPM chose not to join in 1988 when given the opportunity to join. It had been something that OMB had been operating with and trying to develop since 1982.

Well, to make a long story short, it was the day after my testimony here last year that the Office of General Counsel came down and agreed that we could join the common rule, that it would not be going against the statute as such.

What I asked in my budget at that time was for 17 people and $1.5 million to do the statute. Once we were turned down on the money and the people, then all of a sudden it just made as much sense as possible to go with the common rule because we were at least going to be able to honor the intent of the law fully. Excuse me, not fully but to a great extent.

Now, what we have done since then, to further answer your question and possibly come to a conclusion here, is that we are in the process also of writing and seeking assistance in getting some technical amendments to the statute. What we primarily want to preserve in the statute is the penalty in the fine area because that is going to give great emphasis to our effort. But if we can have the common rule which then allows us to administratively debar, along with the statute having technical amendments, then we are going to be in a terrific position to do a very thorough and comprehensive job.

And that is basically where we are today. We are probably–I have said this so often that I grow weary of it myself, but I can't help but say that we are getting close. And I know last year I said we are getting close, and I followed up with a letter to the chairman and to the congressman explaining as best I could the clarification of our position, but it all comes down to waiting for the processes to take place.

And now we are, hopefully, just another couple weeks away from the close of the comment period. And as soon as it ends and OMB clears it and OPM clears it and we have a regulation, we can literally start that day, which is something I have been saying, but the impression probably has been it would be sooner. I had hoped it would be sooner, but that is just the way it fell out.

Mr. HOYER. Mr. Visclosky.

ADMINISTRATIVE SANCTIONS

Mr. VISCLOSKY. Mr. McFarland, I must tell you that I find your response to the Chairman's last question troubling. In looking at your responses last year, you indicated that, "We know for a fact that we can, beginning tomorrow"—and this is April 2nd of last year—"if we wish to, we could receive paperwork from them, HHS, that would give us a case load of 200 cases a month that will represent debarments that they have had in the medicare, medicaid field that probably represent these doctors. We have done quite a bit of study in that field. Now we are in the process, of course, of

going after or of building our debarment program so that we can go after the people that are defrauding our health care program."

You further then indicate that, "We have not pursued it and simply because we are not ready yet. We are not prepared yet to take that on. Hopefully—and these are your words—we are talking just a matter of weeks or a few months before we are ready to do that. But I have—as an example, I have a debarment chief that I have no people working for that person yet," and I acknowledge your statement in terms of 17 people.

You go on. I think it was mentioned in the context of a question about how we were going to set up our computer operation. Do we have the hardware, the software to accommodate this? And I explained at that time there is some availability from HHS which transfer these names over to us. We are prepared in theory and in philosophy to hit on it aggressively. We want to do that. We have no reason not to do that.

In response to myself, your point is well taken. It has been a year. By the same token, when I mentioned that last year, if I gave the impression that we were ready to move on it, that was my mistake and I apologize for it.

You then mention the common rule, which you have discussed with the Chairman here. But in response to a question from myself, but you are now prohibited by OMB from pursuing your own investigation and debarment procedures, your response was, not at all. Not at all. And that is why we are anxious to get started more than anything.

My question is, when are we going to get going here? You know, it is either lack of computer software and hardware or it is lack of agreement with the common rule or it is you didn't get 17 people.

And here we are two years later, and people are still out there defrauding the taxpayers, and we are talking about trying to come to some agreement, talking about authorization legislation.

Mr. McFARLAND. I heard clearly what you read from there, and I also know clearly what I have done in this last year, you say it is totally unacceptable. Well, you certainly have your opinion of that, but I am living and working with this every day, and I know the effort that my people are putting in to make this happen. There has not been one day's delay on our part to make this happen.

Now, the letter that I sent you dated April 8th, 1992, I think probably clarifies and spells out better than what you just read to me, because I was answering questions that you were asking at the time. When I got back and had a chance to think this out further, I tried to put in letter form to you as good an explanation as I possibly could. In there I pointed out that what it takes is OPM to adopt this as a regulation, and I have absolutely no control over that.

The control and the effort that I did exert in this particular situation was that I told my people in the very beginning that I didn't want them, my organization, to be held responsible for any delays whatsoever and to document as accurately as possible what we have done as we go along.

Now, basically, we have a task force that was put together that included the Retirement and Insurance Group, my office, and the General Counsel. And from the moment we received the informa-

tion that we were able to use the common rule, that it wouldn't be in violation of the statute, in the next five months this particular group worked at planning and putting a program package together that would be acceptable. Then, from that point, once that was done, it has gone through the process.

Now, I asked from my people, and I have received one every two weeks, a report outlining what we have done just for the sake of keeping them on their toes and keeping me abreast of things. And believe me when I tell you, there was no question in my mind of the particular questions that you probably were going to have today, and I prepared for them as best I could. But, in preparing for them, I have to come down to one basic conclusion and that is, for lack of a better explanation, I had moved expeditiously on my part.

Now, if I gave implications—and in rereading some of my testimony I agree with you—I didn't say it the way I wish I had said it because it did leave open that area of concern that you have. But what we have done, I think, is very important, and that is we are to the point, hopefully by the 1st of April because of the comment period being over, to get started on the common rule. And once we get started on the common rule, as soon as we can blend in the technical amendments to the statute, then we are going to have a very comprehensive package where we can do exactly what you are expecting us to do.

Nobody takes more seriously than I the fact that it has been languishing for a long time, but I will say categorically, it has not been languishing since I took it over for one minute.

ADMINISTRATIVE SANCTIONS

Mr. VISCLOSKY. Today, you mentioned a comment period and the regulatory approval looking at April 1st, and then you talked about statutory change. Just so I understand for the future, is April 1st the day that your office can begin pursuing these cases, receiving them from HHS and taking action, or is the adoption of the regulation necessary for authorizations to be changed up here?

Mr. MCFARLAND. No. I think we are close here in what you are saying. You are saying April 1st, and here we go again with the dates.

Mr. VISCLOSKY. I want to tie you down.

Mr. MCFARLAND. I know you do, and I wish I could be tied down, and I would be happy to say a certain date, but I can't do that. If OMB doesn't step in and cause a delay and if OPM does not cause a conflict, then fine, we ought to be up and running. Our concern is about the technical amendments.

Mr. VISCLOSKY. Do you need——

Mr. MCFARLAND. No, we don't need them.

Mr. VISCLOSKY. So if there is a delay in terms of the regulation being adopted, it may not be April 1st. But once the regulation is on the rule, the common rule is in effect?

Mr. MCFARLAND. And we move on it, absolutely.

Mr. VISCLOSKY. It is not a question of needing hardware or software or 17 more people?

Mr. MCFARLAND. No. The hardware and software mentioned in that testimony—I think I referred back to the previous year. When

that first question was asked, I think it was in the context of do you have the equipment to do it? And I said, yes, with an intention of even doing better as far as automation.

Mr. VISCLOSKY. The common rule—in terms of the regulatory process, then, I assume the technical changes simply enhance your ability.

Mr. MCFARLAND. I will tell you what it will do, just to give you a quick understanding of where I am coming from. When I said before that I asked for 17 people and $1.5 million, that was to do the statute alone. The common rule hadn't even entered into our thoughts at that time. We weren't even aware of it ourselves. This is something OMB came on later and gave to us, but at that time I asked for 17 people and $1.5 million. That was to do the statute as it is.

Now, to make a long story short, I am not being critical of the statute because everything was in good intention, but it is extremely cumbersome. It includes a full evidentiary hearing for everyone, as compared to the Social Security Act framework that HHS works from where they do simply an administrative hearing and it is over. The person is debarred.

That is what we wanted to get to. But in order to do that, in order to do it the way the law read, I needed 17 people and $1.5 million to put a whole new program together.

Now what we are going to be able to do, and I think this is very noteworthy, is that with—rather than 17 people, with 12 people I can do the common rule and technical amendments together. So with five less than 17, we can now do them both if we get the technical amendments. And I think we will because it seems as if Congressman Ackerman and Senator Pryor's staff are now in agreement that this would be a reasonable approach, so we are going to be working with them as soon as we get a clearance from OMB to move ahead on this.

Mr. VISCLOSKY. So does adoption of the regulation now ensure of your ability to now proceed?

Mr. MCFARLAND. With the common rule aspect.

Mr. VISCLOSKY. I would ask, if it appears that there is going to be a delay or there are complications—I am not suggesting fault on anybody's side, but I think to prevent us sitting here in February or March of next year talking about this, that perhaps you can inform the committee that you see a problem on the horizon. Because I, at least, think it is really worth pursuing and not waiting a year to find something else went wrong. If you let me know there is a wrinkle here, I would appreciate it.

Mr. MCFARLAND. You will certainly have it.

REVIEW OF POSTAL PAYMENT PROPOSAL

Mr. HOYER. The Chair would agree with that request.

Lastly, Inspector General, the administration last year—and I pose this question more as a suggestion, in light of—you do both audits and investigations—in last year's budget request the administration proposed, and it is my understanding the administration is also going to be proposing, that the Postal Service pay $210 million to the Civil Service Retirement Fund, $105 million to the Employees Health Benefit Fund each year for the three years succeed-

ing as payments towards the residual amount that would have been due under the statute if those provisions in the section had been in effect since July of 1971.

Have you or can you determine whether those figures that I have read—$210 million, $105 million—are correct under the statute? Have you made a determination of that, whether that is the appropriate number?

Mr. MCFARLAND. No, sir, I have made no such determination. This is news to me.

Mr. HOYER. Would that be something that you could determine for us?

Mr. MCFARLAND. I think that we will be able to determine that for you.

Mr. HOYER. We would appreciate that if you could get that to us.

We have other questions. Perhaps we may have some other questions we might submit to you. I do not anticipate that there will be a need for an additional hearing, but we would be glad to hear any comments that you might have submitted in writing once the President's budget is released.

If you have additional information that you want to provide to the committee, we would certainly be more than happy to receive it.

The work of the Inspector General is critically important. One of the frustrations, obviously, Mr. Visclosky has—and I think you shared somewhat your frustration—is that here we have an opportunity in one area to really get at fraud and waste which the public really expects us to get after, and, obviously, your shop is designed specifically for that purpose, to make sure we are spending the public's money wisely.

ADMINISTRATIVE SANCTIONS

Mr. MCFARLAND. I want you to understand, gentlemen, that we are doing criminal investigations of doctors, providers. We are going after them in this regard. It is just we haven't done the administrative sanctions yet and I just didn't want you to maybe be laboring under the thought that we are not doing anything. Those investigations alone would be a basis for introducing them to the administrative sanctions automatically.

That is from our shop, and has nothing to do with the ones coming over from HHS. Those should be automatic. And you have my word, you will hear if there is one day's delay.

Mr. HOYER. Thanks. I appreciate it. The hearing is adjourned.

[Questions and answers for the record follow:]

POSTAL SERVICE—RETIREMENT/HEALTH BENEFITS LIABILITY

Question. Since your office performs both audits and investigations I would appreciate it if you would assign your best auditor (or audit teams) to a very important project. In last year's budget request the Administration proposed that the Postal Service pay $210 million to the Civil Service Retirement Fund and $105 million to the Employees Health Benefits Fund each year for three years as payments toward the residual amount that would have been due under 5 U.S.C. 8348(m) and 5 U.S.C. 8906(g)(2) if the provisions of those sections and been in effect since July 1, 1971. Would you please determine whether or not these amounts are correct?

Answer. Immediately after the request was made to validate the cited figures, we began contacting OPM officials to gather the necessary data and information. Our initial contacts disclosed that OPM did not generate the proposed figures. OPM offi-

cials advised us that the proposed figures were developed by the Office of Management and Budget and were based upon work originally done by the Congressional Budget Office. In addition, we were advised that the Postal Service also performed some analysis of the base data. Since our jurisdiction does not extend beyond OPM and since OPM did not perform either the original base calculations or the calculations for the proposed amounts, we met with Mr. C. William Smith on March 5, 1993, and suggested that perhaps this assignment could be better handled by the General Accounting Office (GAO). Mr. Smith agreed and he will request that GAO perform the work. We have advised GAO that they will be receiving the request and have offered to assist them in any way they feel necessary.

TRUST FUND AUDITS—MATERIAL FINDINGS

Question. Do you continue to spend the majority of your time auditing the various OPM trust funds, and if so have there been any material findings since the last hearing?

Answer. Yes. A majority of staff audit time is spent on OPM trust fund activities. As a result of audits of Federal Employees Health Benefits Program insurance carriers, we questioned $16 million of contract charges in fiscal year 1992. To date for fiscal year 1993, we have recommended recoveries of $29 million.

Under the Chief Financial Officers Act, we have audited selected trust fund line items for the balance sheet of the funds' financial statements. We reported a number of material weaknesses in trust fund areas.

For example, operating policies and procedures were not current or were nonexistent for the line items audited. In addition, the overall debt management, debt collection, and financial accounting internal controls for retirement program public receivables were materially deficient and unreliable. Finally, the automated systems have serious deficiencies in security controls.

We also issued our report of the Retirement and Insurance Group's processing of representative payees. Representative payees are individuals who are appointed to handle annuity payments on behalf of annuitants who are incapable of handling their own affairs. Our findings include recommendations to improve the selection process of representative payees and other actions needed to protect the interests of annuitants.

AUDIT CLEARANCE PROCESS

Question. What recommendations has your office made to OPM for improving the audit clearance process in order to assure timely and effective clearance of material findings?

Answer. During fiscal year 1993, we completed an audit of OPM's audit follow-up system. Our audit report recommended that OPM establish a formal, centralized follow-up system to ensure that responses to audit reports are timely and that corrective actions are actually taken. In response to our draft report, former Acting Director Douglas A. Brook agreed that a more formal system of audit follow-up was warranted. Since issuance of our audit, the Office of the Director has assumed direct responsibility for audit follow-up. Audit reports are now issued to the Director's Chief of Staff (currently to the Acting Director until a new Chief of Staff is appointed). The Chief of Staff's office closely monitors program office responses to audit reports and provides a means for frequent, open, and forthright dialogue between the OIG, the OPM follow-up official, and the audited programs.

As a result of implementing a centralized follow-up system, OPM will be in a better position to ensure that the Management Semiannual Report to the Congress is consistent with the OIG Semiannual Report to the Congress.

AUDIT CYCLE

Question. In the OIG's Semiannual Report to Congress, one of the items raised has to do with the audit cycle. Your audit findings discovered that a high percentage of the FEHBP contracts were not being audited before they were destroyed after the five year active period. In the report it states OIG has developed a strategy for reducing the cycle by 1996. Would you briefly explain the strategy OIG has planned?

Answer. The reference in the Semiannual Report to the Congress pertains to the audit cycle on experience-rated health insurance carriers such as the Government-wide Service Benefit Plan administered by the Blue Cross and Blue Shield Association. GAO had recommended, and we fully agreed, that the audit cycle on experience-rated health insurance plans needs to be reduced. While employee organization plans are on a reasonable cycle, other experience-rated plans such as Blue Cross/Blue Shield participating plans are presently on about an eleven-year cycle.

Auditing is a very labor-intensive process, especially audits of experience-rated health plans. Audits of experience-rated health plans involve a detailed examination of accounting records and claims processing systems. Both are highly complex and consist of hundreds of thousands of transactions. In order to decrease the audit cycle, we would need to increase the number of audits per year by either adding staff or auditing more quickly. At the time our semiannual report was prepared, our strategy was a combination of both actions; that is, increase resources and use technology better to audit more quickly.

With regard to increased resources, our plan was to add five positions in fiscal year 1994, from the savings generated by doing the CFO audit work in-house rather than with contractor staff. These additional positions would reduce the audit cycle to about six years. However, the fiscal year 1993 funding for CFO work was insufficient; consequently, not only will there be no savings available from CFO funding in fiscal year 1994, but under current budget scenarios, we do not expect any other additional resources for these five positions. Therefore, this aspect of our strategy appears in jeopardy.

The other aspect of our strategy involves trying to do more with the available resources. Our work in this area is directed towards increased use of computers to assist us in the audit of benefit payments. We have already acquired high-tech PC equipment and we are in the process of acquiring computer software which will perform analytical functions we cannot now accomplish. The new equipment and software will allow our auditors to work more quickly and cover more territory in the available time. While we are presently unsure of the impact that use of this technology will have on the audit cycle, it will improve the efficiency and effectiveness of our audit staff.

DEBARMENT

Question. What is your progress on adopting a regulatory program for debarment of unfit health care providers from the FEHBP?

Answer. A framework to effectuate a full complement of administrative sanctions has been developed. OIG sanctions will include derivative cases under the Nonprocurement Debarment and Suspension Common Rule, i.e., common rule cases, derived primarily from the Department of Health and Human Services (HHS) exclusion list, and original cases, i.e., proactive casework arising from the OPM Federal Employees Health Benefits Program debarment statute, in section 8902a of title 5, United States Code.

On February 4, 1993, OPM's Notice of Proposed Rulemaking concerning adoption of the common rule by the agency was published in the Federal Register. A final rule will be published upon review of any comments. In the interim, pursuant to the authority provided to OPM in its FY 1993 appropriations language, the Retirement and Insurance Group (RIG) has developed procedures for FEHBP carriers to use in administering debarments. On February 18, 1993, RIG issued a letter which instructed all carriers to discontinue reimbursing providers excluded by HHS pursuant to the Social Security Act. We anticipate that this action will also facilitate prompt implementation of the common rule.

Concurrently, we will work to implement the statute providing for non-derivative actions, including identifying amendments which would bring the FEHB law more in line with the Social Security Act under which Medicare/Medicaid debarments are performed. This will provide OPM the flexibility to use more effective administrative procedures so that the debarment process will be more efficient and less cumbersome, while at the same time maintaining the strong civil monetary penalty authority contained in the current FEHBP law.

INVESTIGATIONS

Question. How effective has the Investigation Staff been since receiving criminal investigation training? Have you been able to document a decrease in illegal operations because of the presence of the Investigative Staff?

Answer. Investigative training for the five entry-level special agents at the Federal Law Enforcement Training Center began on February 6, 1992, with the last agent graduating on October 22, 1992. The training has improved the effectiveness of these agents in terms of a greater ability to conduct investigations with less day-to-day supervision and the ability to recognize and pursue leads and develop evidence. However, because of the time necessary to complete a case and the relatively recent completion of training, benefits of the training program have not yet translated into increases in cases closed, prosecutions, or recoveries.

The Office of Investigations was created at the beginning of fiscal year 1991 with one criminal investigator. Since its inception, the office has grown to its current

strength of 12 criminal investigators and 4 support personnel. During the same period, the investigative workload has grown commensurately with the staff increases. Since the volume of investigative work has not yet "found its level," there is no estimate of the magnitude of existing illegal activities in the OPM program areas.

[Additional questions submitted for the record by Congressman Lightfoot and the answers thereto follow:]

ADDITIONAL RESOURCES

Mr. LIGHTFOOT. I noted the recoveries the Inspector General's office has been able to make with respect to health care accounts. Do you believe greater effort in this area would be worthwhile? We often find with the offices of inspector general that the greater the resources devoted to investigation, the greater the savings for the taxpayer.

Answer. Recovery of Federal funds which have been expended fraudulently, improperly, or not in compliance with contracts or guidelines is a vital aspect of the Office of the Inspector General's operations. During fiscal years 1991 and 1992, OIG audit activities produced recommendations for recovery of $49.5 million by OPM. This amount represents costs which were incorrectly charged to OPM contracts by insurance carriers under the Federal Employees Health Benefits Program (FEHBP). The criminal investigations program is qualitatively different from the audit program, in that it must focus on violations of law, rather than expenditure of funds *per se,* and must pursue legally meritorious cases without regard to the cost-effectiveness of their outcomes. Nonetheless, OIG's investigations units have identified, during the past two fiscal years, $346,000 in OPM funds which were defrauded or otherwise unlawfully obtained from the agency.

Given the very large expenditures made by OPM in the form of benefits payments and insurance premiums—in excess of $48 billion annually—if we had more resources to devote to examining those aspects of the agency's operations, it is probable that we would generate additional savings and recoveries. The current distribution of resources in OIG reflects the need, and our responsibility under the IG legislation, to provide audit and investigative coverage for all OPM programs, including the Government-wide personnel policy and management functions, which do not involve significant funds.

The OIG investigative program pursues all health care fraud cases with a view toward criminal prosecution. We aggressively seek civil penalties or recoveries in each case. In FY 1993, the health care units in investigations and audits have a joint effort against one FEHBP carrier which resulted in a return in excess of $3,100,000.

We believe that our efforts in seeking investigative recoveries have only begun. Since the caseload has continued to increase unabated, it would be difficult to estimate the amount of recoveries possible in the future. We believe additional effort in this area would result in significantly higher savings to the taxpayer.

WEDNESDAY, FEBRUARY 24, 1993.

OFFICE OF PERSONNEL MANAGEMENT

WITNESS

CURTIS SMITH, ASSOCIATE DIRECTOR, FOR RETIREMENT AND INSURANCE

CIVIL SERVICE RETIREMENT AND DISABILITY FUND

Mr. HOYER. The meeting will come to order. Mr. Smith, you are back with us testifying for the Civil Service Retirement and Disability Fund. Welcome to the committee. We are going to try to keep these hearings brief. We are going to do our markup on the supplemental this afternoon. So you may proceed in such a manner as you deem appropriate.

Mr. SMITH. I have submitted testimony. If I could ask that that be put in the record.

Mr. HOYER. Without objection.

Mr. SMITH. I won't go through that again. Let me make three overall points that go to the viability of our retirement and disability fund. The first, and maybe the most important, is that on a cash flow basis there is not a problem as far forward as we can project. There is always more income than expense in the fund, so we are not the least bit concerned about being able to pay our retirees, and we are talking 100-year plus projections that our actuaries make on an annual basis.

Mr. HOYER. There have been some—excuse me.

Mr. SMITH. The second part is that we have an accrued unfunded liability, even though cash flow is always in good shape; and the third point I would make is that the unfunded liability begins to right itself in about the year 2023 when the CSRS retirees begin to use FERS money. That automatically requires a payment from Treasury to replace the FERS assets used to pay CSRS benefits, and so over a long period of time we will eliminate the unfunded liability.

Where would you like to start?

Mr. HOYER. Explain to me again the FERS issue that you just went through relatively quickly so I better understand it.

Mr. SMITH. Okay, and a little bit of this is speculative, but one of the real concerns of Congress in creating FERS was, should it leave people in the old system stranded, knowing the old system had an unfunded liability, meaning at some point there would be no money to pay their benefits.

The solution to that from a financing and accounting point of view is to put the money from both systems into one fund, because there would always be income from FERS, then there would be the cash on hand to pay the benefits for the CSRS people as they were coming due.

The other piece of that though, and one of the basic intents of the FERS legislation was the Government should fund up-front these retirement costs and not allow the creation of an unfunded liability in our new retirement system. So FERS is fully funded. Agencies and employees pay the full costs right up front every paycheck, and that money is going into the fund. There is a tiny liability that is being paid for because FERS had a retroactive component because it took a few years to get it in. But that is not a major issue.

In order to continue that, the solidity of the FERS funding, because it was known that FERS assets would be used to make CSRS payments, there was a provision in the FERS legislation that says whenever that money gets used that way, it creates a liability. This FERS unfunded liability will then be amortized in 30 years by payments from Treasury, and so that mechanism is in place.

So we project it will be in the year 2023 that FERS assets start being used to pay CSRS benefits. It will create a FERS unfunded liability and activate the mechanism that has Treasury reimburse the fund over a 30-year period for that liability.

Mr. HOYER. How much do we project that to be?

On an annual basis, what do we project? Starting with 2023, what will the Federal Government's operating budget be called upon to contribute?

Mr. SMITH. I would have to give you that for the record.

Mr. HOYER. Would you do that?

Mr. SMITH. It is going to be a small amount in the first year. If we—I don't know what dollars. Let me stop. It is too far away. I will be happy to do that for the record though.

[The information follows:]

Table 4, pages 40–41 of OPM's FY 1991 CSRDF Annual Report (copy attached) shows how FERS Supplemental Liability Payments will change as FERS assets are used to pay CSRS benefits. The "Amortized Payment" column has the annual payments rising to $2.1 billion by 2025, reaching a peak of $126.1 billion by 2055, and beginning to decline thereafter.

ATTACHMENT

CIVIL SERVICE RETIREMENT AND DISABILITY FUND

An Annual Report
to Comply with the Requirements
of Public Law 95-595

September 30, 1991

United States Office of Personnel Management
Retirement and Insurance Group
1900 E Street, NW
Washington, DC 20415-0001

RI 10-27
March 1992

CIVIL SERVICE RETIREMENT AND DISABILITY FUND

GENERAL INFORMATION

Report for Year Ending September 30, 1991

1. Name of plan:
   The Civil Service Retirement and Disability Fund consists of two tiers: Civil Service Retirement System (CSRS) and Federal Employees' Retirement System (FERS).

2. Name and address of plan sponsor:
   U.S. Office of Personnel Management
   1900 E Street, N.W.
   Washington, D.C. 20415

3. Name and phone number of plan administrator:
   Curtis J. Smith
   Associate Director for Retirement and Insurance
   202-606-0600

4. Type of plan entity: Single-employer plan.

5. Date plans established:
   CSRS was established on May 22, 1920; FERS, on June 6, 1986

6. Plan participants at end of plan year:

	CSRS	FERS	TOTAL
Active employees*	1,726,000	1,260,000	2,986,000
Separated employees entitled to deferred benefits	169,000	42,000	211,000
Annuitants:			
Retired annuitants	1,608,000	20,900	1,628,900
Survivor annuitants	583,000	1,800	584,800
Total annuitants	2,191,000	22,700	2,213,700

   * Number of employees determined on a full-time-equivalent basis. Includes those employees on leave without pay who retain coverage.

7. Type of plan:
   Defined benefit. FERS also has a defined contribution component (the Thrift Savings Plan), which is not part of the Civil Service Retirement and Disability Fund.

8. Administrative costs:
   Administrative costs are borne by the Fund.

9. In this Plan year, was the Plan merged or consolidated into another Plan or were assets or liabilities transferred to another Plan?
   No.

10. Funding arrangement: Trust Fund.

11. Date of most recent actuarial valuation: September 30, 1991

12. Actuarial cost method used in completing tables: Actuarial valuations are performed by the Board of Actuaries, established by 5 U.S.C. 8347(f), using an entry-age normal cost method. The Board's valuation method and assumed decrements were used in developing the values shown in this report.

13. Actuarial assumptions:
    a. Economic:
        1. Rate of return on Plan investments: 7.0 percent.
        2. Ratio of salary expected at normal retirement (age 62 for this purpose) to salary at:

Age 25	16.0
Age 40	4.0
Age 55	1.5

        The above amounts assume general salary increases of 5.0 percent per annum plus individual merit increases based on Plan experience.
        3. Inflation rate: 5.0 percent.

    b. Decrements: (The September 30, 1982, Board of Actuaries Report provides more details.)
        1. Basis of mortality assumptions: Plan experience
        2. Retirement age:
            a. Normal retirement age — 55 with 30 years of service*
                60 with 20 years of service
                62 with 5 years of service
            b. Lowest age at which employee may voluntarily retire with full benefits: 55*
                (certain special groups may retire at younger ages)

        *For employees covered by FERS, the minimum retirement age will move to age 57.

        3. Basis of withdrawal assumption: Plan experience.
        4. Basis of disability assumption: Plan experience.

14. A Plan Summary follows, presenting a brief description of the Plan provisions, including a summary of the principal eligibility and benefit provisions.

I declare that I have examined this report, including accompanying tables and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

Curtis J. Smith, Associate Director for Retirement and Insurance

Date: January 28, 1993

FINANCIAL SECTION

CIVIL SERVICE RETIREMENT AND DISABILITY FUND

STATEMENT OF NET ASSETS AVAILABLE FOR BENEFITS

(Thousands of Dollars)

	September 30, 1991	September 30, 1990
ASSETS		
U.S. Securities, at fair value (Note B.2. and F.)	$258,618,412	$ 235,588,181
Receivables:		
Employee withholdings	223,298	196,447
Government contributions (Note E.)	456,176	428,579
Accrued interest	5,646,838	5,279,860
Overpayments of annuities and refunds	90,162	92,127
Allowances for waivers and bad debts (Note B.5.)	(35,643)	(29,596)
Total Receivables	6,380,831	5,967,417
Advance for administrative expenses	3,970	4,031
Equipment (less depreciation of $2,537 in 1991 and $1,948 in 1990)	6,830	6,110
Funds with Treasury and on-hand (Note K.)	9,077	(33,997)
TOTAL ASSETS	265,019,120	241,531,742
LIABILITIES		
Annuities	2,985,567	3,110,678
Refunds	5,940	26,562
Taxes withheld from annuities	268,258	239,508
Union allotments withheld from annuitants	637	608
Insurance premiums withheld from annuitants	172,071	171,257
Accrued annual leave for trust fund employees	2,448	2,245
Other liabilities	7,928	7,370
TOTAL LIABILITIES	3,442,849	3,558,228
NET ASSETS AVAILABLE FOR BENEFITS	$261,576,271	$ 237,973,514

The acompanying notes are an integral part of the financial statements.

CIVIL SERVICE RETIREMENT AND DISABILITY FUND
STATEMENT OF CHANGES IN NET ASSETS AVAILABLE FOR BENEFITS
(Dollars in thousands)

	For the Fiscal Year Ending 9/30/91			For the Fiscal Year Ending 9/30/90
	CSRS	FERS	TOTAL	TOTAL
NET ASSETS AVAILABLE FOR BENEFITS AT BEGINNING OF PLAN YEAR	$220,253,945	$17,719,569	$237,973,514	$216,700,297
ADDITIONS				
Investment income:				
Net appreciation (depreciation) in the fair value of investments (Note F.)	167,423	0	167,423	(51,769)
Interest	20,837,153	1,737,413	22,574,566	20,871,833
Total investment income	21,004,576	1,737,413	22,741,989	20,820,064
Contributions (Note C.):				
Employees:				
Withheld from salaries	4,136,328	259,798	4,396,126	4,372,043
Salary offsets-reemployed annuitants	63,889	868	64,757	36,166
Service credit and spouse equity deposits and redeposits	76,786	7,201	83,987	82,593
Voluntary contributions	18,480	0	18,480	10,401
Employing agencies	4,264,673	4,275,569	8,540,242	7,923,433
Government:				
New and increased annuities	5,686,506	0	5,686,506	5,211,143
Annuities under special acts	599	0	599	589
FERS unfunded retirement expense	0	459,342	459,342	435,166
Interest on statutory unfunded liability	9,675,000	0	9,675,000	9,460,000
Benefits attributable to military service	2,647,400	0	2,647,400	2,522,700
Spouse equity	40,300	0	40,300	35,300
From U.S. Postal Service for unfunded retirement expense	2,412,138	32,235	2,444,373	1,764,392
From Panama Canal Commission	15,144	0	15,144	15,144
Total contributions	29,037,243	5,035,013	34,072,256	31,869,070
Miscellaneous Income	382	0	382	324
TOTAL ADDITIONS	$50,042,201	$6,772,426	$56,814,627	$52,689,458

CIVIL SERVICE RETIREMENT AND DISABILITY FUND
STATEMENT OF CHANGES IN NET ASSETS AVAILABLE FOR BENEFITS
(Continued)
(Dollars in thousands)

	For the Fiscal Year Ending 9/30/91			For the Fiscal Year Ending 9/30/90
	CSRS	FERS	TOTAL	TOTAL
DEDUCTIONS				
Benefits paid to participants:				
Annuities to Retired employees and Survivors	$31,098,591	$154,566	$31,253,157	$29,205,719
Alternative form of annuity	1,450,233	14,504	1,464,737	1,654,699
Refunds of contributions:				
Separated employees	295,046	28,354	323,400	404,098
Deceased employees	63,757	18,890	82,647	76,944
Voluntary contributions	718	0	718	22
Total benefits paid to participants	32,908,345	216,314	33,124,659	31,341,482
Net transfers to other systems	7,364	0	7,364	7,089
Administrative expenses (Note G.)	60,087	5,018	65,105	62,263
Other expenses	14,347	395	14,742	5,407
TOTAL DEDUCTIONS	32,990,143	221,727	33,211,870	31,416,241
NET ADDITIONS	17,052,058	6,550,699	23,602,757	21,273,217
NET ASSETS AVAILABLE FOR BENEFITS AT END OF PLAN YEAR	$237,306,003	$24,270,268	$261,576,271	$237,973,514

The accompanying notes are an integral part of the financial statements.

CIVIL SERVICE RETIREMENT AND DISABILITY FUND

STATEMENT OF ACTUARIAL PRESENT VALUE OF ACCUMULATED PLAN BENEFITS

(Billions of dollars)

	For the Fiscal Year Ending 9/30/91			For the Fiscal Year Ending 9/30/90
	CSRS	FERS	TOTAL	TOTAL
ACTUARIAL PRESENT VALUE OF ACCUMULATED PLAN BENEFITS (Note B.3.)				
Vested benefits:				
Participants currently receiving payments	$444.0	$3.0	$447.0	$424.7
Participants not currently receiving payments	198.3	7.2	205.5	191.9
Subtotal	642.3	10.2	652.5	616.6
Nonvested benefits	36.9	5.6	42.5	39.2
TOTAL ACTUARIAL PRESENT VALUE OF ACCUMULATED PLAN BENEFITS	$679.2	$15.8	$695.0	$655.8

STATEMENT OF CHANGES IN ACTUARIAL PRESENT VALUE OF ACCUMULATED PLAN BENEFITS

(Billions of dollars)

	For the Fiscal Year Ending 9/30/91			For the Fiscal Year Ending 9/30/90
	CSRS	FERS	TOTAL	TOTAL
ACTUARIAL PRESENT VALUE OF ACCUMULATED PLAN BENEFITS, BEGINNING OF PLAN YEAR	$643.3	$12.5	$655.8	$623.9
Increase during the year attributable to:				
Benefits accumulated, less benefits paid	35.9	3.3	39.2	31.9
Plan amendments	0	0	0	0
Changes in actuarial assumptions (Note J.)	0	0	0	0
Net increase	35.9	3.3	39.2	31.9
ACTUARIAL PRESENT VALUE OF ACCUMULATED PLAN BENEFITS, END OF PLAN YEAR	$679.2	$15.8	$695.0	$655.8

The accompanying notes are an integral part of the financial statements.

CIVIL SERVICE RETIREMENT AND DISABILITY FUND
NOTES TO FINANCIAL STATEMENTS
SEPTEMBER 30, 1991 AND 1990

A. DESCRIPTION OF CIVIL SERVICE RETIREMENT AND DISABILITY FUND

1. General

The Civil Service Retirement and Disability Fund (CSRDF) is comprised of two tiers of defined benefits: the Civil Service Retirement System (CSRS) and the Federal Employees' Retirement System (FERS). The basic benefit components of the CSRS and the FERS are financed and operated through the CSRDF, that is, all receipts for both the CSRS and the FERS are deposited into the CSRDF, and all disbursements for both are made from the CSRDF. By law, the entire Fund is available for payment of either the CSRS or the FERS benefits. Where appropriate, this report provides a separate breakdown of the CSRS and the FERS activity (e.g., actuarial liabilities). Both the CSRS and the FERS include as members, appointed and elected officers and employees in or under the executive, judicial, and legislative branches of the U.S. Government, except those excluded by law or regulation. District of Columbia Government employees (with the exception of law enforcement officers, firefighters, teachers, or other employees covered by another retirement system) first appointed before October 1, 1987, are also covered by the CSRS.

2. Civil Service Retirement System (CSRS)

The CSRS was established by Public Law 66-215, the Civil Service Retirement Act, enacted on May 22, 1920, and has been amended by many subsequent acts of Congress. It is a stand-alone retirement system intended to provide reasonable benefits for long-service Federal employees. The CSRS covers most Federal employees hired before 1984.

a. Annuity and Disability Benefits

The CSRS provides normal retirement with a full annuity at age 55 with 30 years of service, age 60 with 20 years of service, or age 62 with 5 years of service. Disability retirement is permitted at any age with 5 years of service and involuntary retirement at any age after 25 years of service or at age 50 with 20 years of service. Deferred annuities are payable at age 62 with 5 years of service. There is no general mandatory retirement provision. The "average salary" used in benefit computations is based on the highest 3 years of salary. The annuity formula provides 1.5 percent of average salary for the first 5 years of service, 1.75 percent for the next five years, and 2 percent for any remaining service, up to a maximum of 80 percent of average salary. Disability annuitants receive the greater of the preceding computation or a guaranteed minimum of the lesser of 40 percent of average salary or the regular formula using service projected to age 60. The law also contains special eligibility and computation requirements for certain law enforcement officers, firefighters, air traffic controllers, bankruptcy judges, congressional employees, Members of Congress, and certain other groups.

Employees retiring on or after June 6, 1986, but before December 1, 1990, (except those who are retiring on the basis of disability or who have a former spouse entitled by court order to receive a portion of the employee's annuity or a survivor annuity based on the employee's service) were eligible to elect an alternative form of annuity (AFA). Those electing the AFA receive a lump-sum payment equivalent to their credit in the Fund, and an annuity benefit which is reduced by the actuarially determined value of that lump-sum payment. The Omnibus Budget Reconciliation Act of 1990, Public Law 101-508, approved November 5, 1990, suspended for five years, the AFA, for most retirees, but not for those involuntarily separated, individuals with life-threatening medical conditions, and certain employees who were involved with Operation Desert Storm.

b. Death Benefits

Widows and widowers of those who die in service receive 55 percent of the disability formula as a benefit. Generally, this is 22 percent of average salary. Widows and widowers of deceased annuitants receive 55 percent of the annuity unless the employee annuitant waived provision of a survivor benefit, or elected to provide less than a full survivor benefit. Since the reduction (2.5 percent of annuity up to $3,600 a year and 10 percent of the rest) is much less than the equivalent actuarial value of the survivor's annuity, most married annuitants elect the reduced annuity with full survivor benefit. Children of deceased annuitants and employees receive a flat monthly amount.

c. Cost-of-Living Adjustments (COLA's)

In accordance with Public Law 98-270, the Omnibus Budget Reconciliation Act of 1983, approved April 18, 1984, annuities are adjusted annually (December 1 of each year, paid on the first business day in January) to reflect the cost-of-living adjustment (COLA) as measured by the yearly change in the third calendar quarter average Consumer Price Index (CPI) for Urban Wage Earners and Clerical Workers. Initial COLA's of retiring employees (or their survivors) are prorated based on the number of months the employee was in receipt of an annuity prior to the effective date of the increase.

There have been several changes to the CSRS' COLA provision in the past several years. In 1981, Public Law 97-35, the Omnibus Budget Reconciliation Act of 1981, changed the COLA to an annual adjustment, made each March based on the change in the CPI for the previous calendar year. In 1982, Public Law 97-253, the Omnibus Budget Reconciliation Act of 1982, further altered the COLA provisions, resulting in a 1-month delay of the 1983 adjustment and modifying the amount of the increase for non-disabled retirees under age 62. In April 1984, Public Law 98-270 changed the effective date of all future COLA's to December 1 of each year. As a result of Public Law 98-270, there was no COLA in fiscal year 1984. In fiscal year 1986, the December 1, 1985, COLA was cancelled due to the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings), Public Law 99-177.

The CSRS' COLA's since September 1977 have been as follows:

Effective Date	Annuity Increase (%)	Effective Date	Annuity Increase (%)
3/1/78	2.4	4/1/83	3.9
9/1/78	4.9	12/1/84	3.5 *
3/1/79	3.9	12/1/86	1.3
9/1/79	6.9	12/1/87	4.2
3/1/80	6.0	12/1/88	4.0
9/1/80	7.7	12/1/89	4.7
3/1/81	4.4	12/1/90	5.4
3/1/82	8.7	12/1/91	3.7

* 3.3 percent for non-disabled employee annuitants under age 62.

d. Employee Deductions and Refunds

Employees who separate from Government service or transfer to a position which is not under the CSRS are eligible for a refund of the deductions taken from their pay, including interest (at an annual rate of 3 percent), if they have more than one but less than 5 years of civilian service. These total deductions (or accumulated employee contributions) amount to approximately $53 billion as of September 30, 1991. This includes deductions for the active workforce and for separated employees with eligibility for a deferred retirement annuity.

e. Voluntary Contributions

Employees covered by CSRS who want to receive a larger annuity than would be payable based on salary and service may make voluntary contributions. However, employees who owe a deposit or redeposit for civilian service are eligible to make voluntary contributions only after the deposit or redeposit is paid. An employee who made voluntary contributions and received a refund of the contributions may not make voluntary contributions again, unless he or she had a break in service after receiving the refund.

At retirement, each $100 in a voluntary contribution account (including interest earned) will provide an additional annuity of $7 a year plus 20 cents for each full year the employee is over age 55. The employee may also choose to share the additional annuity by electing to provide a survivor annuity. However, the employee's additional annuity would then be reduced by 10 to 40 percent depending on the difference between the employee's age and the age of the person designated to receive the survivor annuity. Voluntary contribution annuities are not increased by COLA's.

Voluntary contributions earn a variable interest rate determined by the Department of the Treasury each calendar year, based on the average yield of new investments purchased by the CSRDF during the previous fiscal year. The interest credited to each voluntary contributions account is compounded annually on December 31. Interest rates applicable to voluntary contributions are as follows:

Year	%	Year	%
Before 1948	4.0	1988	8.375
1948 - 1984	3.0	1989	9.125
1985	13.0	1990	8.75
1986	11.125	1991	8.625
1987	9.0	1992	8.125

As a general rule, interest ceases to accrue on voluntary contributions at the earliest of the following: (1) OPM's authorization of a refund of voluntary contributions; (2) the depositor's separation from Federal service; and (3) the depositor's transfer to a position not subject to the CSRDF.

Total contributions may not at any time exceed 10 percent of the total basic pay the employee has received during Federal service to date. An employee may withdraw all voluntary contributions with interest at any time before receiving additional annuity on those contributions.

3. Federal Employees' Retirement System (FERS)

The FERS was established on June 6, 1986, by the Federal Employees' Retirement System Act (FERSA) of 1986, Public Law 99-335. It is a three part pension program which became effective on January 1, 1987. Using Social Security as a base, it provides an additional basic benefit and a voluntary thrift savings plan. OPM is responsible for administering only the basic benefit portion of the FERS. The Thrift Savings Plan is administered by a separate independent agency, the Federal Retirement Thrift Investment Board. The FERS generally covers those employees who first entered a covered position on or after January 1, 1984. Employees covered by the CSRS had the opportunity to transfer to the FERS coverage during the period of July 1, 1987, through December 31, 1987, and approximately 86,000 did so. In addition, there was an extended open season from January 1, 1988, through June 30, 1988, for CSRS employees who met special criteria.

a. Annuity and Disability Benefits

The FERS provides for full immediate or deferred retirement benefits at the Minimum Retirement Age (MRA) with 30 years of service, age 60 with 20 years of service, or age 62 with 5 years of service. The MRA is 55 for those born before 1948, and gradually increases to 57 for those born in or after 1970. Deferred retirement benefits are also available at or after the MRA with 10 years of

service at reduced benefit levels. Disability retirement may occur at any age with 18 months of service. Full immediate benefits are payable at age 50 with 20 years of service or at any age with 25 years of service in certain cases of involuntary separation or separation during a major reorganization or reduction in force.

The "average salary" used in benefit computations is based on the highest 3 years of salary. The annuity formula generally provides 1 percent of average salary times the years of creditable service. If retirement is at age 62 or later, with at least 20 years of service, a factor of 1.1 percent is used rather than 1 percent. In the first year of retirement, disability annuitants generally receive 60 percent of their high-three average salary, minus 100 percent of their Social Security disability benefits. Subsequently, they receive 40 percent of their high-three average salary, minus 60 percent of their Social Security disability benefit, until recomputation at age 62. The FERS non-disability benefits of those who transfer from the CSRS to the FERS may include a portion computed under the CSRS' formula. The law also contains special eligibility and computation requirements for certain law enforcement officers, firefighters, air traffic controllers, congressional employees, Members of Congress, and military reserve technicians.

Employees retiring between June 6, 1986, and December 1, 1990, (except those who are retiring on the basis of disability or who have a former spouse entitled by court order to receive a portion of the employee's annuity or a survivor annuity based on the employee's service) were eligible to elect an alternative form of annuity (AFA). The Omnibus Budget Reconciliation Act of 1990, Public Law 101-508, approved November 5, 1990, suspended for 5 years, the AFA, for most retirees, but not for those involuntarily separated, individuals with life-threatening medical conditions, and certain employees who were involved with Operation Desert Storm. Those electing the alternative annuity receive a lump-sum payment equivalent to their credit in the retirement fund, and an annuity benefit which is reduced by the actuarially-determined value of that lump-sum payment.

A special annuity supplement is payable until age 62 to certain eligible retirees. Those eligible include employees who retire at the MRA with 30 years of service, age 60 with 20 years of service or on involuntary retirement. The supplement approximates the Social Security benefit earned while employed under the FERS, and is subject to reduction if earnings exceed a specified amount.

b. Death Benefits

Widows and widowers of employees who die in service after at least 18 months of service receive a lump-sum payment of $15,000 (indexed to CSRS' COLA's) plus, one-half of the annual rate of pay at death or one-half of the high-three average pay as of the date of death, whichever is higher. If the employee had at least 10 years of service, the surviving spouse also receives an annuity equaling 50 percent of the accrued basic retirement benefit. Widows and widowers of deceased annuitants receive 50 percent of the annuity, unless the employee annuitant and spouse waived provision of a survivor benefit or elected a benefit of 25 percent. Children of deceased annuitants and employees receive a flat monthly amount, minus the amount of Social Security benefits payable to them.

c. COLA's

Generally, retirees who are age 62 or older receive COLA's. Survivors, disability retirees and certain other special groups receive COLA's regardless of age. Annuities are adjusted annually (December 1 of each year, paid on the first business day in January) to reflect cost-of-living increases as measured by the yearly change in the third calendar quarter's average CPI. If the CPI increase is 3 percent or more, the COLA is one percentage point less than the CPI increase. If the CPI increase is two percent to three percent, the COLA is 2 percent. If the CPI increase is less than 2 percent, the COLA is equal to it. Initial COLA's of retiring employees (or survivors of an employee) are prorated based on the number of months the employee is in receipt of an annuity prior to the effective date of the increase. The special retirement supplement for retirees is not increased by COLA's; however, the supplement for survivors is increased.

d. Employee Deductions and Refunds

Employees who are separated from Government service or transferred to a position which is not under the FERS are eligible for a refund of the deductions taken from their pay, plus interest at a variable market-based rate. Once refunded, a redeposit for this service cannot be made.

B. SUMMARY OF SIGNIFICANT ACCOUNTING AND ACTUARIAL POLICIES

1. CSRDF Reporting

The CSRDF contains two tiers of defined pension benefits (CSRS and FERS) and receives all deposits and makes all disbursements for CSRS and FERS. As such, the CSRDF is considered the plan for financial reporting purposes and separate disclosures of operating results or information for the CSRS and/or the FERS are presented only where appropriate.

2. Valuation of Investments

The Fund's investments consist solely of United States Government securities, which represent 99 percent of the Plan's net assets as of September 30, 1991. The fair value of special Treasury bonds, Federal Financing Bonds, and Certificates of Indebtedness equals the par value; these securities are always redeemed at par value regardless of the date of redemption or the rate of interest, as specified by 5 U.S.C. 8348(d). The fair value of U.S. Treasury Bonds is determined by using the over-the-counter quotations for September 30, 1991, reported in the Wall Street Journal.

3. Actuarial Present Value of Accumulated Plan Benefits

Accumulated plan benefits are the future benefit payments attributable to employees' service rendered prior to the valuation date of September 30, 1991. Accumulated plan benefits include benefits expected to be paid to: (a) retired or separated employees and their beneficiaries, (b) beneficiaries of deceased employees, and (c) present employees or their beneficiaries, including refunds of employee contributions. Total projected service is used to determine eligibility for, but not the amount of, retirement benefits. The value of voluntary, involuntary, and deferred retirement benefits is based on the regular formula using service to the valuation date. The value of disability benefits and benefits for survivors of employees is determined by multiplying the benefit the employee would receive on his or her date of disability or death by a ratio of service at the valuation date to projected service at the time of disability or death. Employees are assumed to continue to earn their final salaries of the valuation date, with no future increases. Thus, for employees retiring after fiscal year 1994, the projected high-three average salary would be the same as the final salary in fiscal year 1991. The annuity benefits are assumed to increase based on an assumed inflation rate of 5 percent per year after retirement, and are discounted to the valuation date assuming a 7 percent rate of interest.

4. Depreciation

Capitalized property includes all furniture and equipment. Depreciation is based on the straight-line method, without regard to salvage value. It is assumed all capitalized property has a 10-year life and will depreciate 10 percent per year. All new property is assumed to have been purchased at the midpoint of the year and is depreciated in the year of acquisition for 6 months or 5 percent of cost.

5. Allowance for Waivers and Bad Debts

For accounts in the process of collection, the allowance for waivers and bad debts is experience-based, using an aging schedule of accounts receivable. For suspended accounts pending reconsideration, the allowance for waivers and bad debts has been revised for 1991, based on experience that 40 percent will be waived or written off. The 1990 reporting is based on a lower allowance.

C. FUNDING POLICY

1. Employee/Employing Agency Contributions

   a. CSRS

   Most employees covered by the CSRS contribute 7 percent of basic pay to the CSRDF. Law enforcement officers, firefighters, and congressional employees contribute an additional 0.5 percent of basic pay, while Members of Congress contribute 8 percent. Each employing agency matches the CSRS-covered employee contributions The total employee and employing agency contribution for most CSRS employees of 14 percent is close to the "static" normal cost of the CSRS benefit.

   b. FERS

   Most employees covered by the FERS contribute a percentage of basic pay equal to 7 percent minus the prevailing Old-age, Survivors and Disability Insurance (OASDI) rate. Special employees such as Members of Congress, law enforcement officers, firefighters, air traffic controllers, and congressional employees contribute an additional 0.5 percent. Agencies contribute the difference between the full "dynamic" normal cost of FERS coverage and the employee contribution.

2. Public Law 91-93, The Civil Service Retirement Amendments of 1969

Under Public Law 91-93, the Treasury makes three types of payments to the CSRDF: (1) payments to amortize, over a 30-year period, any increase in the CSRS unfunded liability that results from new or liberalized benefits (excluding automatic cost-of-living increases in annuities), increases in pay, or extension of coverage to new employee groups; (2) a payment of 5 percent interest on the CSRS "statutory" unfunded liability; and (3) a payment of the estimated cost of benefits attributable to CSRS military service less the value of certain deposits made by employees for such service.

The CSRS unfunded liability which is used in determining the amount of the Treasury contributions is defined in 5 U.S.C. 8331 as the estimated excess of the present value of all benefits payable from the Fund to employees, former employees, and their survivors, over the sum of: (1) the present value of deductions to be withheld from the future basic pay of employees and of future agency contributions to be made in their behalf; plus (2) the present value of the remaining 30-year amortization payments which had previously been scheduled; plus (3) the Fund balance as of the date the unfunded liability is determined. Also, the present value of benefits and contributions are determined under "static" economic assumptions which use a 5 percent annual interest rate and no future salary inflation or cost-of-living increases in annuity. For the purposes of this computation, the Fund balance is defined as cash and investments at par value which are attributable to CSRS. The CSRS "statutory" unfunded liability, as of September 30, 1991, is $195.1 billion and, as of September 30, 1990, $193.5 billion.

In fiscal year 1991, $2.7 billion in benefits were attributable to military service. The Treasury payment was calculated by reducing that amount by $18.1 million, the sum deposited for military service by employees who retired during the year. Of the $2.7 billion in benefits attributable to military service, approximately $450 million was attributable to military retirees with 20 or more years of military service. These employees waived their military retirement benefits, and all of their military service was credited toward a CSRS annuity. The total amount deposited by employees who retired in fiscal year 1991 with 20 or more years of military service was approximately $9 million.

3. U.S. Postal Service

Officers and career employees retained coverage under the CSRS when the U.S. Postal Service commenced operations on July 1, 1971. This coverage has also been continued where applicable under the FERS. The U.S. Postal Service and its employees each contribute to the CSRS and the FERS as do other agencies. However, unlike other Federal agencies, the U.S. Postal Service is required to make three additional payments under the following laws:

a. Public Law 93-349, Civil Service Retirement Fund - Postal Employee Benefits

This law requires the U.S. Postal Service to make contributions to amortize, over a 30-year period, any increase in the CSRS unfunded liability resulting from an increase in covered U.S. Postal Service employees' basic pay; i.e., the pay on which retirement benefits and contributions are based. By law, 5 U.S.C. 8348(h)(2), the 30-year amortization payment is computed by OPM, and the U.S. Postal Service is required to make the first installment of each payment at the end of the fiscal year in which an increase in pay becomes effective. The payments are reflected in the CSRDF financial statements in the year in which they become due and payable.

The U.S. Postal Service labor-management agreements generally provide for two types of pay increases during the 3-year term of an agreement: (1) general increases, which result in an immediate increase in basic pay for all employees and, (2) cost-of-living adjustments (COLA's) which result in an increase in base pay but not an immediate increase in basic pay. Basic pay is not increased until these COLA's are "rolled in," which is generally provided for under the terms of a subsequent labor-management agreement. Moreover, since 1981, the U.S. Postal Service labor-management agreements have adopted a two-phase approach for determining when COLA's become part of basic pay.

For example, under the provisions of the 1985-1987 agreement, COLA's granted during the term of the 1982-1984 agreement were rolled into basic pay during fiscal year 1985 for those employees who were within 6 years of eligibility for normal retirement as of July 21, 1984, and elected a roll-in. However, the 1985-1987 agreement also guaranteed that the COLA's granted during the term of the 1982-1984 agreement would be rolled into basic pay for all other employees in fiscal year 1988.

Under the 1988-1991 agreement, COLA's granted during the term of the 1985-1987 agreement were rolled into basic pay in fiscal year 1988 for employees within 6 years of eligibility for retirement as of November 1987. This agreement also provided for roll-in for all other employees in fiscal year 1991. Additionally, this contract provides for various guaranteed general increases in basic pay, including a general increase of 2 percent, effective in July 1987, which was paid retroactively in fiscal year 1988.

For purposes of preparing the actuarial valuations and projections in this report, the total payroll for Postal employees as of September 30, 1991, includes all COLA's granted during the 1985-1987 agreement, including the COLA for those employees for whom the COLA was guaranteed to be rolled into basic pay during fiscal year 1991.

b. Public Law 99-335, The Federal Employees' Retirement System Act of 1986

Under this act, any unfunded liability arising under the FERS is fully funded by means of level 30-year amortization payments. Unfunded liabilities attributable to U.S. Postal Service employees are financed via payments from the Postal Service, whereas those attributable to non-Postal employees are funded by direct Treasury transfer payments.

c. Public Law 101-508, The Omnibus Budget Reconciliation Act of 1990

This law provides for Postal Service financing of the cost of COLA's paid to all former employees of the Postal Service who retired since July 1, 1971, and to their survivors. Any increases in the static unfunded liability under CSRS attributable to service with the Postal Service are amortized over 15 years.

4. Public Law 96-70, The Panama Canal Act of 1979

Under this act, the Panama Canal Commission is required to make contributions to pay for the additional cost of the liberalized retirement benefits that are provided by the Act. The additional cost is determined by assuming future salary and cost-of-living adjustments in order to provide a more accurate measure of the ultimate or true costs and to ensure that the Panama Canal Treaty does not result in any additional costs to the taxpayer.

5. Public Law 98-615, The Civil Service Retirement Spouse Equity Act of 1984

Under this law, the Fund incurs an additional cost for providing a limited number of survivor annuities which would not have been allowed prior to the Act. The Treasury is required, at the end of each fiscal year, to make a direct transfer payment to the CSRDF to cover these costs. The Spouse Equity transfer for fiscal year 1991 was $40.3 million.

6. Public Law 99-335, The Federal Employees' Retirement System Act of 1986

This law provides for separate financing of all benefits attributable to FERS, including those benefits attributable to frozen CSRS service for employees who elect FERS, based on a dynamic "entry age normal" funding method. Agencies and employees are required to contribute the dynamic normal cost. Any supplemental liabilities under FERS are to be amortized over 30 years. Supplemental liabilities attributable to Postal employees are to be amortized by the U.S. Postal Service, while liabilities attributable to non-Postal employees are amortized by Treasury. The supplemental liability as of September 30, 1988, is being amortized by payments of $419 million per year from the Treasury and $32 million from the U.S. Postal Service starting on September 30, 1989. In addition, increases in the supplemental liability during 1989 and 1990 attributable to non-Postal employees are being amortized by payments of $16 million per year starting on September 30, 1990, and $24 million per year starting on September 30, 1991.

7. Public Law 101-508, the Omnibus Budget Reconciliation Act of 1990

The Omnibus Budget Reconciliation Act of 1990, approved November 5, 1990, made several changes in the retirement law. Temporary major changes were made in the alternative form of annuity (AFA) program which was, for most retirees, suspended for up to 5 years. The right to elect the AFA was continued for involuntarily separated retirees, individuals with life-threatening medical conditions, and certain employees involved with Operation Desert Storm. An alternative to paying a redeposit for certain refunded service under CSRS was established under which the annuity can be actuarially reduced based upon the amount of the redeposit due. A portability of benefits program was established for nonappropriated fund instrumentality (NAFI) employees whereby specified employees transferring from NAFI to civil service (or vice versa) will have a one-time opportunity to elect to remain under their old retirement plan for the remainder of their Government service.

D. REFUNDS AND THE ALTERNATIVE FORM OF ANNUITY

Employees who separate from Government service or transfer to a position not covered by the CSRDF are entitled to a refund of accumulated retirement deductions under certain conditions. Employees with more than 5 years of service may leave their accumulated retirement deductions in the Fund, entitling them to a deferred annuity at age 62. Refunds of retirement contributions include both current and prior year employee contributions.

Employees who retired between June 6, 1986, and December 1, 1990, (except those who were retiring on the basis of disability or who had a former spouse entitled by a court order to receive a portion of the employee's annuity or a survivor annuity based on the employee's service) were eligible to elect an alternative form of annuity (AFA). Those electing the AFA received a lump-sum payment equivalent to their credit in the Fund, and an annuity benefit which is reduced by the actuarially determined value of that lump sum payment. The Omnibus Budget Reconciliation Act of 1990, Public Law 101-508, temporarily suspended the AFA for most retirees.

E. RECEIVABLE FROM THE POSTAL SERVICE

Government contributions includes $23 million due from the U.S. Postal Service because that organization could not compute the FY 1991 increase in basic pay for non-bargaining unit employees in time to be paid in FY 1991. Consequently, on September 30, 1992, a retroactive payment plus 5 percent interest will be required.

In fiscal year 1990, the Fund billed the U.S. Postal Service $1.764 billion. The U.S. Postal Service remitted only $1.690 billion. Consequently, Government contributions for the FY 1990 statement includes a receivable of $74 million from the U.S. Postal Service. This amount was transferred to the CSRDF in October 1991.

F. INVESTMENTS

The Fund's investment portfolio is held in a trust fund managed by the Department of the Treasury. The following presents the principal amounts and fair values of these investments:

	September 30, 1991 (Thousands of dollars)	
	Principal Amount	Fair Value
Marketable securities:		
U.S. Treasury Bonds	$ 2,338,512	$ 2,407,927
Nonmarketable securities:		
Special Treasury Bonds	219,550,496	219,550,496
Federal Financing Bonds	14,999,990	14,999,990
Certificates of Indebtedness	21,659,999	21,659,999
	256,210,485	256,210,485
Total Investments	258,548,997	$ 258,618,412

	September 30, 1990 (Thousands of dollars)	
	Principal Amount	Fair Value
Marketable securities:		
U.S. Treasury Bonds	$ 2,338,512	$ 2,240,504
Nonmarketable securities:		
Special Treasury Bonds	197,918,703	197,918,703
Federal Financing Bonds	14,999,990	14,999,990
Certificates of Indebtedness	20,428,984	20,428,984
	233,347,677	233,347,677
Total Investments	$ 235,686,189	$ 235,588,181

G. ADMINISTRATIVE EXPENSES

	(Thousands of dollars)	
	1991	1990
Personnel Compensation and Benefits	$ 45,899	$ 41,896
Rent, Communications, and Utilities	8,601	11,476
Other Service	7,446	5,582
Reimbursement to Merit Systems Protection Board	1,450	1,400
Printing and Reproduction	560	887
Travel and Transportation	462	355
Supplies and Materials	421	503
Equipment and Capital Improvements	266	164
Total Administrative Expenses	$65,105	$ 62,263

H. PLAN AMENDMENTS

1. Fiscal Year 1990

   a. The Intelligence Authorization Act for fiscal year 1991 Public Law 101-193, approved November 30, 1989, provides greater benefits under CSRS and FERS based upon certain service performed for the CIA overseas. However, the statute provides that the costs of those benefits shall be paid from the Central Intelligence Agency Retirement and Disability Fund.

   b. Retirees may elect an alternative form of annuity which permits them to receive a lump-sum payment equal to their retirement contributions, with actuarially reduced annuity benefits. Temporary legislation enacted in 1987 provided that through September 30, 1989, the payment would be made in two parts, with 60 percent paid initially and the remaining 40 percent plus interest paid 1 year after retirement. Public Law 101-103, Performance Management and Recognition System Reauthorization Act of 1989, approved September 30, 1989, extended these provisions through December 2, 1989. Identical language in two separate bills (Public Law 101-227, approved December 12, 1989, and Public Law 101-239, approved December 19, 1989) further extended the program through September 30, 1990, and modified it by specifying that both the first and second payments would be 50 percent of the lump-sum. Interest remains payable with the second payment.

c. Public Law 101-239, the Omnibus Budget Reconciliation Act of 1989, approved on December 12, 1989, provided for higher payments from the Postal Service to fund cost-of-living adjustments for its former employees who retired since 1986, and their survivors.

d. Under Public Law 101-246, the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, approved February 16, 1990, certain foreign nationals employed by the Department of State overseas may elect to transfer their interest in the CSRS to a local trust or retirement plan, thereby voiding all rights under the CSRS. Both employee and agency contributions, plus interest, may be transferred out of the Fund under this provision after October 1, 1991.

2. Fiscal Year 1991

a. Public Law 101-428, the Capitol Police Retirement Act, approved October 15, 1990, provides enhanced and more uniform benefits under FERS and CSRS for members of the Capitol Police. The law's provisions are similar to those presently applicable to law enforcement officers and firefighters, including earlier optional retirement eligibility, more liberal benefit computation provisions, and mandatory retirement. Application of the provisions become effective gradually between enactment and 1994.

b. Public Law 101-510 provides that certain Panama Canal Commission employees are entitled to improved benefits. This law extends the preferential CSRS provisions granted to pre-treaty Panama Canal Commission employees to subsequently employed individuals, so long as they retire with 11 years of Panama Canal Commission service. Such employees are subject to more liberal eligibility and computation provisions. However, the Panama Canal Commission must reimburse the Fund for the resulting increase in the unfunded liability.

c. The Omnibus Budget Reconciliation Act of 1990, Public Law 101-508, approved November 5, 1990, made several changes in the retirement law. The opportunity for most retirees to elect the alternative form of annuity (AFA) was suspended for up to 5 years. An alternative to paying a redeposit for certain refunded service under CSRS was established in which the annuity can be actuarially reduced based upon the amount of the redeposit due. A portability of benefits program was established for nonappropriated fund instrumentality (NAFI) employees. Specified employees transferring from NAFI to civil service positions (or vice versa) will have a one time opportunity to elect to remain under their old retirement plan for the remainder of their Government service. Also, the U.S. Postal Service is required to make higher payments to defray the cost of past and future COLA's to its retirees.

d. The Federal Employees Pay Comparability Act of 1990, Public Law 101-509, approved November 5, 1990, permits certain retirees to be reemployed and receive both annuity and full pay. It also raised the mandatory retirement age for law enforcement officers from 55 to 57.

e. Public Law 101-530, approved November 6, 1990, further liberalized retirement credit for pre-1969 National Guard Technician (NGT) service. Upon timely payment of a deposit, retirement service credit for NGT service will be available to all Federal employees, former Federal employees, and survivor annuitants who were not previously eligible for it.

f. A new retirement system was created which, at the election of the individual, cover certain judges formerly covered under FERS or CSRS. Public Law 101-650, approved December 1, 1990, established a new system for Claims Court Judges. Amendments were made to the CSRS and FERS provisions applicable to such judges.

I. CONTINGENT LIABILITIES

The Office of Personnel Management has certain claims, lawsuits and complaints pending against it. In the opinion of management and legal counsel, the resolution of these matters will not materially affect the CSRDF's financial position or the results of its operations.

J. CHANGE IN ACTUARIAL ASSUMPTIONS

In June 1987, the Board of Actuaries of the CSRDF announced a change in the dynamic economic assumptions used to cost both tiers of CSRDF benefits. The economic assumptions reflect predictions about the long-term relationships among inflation, interest on investments, and salary adjustments. The new assumptions reflect recent financial experience and indicate a more optimistic view on the part of the Board about long-term interest earnings vis-a-vis the other two factors. These new assumptions become effective for the FERS normal cost contributions for all payroll periods beginning on or after October 1, 1987. In April 1989, the Board announced a change in the demographic rates used in the actuarial valuations, which include withdrawal, death, disability, and retirement rates, and individual merit and longevity increases. However, the economic assumptions did not change. The old and new economic assumptions for the CSRDF, as well as the CSRS and the FERS normal costs, are as follows:

	Effective Date			
	10/1/79	10/1/83	10/1/87	4/1/89
Inflation	5.0%	5.0%	5.0%	5.0%
Interest	6.0%	6.5%	7.0%	7.0%
Salary growth	5.5%	5.5%	5.0%	5.0%
Normal cost:				
CSRS	36.81%	34.84%	28.9%	28.29%
FERS	NA	16.1%*	13.8%	13.7%

* Effective January 1, 1987

The more interest the CSRDF earns on investments, the lower the contributions necessary to pay for benefits. Employee contributions for the FERS and both agency and employee contributions for the CSRS are set by statute and are not affected by the change in assumptions.
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K. FUNDS WITH TREASURY AND ON-HAND

At each fiscal year-end, the U.S. Postal Service (USPS) transfers monies to the CSRS in accordance with statute. For fiscal year 1990, the USPS was advised of a liability for $1.76 billion and, in accordance with normal practice, the USPS was instructed to credit this amount to the CSRDF on its Statement of Transactions report to the Treasury for September 1990. As is also practice, OPM informed the Treasury on September 30, 1990, that this amount should be invested to the credit of the CSRDF on that day. However, OPM learned subsequently from the Treasury that the amount actually reported by the USPS was less than the amount of the liability of which it was advised. Consequently, the CSRDF was "over-invested" for September, which is reflected in the financial statements as a "negative" cash balance. This situation was corrected during the month of October 1990.

L. SUBSEQUENT EVENTS

The Board of Actuaries adopted a new set of demographic assumptions for the calculation of normal cost of the FERS. As a consequence, both the normal cost of FERS coverage and agency contributions for FERS employees changed. Normal cost is an estimate of the percentage of pay which must be contributed for a typical group of new employees over their careers in order to pay fully for their FERS basic benefits upon retirement.

The following table provides the revised FERS normal cost and agency contribution rates for the various types of FERS employees. Federal regulations provide that agency contributions may be changed only at the beginning of a fiscal year. Thus, the new agency contribution rates were effective with the first pay period beginning on or after October 1, 1991. Employee contributions for the FERS and both agency and employee contributions for the CSRS are set by statute and are not affected by the change in assumptions. Thus, there was no change in the withholding rate for FERS employees in October 1991.

Type	Normal Cost (%)	Agency Contribution Rate (%)
Military reserve technicians	13.3	12.5
Air traffic controllers	26.2	24.9
Law enforcement officers, firefighters, and employees under section 302 of the CIA Act of 1964 for Certain Employees	28.6	27.3
Congressional employees	20.1	18.8
Members of Congress	20.8	19.5
All other employees	13.7	12.9

ACTUARIAL SECTION

CIVIL SERVICE RETIREMENT AND DISABILITY FUND

ACTUARIAL VALUATION OF THE CIVIL SERVICE RETIREMENT AND DISABILITY FUND

Since the Civil Service Retirement and Disability Fund (CSRDF) is available to pay both CSRS and FERS benefits, it comprises a single retirement plan for actuarial purposes, even though there are two different benefit tiers and funding methods and the activities associated with each tier are accounted for separately. The results of the actuarial valuation are shown for CSRS and FERS separately along with the results for both tiers combined in Tables 1-5 (pages 31-48).

Employee and Annuitant Population

The actuarial valuation of the Fund is based on the employee and annuitant populations as of September 30, 1991. There were a total of 2,986,000 employees as of this date, determined on a full-time equivalent basis, including 1,260,000 covered under FERS. The balance of 1,726,000 employees are covered under CSRS.

The inactive population as of September 30, 1991, includes: 1,628,900 retired employees; 422,600 survivors of annuitants; 121,600 survivors of employees; 40,600 child survivors; and 211,000 vested separated employees.

Economic Assumptions

The actuarial valuation presented in Table 1 (page 31) is based on "dynamic" economic assumptions which explicitly take inflation into account. The OMB/GAO instructions for this report recommend the use of a long term inflation assumption of 5 percent per annum, whereas prior to fiscal year 1987, the use of a 5 percent rate of inflation was required.

In June 1987, the Board of Actuaries of the CSRDF adopted a new set of economic assumptions to be used to calculate the normal cost for FERS and for the dynamic actuarial valuations of CSRS effective October 1, 1987. The Board concurred with the use of a 5 percent long-term inflation rate and also determined, based on a study of long term historical trends, that interest rates on long-term Government securities could be expected to exceed the rate of inflation by 2 percent per annum, resulting in a long-term interest rate assumption of 7 percent per annum. Finally, the Board determined that Federal salaries could be assumed to increase at the rate of 5 percent per annum. In addition to these assumed 5 percent general salary increases, there is also a scale of individual merit and longevity increases that is used in the valuation. In April 1991, The Board approved a new set of demographic assumptions, which include withdrawal, death, disability, and retirement rates, and a scale of individual merit and longevity salary increases.

The actual employee and employing agency contributions to CSRS are set by statute. Supplemental payments are also provided under a statutory funding method passed by Congress in 1969. This funding method is based on the "static" economic assumptions of no future inflation, no future general schedule salary increases, and a 5 percent interest rate.

Normal Cost (Page 31)

The normal cost is the level percentage of pay which would have to be contributed for a typical group of new employees over their entire working careers in order to fully finance, with interest, all of their retirement benefits.

FERS is funded under an entry age normal funding method as prescribed in Chapter 84 of Title 5, U.S.C. Agencies and employees contribute the dynamic normal cost, i.e. the normal cost determined under dynamic economic assumptions. Under FERS, the employees contribute a percentage of salary that is equal to the difference between 7 percent and the tax rate under the OASDI portion of Social Security. An extra 0.5 percent of pay is contributed by law enforcement officers and firefighters, air traffic controllers, congressional employees, and Members of Congress. The dynamic normal cost for FERS regular employees is 13.7 percent. This normal cost is for the defined benefit plan only and does not include the cost of Social Security or the Thrift Plan.

For CSRS, employees and agencies each contribute 7 percent of pay, and the total contribution of 14 percent of pay approximates the normal cost for CSRS, determined under static economic assumptions. For purposes of this report, however, the normal cost and the actuarial valuation of CSRS are based on dynamic economic assumptions. The dynamic normal cost for CSRS regular employees is 28.29 percent.

Unfunded Actuarial Liability (Page 31)

The unfunded actuarial liability is the amount which, if deposited in the Fund on September 30, 1991, would fully finance the total cost of the FERS and CSRS retirement benefits for the current, closed group of employees and annuitants, assuming that the full normal cost is contributed over the balance of the employees' working careers. It is represented by the difference between the net assets available for benefits on September 30, 1991, ($261.6 billion) and that which would be the Fund's net assets had the full normal cost been contributed over the entire working careers of all current employees and annuitants. The unfunded actuarial liability that is attributable to FERS is also referred to as the supplemental liability.

In Table 1, the unfunded liability is expressed as:

(1) the actuarial present value of future benefits
less (2) the present value of future normal cost contributions
less (3) the net assets in the fund.

The actuarial present value of future benefits is the value of plan benefits that are expected to be paid in the future to current employees and annuitants stated in today's dollars, i.e. future amounts discounted for the time value of money. It assumes that current employees will continue to earn benefits over their expected future working lives, that their salaries will increase by the assumed salary increases, and that annuities will rise based on the assumed COLA's.

The present value of future normal costs is the value, in today's dollars, of the future normal cost contributions to be made over the expected future working lifetimes of the current employees. In Table 1, the present value of future normal cost contributions is determined separately for CSRS and FERS. For CSRS, it is based on the CSRS dynamic normal cost of 28.29 percent, and for FERS, it is based on the FERS normal cost of 13.7 percent. However, as specified in the statute governing the financing of the CSRS, employees and agencies actually contribute a total of 14 percent of pay, which approximates the static normal cost of CSRS. The Treasury and the Postal Service make additional contributions, as described in Note C to the financial statements on page 16.

To simplify the actuarial valuation process, the cost of extra benefits under FERS for employees in special groups (e.g., law enforcement) is assumed to be exactly offset by their extra normal cost contributions. In the valuation, employees in special groups are assumed to have the same benefits and make the same contributions as regular employees. The valuation includes a figure for the additional liability for extra benefits for special groups under FERS that is equal to the accumulation with interest of the excess of the special normal cost over the regular normal cost from the time the special employees first began to accrue benefits under FERS. As of September 30, 1991, this extra liability amounted to $0.9 billion. There will be a need to adjust this figure when the amount of extra benefits actually paid out each year to special groups becomes significant.

Comparison of a Funding Method with Actual Contributions (Pages 33-35)

In accordance with OMB and GAO instructions, Tables 2 and 2(A) present a funding method that would fully finance the retirement benefits for all current employees and annuitants in 40 years for CSRS and FERS combined. The actuarial status information and methodology presented in Table 1 forms the basis for the data shown in this table. The total contribution is $62.9 billion for fiscal year 1991, which is 68.1 percent of payroll. The total contribution includes a level-dollar amortization over 40 years of the unfunded liability amounting to $41.6 billion per year and a normal cost contribution for fiscal year 1991 of $21.3 billion. These contributions are also compared with the actual contribution to the CSRDF.

The CSRS is financed by means of a funding method based on the static economic assumptions of no future general salary increases, no future cost-of-living increases for annuitants, and 5 percent interest. Employees and agencies together contribute 14 percent of pay, and the Treasury pays interest on the static unfunded liability along with payments to amortize, over a 30-year period, any increases in unfunded liability due to salary increases for non-Postal employees. The cost of salary increases for Postal employees are amortized by the Postal Service. Also, the cost of COLA's paid to former Postal employees who retired since 1971 is amortized by payments from the Postal Service over a 15-year period. The Treasury also pays for the cost of any benefits attributable to military service. Based on a provision of the Federal Employees' Retirement System Technical Correction Act, the static unfunded liability for CSRS is to be determined taking into account only the assets attributable to CSRS. For additional details, see Note C.2. to the Financial Statements.

In addition to the normal cost payments, any supplemental liabilities under FERS, including liabilities attributable to the frozen CSRS service, are to be amortized over 30 years. The payments on the initial supplemental liability as of September 30, 1988, began on September 30, 1989. Each year thereafter, any change in the supplemental liability will be amortized by means of a new series of 30-year payments. Any supplemental liabilities attributable to Postal employees are to be amortized by separate 30-year payments made by the Postal Service. In order to determine the value of FERS assets attributable to Postal employees, an account will be maintained which will be credited with net contributions for Postal employees and with interest at the same rate as is earned by the entire FERS fund. As of September 30, 1991, the present value of the remaining payments on the initial supplemental liability amounted to $5.9 billion. When this is subtracted from the supplemental liability as of September 30, 1991, which totals $6.1 billion, it results in a $0.2 billion increase in the supplemental liability for 1991 for non-Postal and Postal employees combined.

Projected Flow of Plan Assets (Pages 36-48)

Tables 3 and 3A show a 75-year projection of the actual funding for the CSRDF under conditions of expected future inflation. A sufficient number of new employees are assumed to be hired each year so that the total employee population remains constant. There are separate tables for FERS (Tables 4 and 4A) and for CSRS (Tables 5 and 5A) along with a consolidated statement for the entire CSRDF.

In this projection, the CSRS benefit payments begin to exceed total CSRS income in the year 2008, and the assets attributable to CSRS are depleted by the year 2023. Since the CSRS benefits continue to be paid from the assets of the CSRDF, the assets attributable to FERS will be reduced each year by the amount that the CSRS benefits exceed the CSRS contributions. This will cause an increase in the supplemental liability under FERS each year, which must then be amortized by a new series of 30-year payments under FERS. The total assets of the CSRDF continue to grow throughout the term of the projection, and ultimately reach a level of about 4.5 times payroll, or nearly 20 times the level of annual benefit outlays.

CIVIL SERVICE RETIREMENT AND DISABILITY FUND

OPINION OF THE ENROLLED ACTUARY

Actuarial Valuation of the Civil Service Retirement and Disability Fund
as of September 30, 1991

This statement has been prepared in accordance with general accepted actuarial principles and practices, and to the best of my knowledge, fairly reflects the results of the actuarial valuation of the Civil Service Retirement and Disability Fund (CSRDF), which includes both the Civil Service Retirement System (CSRS) and Federal Employees' Retirement System (FERS), as of September 30, 1991. In preparing this statement, I relied on the financial information provided by the Office of Financial Control and Management.

The present values shown herein have been determined using a 5 percent rate-of-inflation assumption which also was recommended by the Office of Management and Budget to meet the Public Law 95-595 requirement for consistency among the annual reports for Federal retirement systems. This valuation also assumes general salary increases of 5 percent per year, and an investment return assumption of 7 percent per year.

In my opinion, the present values in the actuarial tables in this report have been estimated on the basis of actuarial assumptions which are reasonable in the aggregate, and reflect my best estimate of anticipated experience under the Plan (both the CSRS and the FERS) based on provisions of the Plan in effect at the end of fiscal year 1991. To the best of my knowledge, the report is complete and accurate.

by: Michael Virga

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TABLE 1: Actuarial Status Information as of End of Plan Year

(Billions of dollars)

	For the Fiscal Year Ending 9/30/91			For the Fiscal Year Ending 9/30/90
	CSRS	FERS	TOTAL	TOTAL
1. Actuarial present value of future benefits and administrative expenses:				
(a) Annuitants on roll	$ 444.0	$ 3.0	$ 447.0	$ 424.7
(b) Separated employees	5.2	0.2	5.4	5.1
(c) Active employees	561.1	112.3	673.4	639.0
TOTAL	1010.3	115.5	1125.8	1068.8
2. LESS: Present value of future employer/employee normal cost contributions and future military service deposits:	185.3	85.1	270.4	262.1
3. Actuarial accrued liability	825.0	30.4	855.4	806.7
4. LESS: Net assets in fund	237.3	24.3	261.6	238.0
5. Unfunded actuarial accrued liability	$ 587.7	$ 6.1	$ 593.8	$ 568.7
6. Normal cost as a percentage of covered payroll:				
(a) Employee-CSRS			7.0%	7.00%
(b) Employer-CSRS			21.29%	21.29%
(c) TOTAL-CSRS *			28.29%	28.29%
(d) Employee-FERS			0.8%	.8%
(e) Employer-FERS			12.9%	12.9%
(f) TOTAL-FERS *			13.7%	13.7%

*Different rates are applicable for special groups.

7. Ratio of assets in fund to present value of future benefits for annuitants now on roll plus accumulated employee contributions:

(a) Value in line 1(a) plus accumulated employee contributions**	(b) Assets in fund divided by col. (a)	(c) Col. (b) ratio last year	(d) Col. (b) ratio 2 years ago
$500.0	52%	50%	48%

** Includes employee contributions of terminated employees entitled to a deferred vested benefit (see Notes A.2.d. and A.3.d.).

TABLE I: TECHNICAL NOTES

The valuation of the CSRDF as of September 30, 1991, is based on the employee and annuitant populations as of that date. Of a total of 2,986,000 active employees as of September 30, 1991, 1,260,000 were assumed to be covered by FERS. The balance of 1,726,000 employees covered by CSRS includes 77,000 CSRS offset employees.

The present value of future benefits and contributions as of September 30, 1991, is based on new economic assumptions of 5 percent inflation, 5 percent annual general schedule salary increases, and 7 percent interest, that were adopted by the Board of Actuaries, effective October 1, 1987. (However, in the valuations, the actual general schedule increase is used for the first year of the projection rather than the assumed increase. The actual increase is generally promulgated prior to the valuation date. Thus, a 4.1 percent general schedule increase was assumed for fiscal year 1991 in the September 30, 1990, valuation, and a 4.2 percent increase was assumed for fiscal year 1992, in the September 30, 1991, valuation.)

The CSRS normal cost is defined as the level percentage of pay necessary to fully fund all retirement benefits for a typical group of new Federal employees who are assumed to be covered under CSRS, even though all new Federal employees are now actually covered under FERS. The normal cost for CSRS is used in determining the actuarial accrued liability.

Item seven, the percent of retiree benefits which are covered by assets, shows a continued improvement over the past 12 years. This item is a measure of benefit security used by private sector firms.

The initial supplemental liability under FERS as of September 30, 1988, and any subsequent changes in supplemental liability, are to be amortized by 30-year payments to be made by the Treasury for non-Postal employees, and by the U.S. Postal Service for Postal employees. The change in supplemental liability is determined by subtracting the present value of any remaining 30-year payments that have already been scheduled from the amount of the supplemental liability. As of September 30, 1991, the present value of the remaining payments on the supplemental liability amounted to $5.9 billion. When this is subtracted from the supplemental liability as of September 30, 1991, of $6.1 billion, it results in a $0.2 billion increase in the supplemental liability for 1991 for Postal and non-Postal employees combined.

TABLE 2: Comparison of a Funding Method Whereby the Unfunded Liability is Amortized in Level Dollar Amounts over 40 Years with Actual Contributions

(Billions of dollars)

(1) Plan Year	(2) Normal Cost	(3) 40 year Level Amortization of Unfunded Liability	(4) Total Contribution* (Col. 2 plus Col. 3)	(5) Total Contributions to Plan From All Sources	(6) Difference Between Total Contribution (Col. 4) and Actual Contributions (Col. 5)	(7) Actual Contributions as a Percentage of Total Contribution (Col. 5 Divided by Col. 4)
ASSUMPTIONS (effective 1979) (See Note I of Financial Section):						
1979	$17.4	$25.3	$42.7	$16.3	$26.4	38.2%
1980	$18.8	$29.4	$48.2	$19.2	$29.0	39.8%
1981	$19.9	$31.3	$51.2	$22.2	$29.0	43.4%
1982	$21.3	$32.3	$53.6	$23.6	$30.0	44.0%
1983	$22.5	$33.1	$55.6	$25.0	$30.6	45.0%
ASSUMPTIONS (effective 1983) (See Note I of Financial Section):						
1983	$21.5	$34.7	$56.2	$25.0	$31.2	44.5%
1984	$22.4	$36.0	$58.4	$25.5	$32.9	43.7%
1985	$24.2	$36.1	$60.3	$27.0	$33.3	44.8%
1986	$25.8	$36.1	$61.9	$27.7	$34.2	44.7%
1987	$23.9	$36.1	$60.0	$27.8	$32.2	46.3%
ASSUMPTIONS (effective 1987) (See Note I of Financial Section):						
1987	$19.8	$34.1	$53.9	$27.8	$26.1	51.58%
1988	$20.2	$35.6	$55.8	$28.8	$27.0	51.61%
1989	$20.7	$36.6	$57.3	$29.9	$27.4	52.2%
Assumptions (effective 1989):						
1989	$20.2	$38.4	$58.6	$29.9	$28.7	51.0%
1990	$20.9	$39.9	$60.8	$31.9	$28.9	52.5%
1991	$21.3	$41.6	$62.9	34.1	28.8	54.2%

*The above table shows the percent of pay for the first year. The percentage for subsequent years will depend on whether the group is open or closed and total payroll increases or decreases.

TABLE 2A: Comparison of a Funding Method Whereby the Unfunded Liability is Amortized in Level Dollar Amounts over 40 Years with Actual Contributions

(Percentage of payroll)

(1) Plan Year	(2) Normal Cost	(3) 40-year Level Amortization of Unfunded Liability	(4) Total Contribution* (Col. 2 plus Col. 3)	(5) Total Contributions to Plan From All Sources	(6) Total Contribution* (Col. 4) less Actual Contributions (Col. 5) as a percentage of payroll
ASSUMPTIONS (effective 1979) (See Note 1 of Financial Section):					
1979	36.8%	53.3%	90.1%	34.4%	55.7%
1980	36.7%	57.4%	94.1%	37.7%	56.4%
1981	35.8%	56.3%	92.1%	39.9%	52.2%
1982	36.5%	55.4%	91.9%	40.5%	51.4%
1983	36.5%	53.7%	90.2%	40.6%	49.6%
ASSUMPTIONS (effective 1983) (See Note 1 of Financial Section):					
1983	34.9%	56.3%	91.2%	40.6%	50.6%
1984	34.9%	56.1%	91.0%	39.7%	51.3%
1985	34.9%	52.1%	87.0%	38.9%	48.1%
1986	34.8%	48.8%	83.6%	37.4%	46.2%
1987	32.0%	48.5%	80.5%	37.3%	43.2%
ASSUMPTIONS (effective 1987) (See Note 1 of Financial Section):					
1987	26.6%	45.7%	72.3%	37.3%	35.0%
1988	25.4%	44.7%	70.2%	36.2%	34.0%
1989	24.8%	43.9%	68.6%	35.8%	32.8%
Assumptions (effective 1989):					
1989	24.3%	46.1%	70.4%	35.8%	34.6%
1990	23.8%	45.5%	69.3%	36.4%	33.0%
1991	23.0%	45.1%	68.1%	36.9%	31.2%

*The above table shows the percent of pay for the first year; the percentage for subsequent years will depend on whether the group is open or closed and whether the total payroll increases or decreases.

TABLES 2 AND 2A: TECHNICAL NOTES

In accordance with OMB and GAO instructions, Tables 2 and 2(A) present a funding method that would fully finance the retirement benefits for all current employees and annuitants in 40 years. The total contribution is $62.9 billion for fiscal year 1991, which is 68.1% of payroll. These contributions would be sufficient to pay for the benefits of all current employees and annuitants, assuming no new employees were covered under the system, and thus, there were no additional contributions for new employees. The total contribution includes a level dollar amortization over 40 years of the unfunded liability amounting to $41.6 billion and normal cost contributions of $21.3 billion. The specifications require a presentation of level dollar financing of the unfunded liability over a 40-year period.

TABLE 3: Past and Projected Flow of Plans Assets (Combined CSRS and FERS systems)

(Billions of dollars)

FISCAL YEAR	EMPLOYEE CONTRIBUTIONS	AGENCY CONTRIBUTIONS	OTHER GOVERNMENT CONTRIBUTIONS	INVESTMENT INCOME	TOTAL INCOME	TOTAL EXPENSE	NET ASSETS END OF YEAR	COMBINED PAYROLL
PAST FLOW								
1979	$3.4	$3.4	$9.5	$3.8	$20.1	$12.6	$63.9	$47.4
1980	3.7	3.6	12.0	4.8	24.1	15.0	73.0	51.2
1981	4.0	3.9	14.2	6.0	28.2	17.8	83.4	55.6
1982	4.2	4.1	15.4	8.7	32.4	19.7	96.1	58.3
1983	4.5	4.3	16.3	9.8	34.8	20.9	110.0	61.6
1984	4.6	4.6	16.3	11.3	36.7	22.0	124.7	64.2
1985	5.0	4.8	17.2	13.8	40.8	23.2	142.3	69.3
1986	5.2	5.1	17.5	15.5	43.2	24.7	160.9	72.4
1987	4.8	5.9	17.0	15.9	43.6	25.8	178.7	74.2
1988	4.5	6.7	17.5	17.9	46.7	28.3	197.1	79.6
1989	4.5	7.3	18.1	19.4	49.3	29.7	216.7	83.4
1990	4.5	7.9	19.4	20.8	52.7	31.4	238.0	87.6
1991	4.6	8.5	21.0	22.7	56.8	33.2	261.6	92.3
PROJECTED FLOW								
1992	4.6	9.1	22.0	23.0	58.7	34.0	283.3	98.5
1993	4.6	9.7	23.3	23.7	61.3	34.8	309.8	103.0
1994	4.7	10.5	24.0	24.9	64.1	36.4	337.5	109.8
1995	4.8	11.4	25.1	26.1	67.4	38.0	366.9	117.1
1996	4.9	12.4	25.7	27.4	70.3	39.8	397.5	124.6
1997	5.0	13.3	26.7	28.7	73.7	41.6	429.5	131.6
1998	5.0	14.2	27.8	30.9	77.9	44.1	463.3	138.7
1999	5.1	15.2	29.4	32.6	82.3	47.1	498.6	146.3
2000	5.1	16.3	31.1	34.7	87.2	50.1	535.6	154.2

TABLE 3(cont.): Past and Present Flow of Plans Assets (Combined CSRS and FERS systems)

(Billions of dollars)

FISCAL YEAR	EMPLOYEE CONTRIBUTIONS	AGENCY CONTRIBUTIONS	OTHER GOVERNMENT CONTRIBUTIONS	INVESTMENT INCOME	TOTAL INCOME	TOTAL EXPENSE	NET ASSETS END OF YEAR	COMBINED PAYROLL
2001	$5.1	$17.4	$32.7	$37.0	$92.3	$53.4	$574.5	$162.4
2002	5.1	18.6	34.5	39.4	97.6	57.0	615.1	170.9
2003	5.1	19.8	36.3	41.9	103.0	61.0	657.1	179.5
2004	5.0	21.1	38.1	44.5	108.7	65.3	700.5	188.5
2005	4.9	22.5	39.8	47.1	114.4	69.9	745.0	197.8
2010	4.2	30.5	49.4	63.2	147.3	96.6	986.8	251.4
2015	3.5	40.4	59.5	81.2	184.6	128.0	1,257.5	319.6
2020	3.6	52.5	69.9	101.6	227.7	160.5	1,571.1	408.5
2025	4.4	67.2	79.3	126.4	277.3	194.7	1,949.7	521.2
2030	5.5	86.0	94.7	159.0	345.2	230.6	2,454.2	666.6
2035	7.0	109.8	107.6	204.3	428.7	270.2	3,153.1	851.2
2040	9.0	140.0	118.3	267.4	534.7	314.7	4,122.1	1,085.2
2045	11.5	178.4	126.7	354.9	671.4	368.8	5,460.9	1,382.9
2050	14.6	227.5	132.2	474.3	848.6	439.9	7,282.7	1,763.6
2055	18.7	290.4	132.7	634.0	1,075.8	537.8	9,707.6	2,251.2
2060	23.9	370.8	108.9	838.5	1,342.1	672.0	12,785.5	2,874.5
2065	30.5	473.4	82.1	1,091.8	1,677.7	850.9	16,594.4	3,669.7

NOTE: The transfers between FERS and CSRS are not included in either income or expenses in this consolidated statement.

TABLE 3A: Past and Projected Flow of Plans Assets (Combined CSRS and FERS systems)

(Percentage of total payroll (CSRS & FERS))

FISCAL YEAR	EMPLOYEE CONTRIBUTIONS	OTHER AGENCY CONTRIBUTIONS	OTHER GOVERNMENT CONTRIBUTIONS	INVESTMENT INCOME	TOTAL INCOME	TOTAL EXPENSE	NET ASSETS END OF YEAR	COMBINED PAYROLL
PAST FLOW								
1979	7.2%	7.2%	20.0%	8.0%	42.4%	26.6%	134.8%	100.0
1980	7.2	7.0	23.4	9.4	47.1	29.3	142.6	100.0
1981	7.2	7.0	25.5	10.8	50.7	32.0	150.0	100.0
1982	7.2	7.0	26.4	14.9	55.6	33.8	164.8	100.0
1983	7.3	7.0	26.5	15.9	56.5	33.9	178.6	100.0
1984	7.2	7.2	25.3	17.6	57.2	34.3	194.2	100.0
1985	7.2	7.0	24.8	19.9	58.9	33.5	205.3	100.0
1986	7.2	7.0	24.1	21.4	59.7	34.1	222.3	100.0
1987	6.5	8.0	22.9	21.4	58.8	34.7	240.9	100.0
1988	5.7	8.5	22.0	22.5	58.7	35.6	247.7	100.0
1989	5.4	8.7	21.7	23.3	59.1	35.6	259.8	100.0
1990	5.1	9.0	22.2	23.8	60.1	35.9	271.7	100.0
1991	4.9	9.3	22.7	24.7	61.6	36.0	283.5	100.0
PROJECTED FLOW								
1992	4.6	9.3	22.3	23.3	59.5	34.5	287.5	100.0
1993	4.5	9.4	22.6	23.0	59.5	33.8	300.7	100.0
1994	4.3	9.6	21.8	22.6	58.4	33.1	307.4	100.0
1995	4.1	9.8	21.4	22.3	57.6	32.5	313.2	100.0
1996	3.9	9.9	20.6	22.0	56.4	31.9	318.9	100.0
1997	3.8	10.1	20.3	21.8	56.0	31.6	326.5	100.0
1998	3.6	10.2	20.0	22.2	56.2	31.8	333.9	100.0
1999	3.5	10.4	20.1	22.3	56.3	32.2	340.8	100.0
2000	3.3	10.6	20.2	22.5	56.5	32.5	347.4	100.0

TABLE 3A (cont.): Past and Projected Flow of Plans Assets (Combined CSRS and FERS systems)

(Percentage of total payroll)

FISCAL YEAR	EMPLOYEE CONTRIBUTIONS	AGENCY CONTRIBUTIONS	OTHER GOVERNMENT CONTRIBUTIONS	INVESTMENT INCOME	TOTAL INCOME	TOTAL EXPENSE	NET ASSETS END OF YEAR	COMBINED PAYROLL
2001	3.2	10.7	20.2	22.8	56.8	32.9	353.7	100.0
2002	3.0	10.9	20.2	23.1	57.1	33.4	360.0	100.0
2003	2.8	11.0	20.2	23.3	57.4	34.0	366.0	100.0
2004	2.7	11.2	20.2	23.6	57.7	34.6	371.6	100.0
2005	2.5	11.4	20.1	23.8	57.8	35.3	376.5	100.0
2010	1.7	12.1	19.7	25.1	58.6	38.4	392.6	100.0
2015	1.1	12.7	18.6	25.4	57.8	40.1	393.5	100.0
2020	0.9	12.8	17.1	24.9	55.7	39.3	384.6	100.0
2025	0.8	12.9	15.2	24.3	53.2	37.4	374.0	100.0
2030	0.8	12.9	14.2	23.8	51.8	34.6	368.2	100.0
2035	0.8	12.9	12.6	24.0	50.4	31.7	370.4	100.0
2040	0.8	12.9	10.9	24.6	49.3	29.0	379.8	100.0
2045	0.8	12.9	9.2	25.7	48.5	26.7	394.9	100.0
2050	0.8	12.9	7.5	26.9	48.1	24.9	412.9	100.0
2055	0.8	12.9	5.9	28.2	47.8	23.9	431.2	100.0
2060	0.8	12.9	3.8	29.2	46.7	23.4	444.8	100.0
2065	0.8	12.9	2.2	29.8	45.7	23.2	452.2	100.0

Note: The transfers from FERS to CSRS are not included in either income or expenses in this consolidated statement.

TABLE 4: Past and Projected Flow of Plan Assets (FERS)

(Billions of dollars)

FISCAL YEAR	EMPLOYEE CONTRIB.	AGENCY CONTRIB.	AMORTIZED PAYMENT	TOTAL GOVERNMENT CONTRIB.	INVESTMENT INCOME	TOTAL INCOME	FERS BENEFIT PAYMENT	TRANSF TO (FROM) CSRS	TOTAL EXPENSE	NET ASSETS END OF YEAR	FERS PAYROLL
PAST FLOW											
1987	$0.3	$1.5	$0.0	$1.5	$0.2	$2.0	$0.0	$(1.8)**	$(1.8)	$3.8	$11.0
1988	0.2	2.4	0.0	2.4	0.4	3.0	0.2	(1.3)*	(1.1)	8.0	18.1
1989	0.2	3.0	0.5	3.5	0.8	4.5	0.2	0.0	0.2	12.3	23.0
1990	0.2	3.7	0.5	4.1	1.3	5.6	0.2	0.0	0.2	17.7	26.7
1991	0.3	4.3	0.5	4.8	1.7	6.8	0.2	0.0	0.2	24.3	31.2
PROJECTED FLOW											
1992	0.3	4.9	0.5	5.4	2.1	7.8	0.3	0.0	0.3	31.8	37.8
1993	0.3	5.5	0.5	6.0	2.3	8.7	0.3	0.0	0.3	40.1	42.5
1994	0.4	6.3	0.5	6.8	2.8	10.0	0.4	0.0	0.4	49.7	48.5
1995	0.4	7.1	0.5	7.6	3.5	11.5	0.5	0.0	0.5	60.7	55.0
1996	0.5	8.0	0.5	8.5	4.2	13.2	0.6	0.0	0.6	73.3	61.8
1997	0.6	8.9	0.5	9.4	5.0	15.0	0.7	0.0	0.7	87.6	68.8
1998	0.6	9.8	0.5	10.4	6.5	17.4	0.9	0.0	0.9	104.2	76.3
1999	0.7	10.9	0.5	11.4	7.7	19.7	1.0	0.0	1.0	122.9	84.4
2000	0.7	12.0	0.5	12.5	9.0	22.3	1.2	0.0	1.2	143.9	93.0
2001	0.8	13.2	0.5	13.7	10.5	25.0	1.5	0.0	1.5	167.5	102.2
2002	0.9	14.5	0.5	15.0	12.2	28.1	1.8	0.0	1.8	193.8	112.2
2003	1.0	15.9	0.5	16.4	14.1	31.5	2.1	0.0	2.1	223.1	123.0
2004	1.1	17.4	0.5	17.9	16.2	35.1	2.6	0.0	2.6	255.7	134.5
2005	1.2	18.9	0.5	19.5	18.5	39.1	3.1	0.0	3.1	291.8	146.8

* Transfer of funds from CSRS to FERS for the individuals electing FERS coverage.

**Transfer of funds from CSRS to FERS for individuals who were automatically transferred to FERS on January 1, 1987

TABLE 4(cont.): Past and Projected Flow of Plan Assets (FERS)

(Billions of dollars)

FISCAL YEAR	EMPLOYEE CONTRIB.	AGENCY CONTRIB.	AMORTIZED PAYMENT	TOTAL GOVERNMENT CONTRIB.	INVESTMENT INCOME	TOTAL INCOME	FERS BENEFIT PAYMENT	TRANSF TO (FROM) CSRS	TOTAL EXPENSE	NET ASSETS END OF YEAR	FERS PAYROLL
2010	$ 1.8	$ 28.2	$ 0.5	$ 28.7	$ 34.1	$ 64.6	$ 7.5	$ 0.0	$ 7.5	$ 532.9	$ 218.6
2015	2.5	39.5	0.5	40.0	57.7	100.2	17.1	0.0	17.1	895.0	306.0
2020	3.3	52.2	0.1	52.2	90.4	146.0	35.4	0.0	35.4	1,392.9	404.4
2025	4.3	67.1	2.1	69.2	126.4	199.9	63.7	53.5	117.3	1,949.7	520.1
2030	5.5	86.0	26.7	112.7	159.0	277.1	102.0	60.6	162.6	2,454.2	666.3
2035	7.0	109.8	53.5	163.3	204.3	374.6	153.1	62.9	216.1	3,153.1	851.2
2040	9.0	140.0	79.8	219.8	267.4	496.2	218.6	57.6	276.2	4,122.1	1,085.2
2045	11.5	178.4	102.3	280.7	354.9	647.1	299.6	44.9	344.4	5,460.9	1,382.9
2050	14.6	227.5	118.6	346.2	474.3	835.1	397.6	28.8	426.4	7,282.7	1,763.6
2055	18.7	290.4	126.2	416.6	634.0	1,069.3	516.5	14.8	531.3	9,707.6	2,251.2
2060	23.9	370.8	106.1	476.9	838.5	1,339.3	663.5	5.8	669.2	12,785.5	2,874.5
2065	30.5	473.4	81.0	554.4	1,091.8	1,676.6	848.3	1.5	849.8	16,594.4	3,669.7

TABLE 4A: Past and Projected Flow of Plan Assets (FERS)

(Percentage of total payroll (CSRS & FERS))

FISCAL YEAR	EMPLOYEE CONTRIB.	AGENCY CONTRIB.	AMORTIZED PAYMENT	TOTAL GOVERNMENT CONTRIB.	INVESTMENT INCOME	TOTAL INCOME	FERS BENEFIT PAYMENT	TRANSF TO (FROM) CSRS	TOTAL EXPENSE	NET ASSETS END OF YEAR	FERS PAYROLL
PAST FLOW											
1987	0.4%	2.0%	0.0%	2.0%	0.3%	2.7%	0.0%	(2.4)%**	(2.4)%	5.2%	14.8%
1988	0.2	3.0	0.0	3.0	0.6	3.8	0.2	(1.6)*	(1.4)	10.0	22.7
1989	0.3	3.7	0.5	4.2	0.9	5.4	0.2	0.0	0.2	14.8	27.6
1990	0.3	4.2	0.5	4.7	1.4	6.4	0.3	0.0	0.3	20.2	30.5
1991	0.3	4.6	0.5	5.2	1.9	7.3	0.2	0.0	0.2	26.3	33.8
PROJECTED FLOW											
1992	0.3	4.9	0.5	5.5	2.1	7.9	0.3	0.0	0.3	32.2	38.4
1993	0.3	5.3	0.5	5.8	2.3	8.4	0.3	0.0	0.3	38.9	41.3
1994	0.4	5.7	0.5	6.2	2.6	9.1	0.4	0.0	0.4	45.2	44.2
1995	0.4	6.1	0.4	6.5	2.9	9.8	0.4	0.0	0.4	51.8	46.9
1996	0.4	6.4	0.4	6.8	3.4	10.6	0.5	0.0	0.5	58.8	49.6
1997	0.4	6.7	0.4	7.1	3.8	11.4	0.5	0.0	0.5	66.6	52.3
1998	0.4	7.1	0.4	7.5	4.7	12.6	0.6	0.0	0.6	75.1	55.0
1999	0.5	7.4	0.4	7.8	5.2	13.5	0.7	0.0	0.7	84.0	57.7
2000	0.5	7.8	0.3	8.1	5.8	14.4	0.8	0.0	0.8	93.3	60.3

* Transfer of funds from CSRS to FERS for the individuals electing FERS coverage.

** Transfer of funds from CSRS to FERS for individuals that automatically transferred to FERS on January 1, 1987

TABLE 4A (cont.): Past and Projected Flow of Plan Assets (FERS)

(Percentage of total payroll (CSRS & FERS))

FISCAL YEAR	EMPLOYEE CONTRIB.	AGENCY CONTRIB.	AMORTIZED PAYMENT	TOTAL GOVERNMENT CONTRIB.	INVESTMENT INCOME	TOTAL INCOME	FERS BENEFIT PAYMENT	TRANSF TO (FROM) CSRS	TOTAL EXPENSE	NET ASSETS END OF YEAR	FERS PAYROLL
2001	0.5%	8.1%	0.3%	8.4%	6.5%	15.4%	0.9%	0.0%	0.9%	103.1%	62.9%
2002	0.5	8.5	0.3	8.8	7.1	16.4	1.0	0.0	1.0	113.4	65.6
2003	0.6	8.8	0.3	9.1	7.8	17.5	1.2	0.0	1.2	124.3	68.5
2004	0.6	9.2	0.3	9.5	8.6	18.6	1.4	0.0	1.4	135.6	71.4
2005	0.6	9.6	0.3	9.8	9.3	19.8	1.6	0.0	1.6	147.5	74.2
2010	0.7	11.2	0.2	11.4	13.6	25.7	3.0	0.0	3.0	212.0	87.0
2015	0.8	12.4	0.2	12.5	18.1	31.4	5.3	0.0	5.3	280.1	95.8
2020	0.8	12.8	0.0	12.8	22.1	35.7	8.7	0.0	8.7	341.0	99.0
2025	0.8	12.9	0.4	13.3	24.3	38.3	12.2	10.3	22.5	374.0	99.8
2030	0.8	12.9	4.0	16.9	23.8	41.6	15.3	9.1	24.4	368.2	100.0
2035	0.8	12.9	6.3	19.2	24.0	44.0	18.0	7.4	25.4	370.4	100.0
2040	0.8	12.9	7.4	20.3	24.6	45.7	20.1	5.3	25.5	379.8	100.0
2045	0.8	12.9	7.4	20.3	25.7	46.8	21.7	3.2	24.9	394.9	100.0
2050	0.8	12.9	6.7	19.6	26.9	47.4	22.5	1.6	24.2	412.9	100.0
2055	0.8	12.9	5.6	18.5	28.2	47.5	22.9	0.7	23.6	431.2	100.0
2060	0.8	12.9	3.7	16.6	29.2	46.6	23.1	0.2	23.3	444.8	100.0
2065	0.8	12.9	2.2	15.1	29.8	45.7	23.1	0.0	23.2	452.2	100.0

TABLE 5: Past and Projected Flow of Plan Assets (CSRS)

(Billions of dollars)

FISCAL YEAR	EMPLOYEE CONTRIB.	AGENCY CONTRIB.	30-YR PAYMT	POSTAL 15-YEAR PAYMT	PAYMENT ON UAL	MILITARY SERVICE PAYMENT	TRANSFER FROM (TO) FERS	TOTAL GOVT CONTRIB.	INVESTMENT INCOME	TOTAL INCOME	TOTAL OUTLAYS	FUND END OF YEAR	CSRS PAYROLL
PAST FLOW													
1979	$3.4	$3.4	$3.1	0.0	$5.6	$0.8	$0.0	$12.9	$3.8	$20.1	$12.6	$63.9	$47.4
1980	3.7	3.6	3.5	0.0	7.4	1.1	0.0	15.6	4.8	24.1	15.0	73.0	51.2
1981	4.0	3.9	4.0	0.0	8.9	1.3	0.0	18.2	6.0	28.2	17.8	83.4	55.6
1982	4.2	4.1	4.5	0.0	9.4	1.5	0.0	19.4	8.7	32.4	19.7	96.1	58.3
1983	4.5	4.3	4.9	0.0	9.7	1.7	0.0	20.6	9.8	34.8	20.9	110.0	61.6
1984	4.6	4.6	5.1	0.0	9.4	1.8	0.0	20.8	11.3	36.7	22.0	124.7	64.2
1985	5.0	4.8	5.8	0.0	9.5	1.9	0.0	22.0	13.8	40.8	23.2	142.3	69.3
1986	5.2	5.1	5.8	0.0	9.7	2.0	0.0	22.5	15.5	43.2	24.7	160.9	72.4
1987	4.5	4.4	6.0	0.0	9.0	2.0	(1.8)***	19.6	15.6	39.8	25.7	174.9	63.2
1988	4.3	4.3	6.3	0.0	9.0**	2.2	(1.3)*	20.6	17.4	42.4	28.1	189.1	61.5
1989	4.3	4.2	6.5	0.0	8.8	2.3	0.0	21.9	18.7	44.8	29.5	204.4	60.4
1990	4.3	4.3	6.8	.1	9.5	2.5	0.0	23.2	19.6	47.1	31.2	220.3	60.9
1991	4.3	4.3	7.5	0.6	9.7	2.6	0.0	24.7	21.0	50.0	33.0	237.3	61.0
PROJECTED FLOW													
1992	4.3	4.3	8.1	0.8	9.8	2.9	0.0	25.7	20.9	50.9	33.7	251.5	60.7
1993	4.2	4.2	8.5	0.9	10.3	3.0	0.0	27.0	21.4	52.6	34.4	269.7	60.5
1994	4.3	4.3	9.4	1.1	9.8	3.1	0.0	27.8	22.1	54.1	36.0	287.9	61.3
1995	4.4	4.4	10.2	1.2	9.8	3.3	0.0	28.9	22.7	55.9	37.6	306.2	62.2

* Transfer of funds from CSRS to FERS for the individuals electing FERS coverage.

** For fiscal year 1988 only, the unfunded actuarial liability (UAL) payment included $350 million from the Postal Service as required by Congress.

*** Transfer of funds from CSRS to FERS for individuals who automatically transferred to FERS on January 1, 1987

TABLE 5(cont.): Past and Projected Flow of Plan Assets (CSRS)

(Billions of dollars)

FISCAL YEAR	EMPLOYEE CONTRIB.	AGENCY CONTRIB.	30-YR PAYMT	POSTAL 15 - YEAR PAYMT	PAYMENT ON UAL	MILITARY SERVICE PAYMENT	TRANSFER FROM (TO) FERS	TOTAL GOVT CONTRIB.	INVESTMENT INCOME	TOTAL INCOME	TOTAL OUTLAYS	FUND END OF YEAR	CSRS PAYROLL
1996	$4.4	$4.4	$ 11.1	0.9	$9.8	$ 3.4	$ 0.0	$ 29.5	$ 23.2	$ 57.1	$ 39.2	$324.2	$62.8
1997	4.4	4.4	11.8	1.0	9.9	3.5	0.0	30.5	23.7	58.7	40.9	341.9	62.8
1998	4.4	4.4	12.5	1.1	10.0	3.6	0.0	31.6	24.4	60.5	43.3	359.1	62.5
1999	4.4	4.3	13.2	1.4	10.4	3.8	0.0	33.2	25.0	62.6	46.0	375.7	61.9
2000	4.4	4.3	13.9	1.7	11.0	4.0	0.0	34.8	25.7	64.9	48.9	391.7	61.2
2001	4.3	4.2	14.5	2.1	11.5	4.1	0.0	36.4	26.5	67.2	51.9	407.0	60.2
2002	4.2	4.1	15.2	2.5	12.0	4.3	0.0	38.1	27.2	69.5	55.2	421.3	58.7
2003	4.1	4.0	15.8	2.9	12.6	4.4	0.0	39.7	27.8	71.6	58.9	434.0	56.6
2004	3.9	3.8	16.3	3.4	13.2	4.6	0.0	41.4	28.3	73.5	62.8	444.8	54.0
2005	3.7	3.6	16.7	3.9	13.9	4.8	0.0	42.9	28.7	75.2	66.8	453.2	51.0
2010	2.4	2.3	18.0	7.1	18.5	5.4	0.0	51.2	29.1	82.7	89.0	453.9	32.8
2015	1.0	0.9	17.5	10.7	25.3	5.6	0.0	59.9	23.5	84.4	110.9	362.5	13.5
2020	0.3	0.3	16.7	13.5	34.4	5.3	0.0	70.2	11.2	81.7	125.1	178.2	4.1
2025	0.1	0.1	13.7	14.9	43.9	4.7	53.5	130.9	0.0	131.0	131.0	0.0	1.1
2030	0.0	0.0	9.9	14.6	39.5	3.9	60.6	128.6	0.0	128.6	128.6	0.0	0.3
2035	0.0	0.0	5.8	13.0	32.3	3.0	62.9	117.0	0.0	117.0	117.0	0.0	0.0
2040	0.0	0.0	2.5	10.4	23.4	2.1	57.6	96.1	0.0	96.1	96.1	0.0	0.0
2045	0.0	0.0	0.8	7.6	14.6	1.3	44.9	69.2	0.0	69.2	69.2	0.0	0.0
2050	0.0	0.0	0.2	5.0	7.6	0.7	28.8	42.3	0.0	42.3	42.3	0.0	0.0
2055	0.0	0.0	0.0	2.9	3.2	0.3	14.8	21.3	0.0	21.3	21.3	0.0	0.0
2060	0.0	0.0	0.0	1.5	1.1	0.1	5.8	8.5	0.0	8.5	8.5	0.0	0.0
2065	0.0	0.0	0.0	0.6	0.4	0.0	1.5	2.6	0.0	2.6	2.6	0.0	0.0

TABLE 5A: Past and Projected Flow of Plan Assets (CSRS)

(Percentage of total payroll (CSRS & FERS))

FISCAL YEAR	EMPLOYEE CONTRIB.	AGENCY CONTRIB.	30-YR PAYMT	POSTAL 15 - YEAR PAYMENT	PAYMENT ON UAL	MILITARY SERVICE PAYMENT	TRANSFER FROM (TO) FERS	TOTAL GOVT CONTRIB.	INVESTMENT INCOME	TOTAL INCOME	TOTAL OUTLAYS	FUND END OF YEAR	CSRS PAYROLL
PASTFLOW													
1979	7.2	7.2	6.5	0.0	11.8	1.7	0.0	27.2	8.0	42.4	26.6	134.8	100.0
1980	7.2	7.0	6.8	0.0	14.5	2.1	0.0	30.5	9.4	47.1	29.3	142.6	100.0
1981	7.2	7.0	7.2	0.0	16.0	2.3	0.0	32.7	10.8	50.7	32.0	150.0	100.0
1982	7.2	7.0	7.7	0.0	16.1	2.6	0.0	33.3	14.9	55.6	33.8	164.8	100.0
1983	7.2	7.0	8.0	0.0	15.7	2.8	0.0	33.4	15.9	56.5	33.8	164.8	100.0
1984	7.2	7.2	7.9	0.0	14.6	2.8	0.0	32.4	17.6	57.2	34.3	194.2	100.0
1985	7.2	7.0	8.3	0.0	13.8	2.7	0.0	31.8	19.9	58.9	33.5	205.3	100.0
1986	7.2	7.0	8.0	0.0	13.4	2.7	0.0	31.1	21.4	59.7	34.1	222.3	100.0
1987	6.1	6.0	8.0	0.0	12.1	2.8	(2.4)***	26.4	21.1	53.6	34.7	235.7	85.2
1988	5.5	5.5	7.9	0.0	11.4**	2.7	(1.6)*	25.8	21.9	53.2	35.3	237.6	77.3
1989	5.1	5.1	7.8	0.0	10.6	2.8	0.0	26.2	22.4	53.7	35.4	245.1	72.4
1990	4.9	4.9	7.8	0.1	10.8	2.9	0.0	26.5	22.3	53.7	35.6	251.4	69.5
1991	4.6	4.6	8.1	0.7	10.5	2.9	0.0	26.8	22.8	54.2	35.8	257.2	66.2
PROJECTED FLOW													
1992	4.3	4.3	8.2	0.8	9.9	2.9	0.0	26.1	21.2	51.7	34.2	255.3	61.6
1993	4.1	4.1	8.3	0.9	10.0	2.9	0.0	26.2	20.8	51.1	33.4	261.8	58.7
1994	3.9	3.9	8.6	1.0	9.0	2.9	0.0	25.3	20.1	49.3	32.8	262.2	55.8
1995	3.7	3.7	8.7	1.0	8.4	2.8	0.0	24.7	19.3	47.7	32.1	261.4	53.1

* Transfer of funds from CSRS to FERS for the individuals electing FERS coverage.

** For fiscal year 1988 only, the unfunded actuarial liability (UAL) payment included $350 million from the Postal Service as required by Congress.

*** Transfer of funds from CSRS to FERS for individuals that automatically transferred to FERS on January 1, 1987

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TABLE 5A(cont.): Past and Projected Flow of Plan Assets (CSRS)

(Percentage of total payroll (CSRS & FERS))

FISCAL YEAR	EMPLOYEE CONTRIB.	AGENCY CONTRIB.	30-YR PAYMT	POSTAL 15 - YEAR PAYMENT	PAYMENT ON UAL	MILITARY SERVICE PAYMENT	TRANSFER FROM (TO) FERS	TOTAL GOVT CONTRIB.	INVESTMENT INCOME	TOTAL INCOME	TOTAL OUTLAYS	FUND END OF YEAR	CSRS PAYROLL
1996	3.6	3.5	8.9	0.7	7.9	2.7	0.0	23.7	18.6	45.8	31.4	260.1	50.4
1997	3.4	3.3	9.0	0.7	7.5	2.7	0.0	23.2	18.0	44.6	31.1	259.9	47.7
1998	3.2	3.2	9.0	0.8	7.2	2.6	0.0	22.8	17.6	43.6	31.2	258.8	45.0
1999	3.0	3.0	9.0	1.0	7.1	2.6	0.0	22.7	17.1	42.8	31.5	256.8	42.3
2000	2.8	2.8	9.0	1.1	7.1	2.6	0.0	22.6	16.7	42.1	31.7	254.0	39.7
2001	2.6	2.6	8.9	1.3	7.1	2.6	0.0	22.4	16.3	41.4	32.0	250.6	37.1
2002	2.5	2.4	8.9	1.5	7.0	2.5	0.0	22.3	15.9	40.7	32.3	246.6	34.4
2003	2.3	2.2	8.8	1.6	7.0	2.5	0.0	22.1	15.5	39.9	32.8	241.7	31.5
2004	2.1	2.0	8.7	1.8	7.0	2.4	0.0	21.9	15.0	39.0	33.3	236.0	28.6
2005	1.9	1.8	8.4	2.0	7.0	2.4	0.0	21.7	14.5	38.0	33.8	229.1	25.8
2010	1.0	0.9	7.2	2.8	7.4	2.1	0.0	20.4	11.6	32.9	35.4	180.6	13.0
2015	0.3	0.3	5.5	3.3	7.9	1.7	0.0	18.8	7.3	26.4	34.7	113.4	4.2
2020	0.1	0.1	4.1	3.3	8.4	1.3	0.0	17.2	2.7	20.0	30.6	43.6	1.0
2025	0.0	0.0	2.6	2.9	8.4	0.9	10.3	25.1	0.0	25.1	25.1	0.0	0.2
2030	0.0	0.0	1.5	2.2	5.9	0.6	9.1	19.3	0.0	19.3	19.3	0.0	0.0
2035	0.0	0.0	0.7	1.5	3.8	0.4	7.4	13.7	0.0	13.7	13.7	0.0	0.0
2040	0.0	0.0	0.2	1.0	2.2	0.2	5.3	8.9	0.0	8.9	8.9	0.0	0.0
2045	0.0	0.0	0.1	0.6	1.1	0.1	3.2	5.0	0.0	5.0	5.0	0.0	0.0
2050	0.0	0.0	0.0	0.3	0.4	0.0	1.6	2.4	0.0	2.4	2.4	0.0	0.0
2055	0.0	0.0	0.0	0.1	0.1	0.0	0.7	0.9	0.0	0.9	0.9	0.0	0.0
2060	0.0	0.0	0.0	0.1	0.0	0.0	0.2	0.3	0.0	0.3	0.3	0.0	0.0
2065	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.1	0.0	0.1	0.1	0.0	0.0

TABLES 3, 3A, 4, 4A, 5, AND 5A: TECHNICAL NOTES

The projected flow of plan assets calculated in Tables 3, 3A, 4, 4A, 5, and 5A is based on the following economic assumptions:*

Cost of Living Adjustments		General Schedule Increases		Interest Rates for New Issues	
12/91	3.7%	1/92	4.2%	6/92	6.75%
12/92	3.0%	1/93	3.7%	6/93	6.75%
12/93	3.2%	1/94	6.5%	6/94	6.5%
12/94	3.2%	1/95	5.8%	6/95	6.5%
12/95	3.2%	1/96	5.7%	6/96	6.5%
12/96	3.1%	1/97	4.7%	6/97	6.5%
Future Years	5.0%	Future Years	5.0%	Future Years	7.0%

*The economic assumptions for the first six years are from the OMB economic assumptions distributed in December 1991, and used in the compilation of the 1993 budget.

SOURCE OF INCOME TO THE FUND

Mr. HOYER. What are the major sources of income of the Civil Service Retirement and Disability Fund?

Mr. SMITH. Let me just do a run down of the big pieces of where our money comes from. Employee contributions are significant, about $4.5 billion a year. Agency contributions are also significant at about $12 billion a year, and then the other two really large amounts, and I can do an exhaustive list for you if you want, but the other two large amounts are appropriations from the Treasury General Fund and interest.

For example, in 1993 there was an appropriation that came through this subcommittee for $6.9 billion that paid for the impact of pay raises on the unfunded liability, to amortize that so there would be no unfunded liability. Also we do some special acts, such as Lighthouse widows, and that account reimburses us for that.

The other piece is a little over $13 billion in a permanent indefinite appropriation which means that the authority to bill the Treasury for certain types of payments has been granted on a permanent basis and does not require annual appropriations. That $13 billion was for interest on the unfunded liability, military service, spouse equity, and a small piece for the FERS supplemental liability that I mentioned earlier.

Mr. HOYER. When was the $13 billion appropriated, do you know?

Mr. SMITH. The $13 billion comes because the law says that there is a permanent indefinite appropriation and OPM just tells Treasury what the amount will be and the amount is transferred. So I don't think it shows up in our appropriations language or in the bill the committee passes.

Mr. HOYER. You may have mentioned this, maybe it is 2023. Is that the year you anticipate outgo will exceed total income?

Mr. SMITH. No. We don't ever see that happening. That is the year in which we think the money that you would isolate, money from the CSRS system, has been exhausted from the CSRS people and we are using FERS money to pay CSRS people.

Mr. HOYER. Let me make sure—let me articulate this. The question would be, in what year do you anticipate total outgo will exceed total income to the fund and you therefore will have to start using balances in the fund to pay beneficiaries?

Mr. SMITH. In our projections, that does not happen.

Mr. HOYER. You will always have——

Mr. SMITH. Yes, total fund, always.

Mr. HOYER. Unlike social security, therefore the payment in will always exceed the payment out as far as we can predict?

Mr. SMITH. As far as our projections have gone.

REVENUE FROM CSRS AND FERS

Mr. HOYER. I know it is difficult to precisely determine it, but about how much of the revenue both to and in the fund is related to CRS and how much to FERS?

Mr. SMITH. Can do I that for the record? It is a fairly technical question. Right now the membership is about half and half, of the active employees. We are not quite to where FERS is half but we

are getting close, although the FERS' income is about the same as the CSRS income. So we may be close to even right now but I will do that for the record.

[The information follows:]

The FY 1991 CSRS receipts totaled $50.0 billion, and FERS receipts totaled $6.8 billion. At the end of the year, the net assets available for benefits of the respective systems were $237.3 billion and $24.3 billion.

THRIFT SAVINGS PLANS

Mr. HOYER. And the FERS investment fund do you know how much is in that? Do you oversee that fund?

Mr. SMITH. You mean the Thrift Savings Plan? No, we do not. That was deliberately very, very independent of the executive branch, of all branches actually.

FUND DEPLETION

Mr. HOYER. You state that in 2023 the CRS assets in the fund will be depleted. You are also estimating in the same year the benefits still owed annuitants will be $593 billion.

Mr. SMITH. Yes. This represents the unfunded accrued actuarial liability of the Fund as of September 30, 1991.

Mr. HOYER. At that point, assets attributed to FERS will be—at that point, will assets attributable to FERS be used to pay CRS liability? Is that what you said?

Mr. SMITH. That is what I said, and at the same time it will trigger an appropriation to repay the funds, the FERS fund. So when this is all over, FERS will still be healthy and there will be no liability, no unfunded liability.

STAFF LEVEL

Mr. HOYER. How many people are there in your group?

Mr. SMITH. In the retirement and insurance group, there are about 1,350 of us.

Mr. HOYER. Of the 6,800?

Mr. SMITH. Yes.

SOUNDNESS OF RETIREMENT SYSTEMS

Mr. HOYER. Would it be fair to say that the Federal Employment Retirement System and Civil CSRS Retirement System is as sound a retirement system as we have in the country?

Mr. SMITH. I am only hesitating because we do have a large unfunded liability, and I am sure there must be systems in the country that do not, but I can't tell you which ones they are. We are sound in the sense that we always have enough money to pay benefits; as long as the government operates and continues, then we are okay.

If we were—the only bad news is if the government went out of business before the FERS supplemental liability had been reimbursed what it has paid for CSRS, then we would have a problem, but short of that, there is no reason for people to worry about being able to pay benefits, certainly. There are other issues about unfunded liabilities and whether you should tolerate them.

Mr. HOYER. Presumably, if the government went out of business, which is the condition to which you refer, even if it were a funded liability, presumably if the government went out of business, whatever paper or dollars were backing up that funded liability wouldn't be worth much.

Mr. SMITH. That is a very good point because all of the fund, and we have about $300 billion in the fund right now, is invested in Treasury securities.

Mr. HOYER. So if the government went out of business——

Mr. SMITH. It will be grim.

Mr. HOYER. But my point is, it is somewhat of an academic question to talk about unfunded liabilities or funded liability if the government goes out of business because they have invested their assets in the government.

Mr. SMITH. Right.

Mr. HOYER. Mr. Lightfoot.

EARLY-OUT RETIREMENTS

Mr. LIGHTFOOT. Thank you, Mr. Hoyer. Mr. Smith, thank you for coming today. I think the Chairman touched on pretty much what I had in mind. One question: On the President's talking about some early-out retirements and so on, how do you contemplate handling that and will that be any kind of a problem?

Mr. SMITH. No. The whole system is built to assume that over a period of time there is a certain amount of that activity and so it is funded. There is a work load problem when you get a huge piece of it unexpectedly, as we did with the Postal Service last year, although we have worked our way pretty comfortably through that.

I don't think with the kind of attrition figures we have seen talked about, with 100,000 we mentioned this morning, that is any problem for us, either funding or operating.

TURNOVER

Mr. LIGHTFOOT. I heard a figure of 200,000 a year. Is that accurate on how many government employees leave, quit, retire, whatever?

Mr. SMITH. I am reaching way back to three years ago when I was doing that work. I would have said 350,000.

Mr. LIGHTFOOT. A year?

Mr. SMITH. Just kind of normal turnover.

Mr. LIGHTFOOT. Go somewhere else or whatever?

Mr. SMITH. Right, right. A large portion of that is churning at the entry level, which is where most of your turnover is, rather than at your senior levels, but I remember something like that.

In my own organization, the turnover last year was about 5 percent.

Mr. HOYER. 350,000 is 17 percent.

Mr. SMITH. Yes.

Mr. HOYER. Of the two years, talking about the totals——

Mr. SMITH. And it may be down to 200,000. My organization was running 15 to 20 percent until the recession and that dropped it off to 5 percent. So the economy, of course, has a lot to do with how

much turnover there is in the Government depending on whether people can find other jobs.

Mr. LIGHTFOOT. That tends to be at the entry level rather than the other level?

Mr. SMITH. Yes. From the retirement end of this, 75 percent of the turnover is in people's first five years; and so after five years, 75 percent of the people will actually retire from the Government. There is a huge, huge shift in staying with the work force at that point.

Mr. LIGHTFOOT. Five years to decide if you want to be a Fed or not, right?

Mr. SMITH. Yes, or even if it is by default. If you didn't get out before five years, your chances get real slim.

Mr. LIGHTFOOT. Thank you very much.

Thank you, Mr. Chairman.

PROJECTIONS OF LIABILITY

Mr. HOYER. Now, just to clarify, in your determination of the status of the CSRS system, you had figured in a projection for the COLA adjustment impacting on the retirement liability obviously at that time?

Mr. SMITH. Yes, and I haven't mentioned this. I don't want to confuse things. Our statute requires us to have a static approach to these things which says there are no pay raises and there are no cost-of-living adjustments, but what I have been talking to you about today comes from a much sounder dynamic approach to the fund. So we live in two worlds. One is the static set up by the statute and one is the dynamic which is required by Public Law 95–595.

Mr. HOYER. How long does the statute—it seems to me somewhat unreasonable, requiring you to deal with a static situation which we clearly don't expect to happen.

Mr. SMITH. I don't know what the historical reasons for that are. It ceased to be a real problem because our obligations under Public Law 95–595 are to report the things that are actuarially sound. All the information I am giving you comes from our actuary's report, subject to inflation. I don't know the historical reasons for the static.

INDEPENDENT REVIEW

Mr. HOYER. Do we have an outside auditor, or is the—who audits your work?

Mr. SMITH. We do audits. GAO had audited the books, but quite some time ago. Under the CFO, the Inspector General is beginning to audit our financial statements which includes the actuarial underpinning to those financial statements, and this year I believe has contracted with an outside actuary to look at the assumptions that my actuaries are making and validate them.

Mr. HOYER. When do we expect that report?

Mr. SMITH. I don't know the answer to that. I should also say, we have three outside actuaries who look over our work and decide if we are doing things correctly and recommend what we should assume about interest rates and that sort of thing.

Mr. HOYER. Who are they?

Mr. SMITH. Mr. Boyton has been the chief one. The other names I can supply for the record. They are generally retired actuaries with a good reputation from large firms.

Mr. HOYER. Mr. Visclosky.

Mr. VISCLOSKY. I am fine, Mr. Chairman. Thank you.

Mr. HOYER. Mr. Lightfoot. All right. Mr. Smith, very much appreciate your testimony and we certainly appreciate the status of this.

Mr. SMITH. Good. Thank you.

Mr. LIGHTFOOT. Mr. Chairman, I would like unanimous consent, in case Mr. Wolf or Mr. Istook have something, to put it in the record.

Mr. HOYER. Without objection.

[Questions and answers for the record from Mr. Hoyer follow:]

CIVIL SERVICE RETIREMENT AND DISABILITY FUND

Question. The current balance in the Civil Service Retirement and Disability Fund is about $285 billion. The total annual income to the fund is about $60 billion and the total on tap is $35 billion. That means the balance in the fund is increasing by about $25 billion per year. Would you please briefly review the major sources of income to the fund?

Answer. In FY 1991, the most recent year for which OPM has submitted a formal report to Congress on the financial operations of the Civil Service Retirement and Disability Fund (CSRDF), income totaled $56.8 billion and was distributed among the following major sources:

[In billions of dollars]

Item:	Amount	Percent
Employee contributions	4.6	8
Agency contributions	11.0	19
General fund contributions	18.5	33
Interest	22.7	40
Total	56.8	100

[1] Includes contributions from the U.S. Postal Service and the Panama Canal Commission.

A copy of the "FY 1991 CSRDF Annual Report," prepared in compliance with Public Law 95–595, was provided earlier for the record. It contains detailed information about many of the questions raised during the hearing.

Question. In what year do you anticipate the total outgo will exceed total income to the fund and you therefore will have to start using balances in the fund to pay beneficiaries?

Answer. Public Law 99–335, the Federal Employees' Retirement System Act of 1986, mandated that the basic components of both the CSRS and FERS be financed and operated through the CSRDF. In other words, all receipts for the CSRS and FERS are deposited into the CSRDF, and all disbursements for both are made from the CSRDF. As a result of this arrangement, we do not foresee a situation where Fund outgo will exceed Fund income, and it therefore will not be necessary to draw down fund balances to pay beneficiaries. (See "FY 1991 CSRDF Annual Report," table 3, pp. 36–37).

Question. I know it's difficult to precisely determine this, but about how much of the revenue both to and in the fund is related to CSRS and how much to FERS?

Answer. In FY 1991, CSRS receipts totaled $50.0 billion, and FERS receipts totaled $6.8 billion. At the end of the year, the net assets available for benefits of the respective systems were $237.3 billion and $24.3 billion. (See "FY 1991 CSRDF Annual Report," pp. 8–9).

Question. You state that in the year 2023 the CSRS assets in the fund will be depleted. You are also estimating that in the year 2023 that benefits still owed to CSRS annuitants will be $593 billion. At that point, 30 years from now, assets attributable to FERS will be used to pay CSRS auuitants. Exactly how is this supplemental liability financed under the FERS statute?

Answer. Section 8423 of title 5, United States Code, requires that all acts resulting in the creation of a supplemental liability under FERS[1] be amortized by a series of 30 equal annual payments from the General Fund of the U.S. Treasury. As stated earlier, the CSRDF is available to pay both CSRS and FERS benefits. Our latest official projections show that the assets attributable to CSRS will be depleted by the year 2023. Since CSRS benefits will continue to be paid from the assets of the CSRDF, the assets attributable to FERS will be reduced each year by the amount that CSRS benefits exceed CSRS contributions. This, in turn, will result in the creation of FERS supplemental liabilities which will be amortized by General Fund payments. (See "FY 1991 CSRDF Annual Report," p. 29, and Table 3, pp. 36–37).

Question. Would you please provide your summary as to the current and long-tern financial condition of the Civil Service Retirement and Disability Fund?

Answer. Our opening statement was submitted for the record, and was therefore not discussed during the hearing. Please accept it as the answer to this question since it focuses on the current and long-term financial condition of the CSRDF.

[1] A FERS supplemental liability exists when, at the end of any plan year, the actuarial present value of future FERS benefits exceeds the present value of future FERS contributions plus the net assets attributable to FERS in the CSRDF.

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